Transparency International Kenya & 3 others v General & 3 others; General & 3 others (Interested Parties) (Petition E747 of 2025) [2026] KEHC 2485 (KLR) (Constitutional and Human Rights) (19 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2485 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E747 OF 2025

B MWAMUYE, J

FEBRUARY 19, 2026

IN THE HIGH COURT OF KENYA AT NAIROBI CONSTITUTIONAL AND HUMAN RIGHTS DIVISION PETITION NO. E747 OF 2025

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND IN THE MATTER OF ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 1, 2(4), 3, 10, 21(1), 22, 23, 27, 35, 43, 73, 94, 95, 118, 201, 225, 227, 229, 232 AND 258 OF THE CONSTITUTION OF KENYA, 2010 AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE CONSTITUTION OF KENYA, 2010 AND

IN THE MATTER OF THE PRIVATIZATION ACT, 2025

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013)

BETWEEN

TRANSPARENCY INTERNATIONAL KENYA ..... 1ST PETITIONER

KENYA HUMAN RIGHTS COMMISSION ..... 2ND PETITIONER

INUKA KENYA NI SISI ..... 3RD PETITIONER

THE INSTITUTE OF SOCIAL ACCOUNTABILITY ..... 4TH PETITIONER

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

THE NATIONAL ASSEMBLY ..... 2ND RESPONDENT

THE CABINET SECRETARY, NATIONAL TREASURY & ECONOMIC PLANNING ..... 3RD RESPONDENT

THE PRIVATIZATION AUTHORITY ..... 4TH RESPONDENT

AND

OFFICE OF THE AUDITOR GENERAL ..... INTERESTED PARTY

KATIBA INSTITUTE ..... INTERESTED PARTY

SIASA PLACE ..... INTERESTED PARTY

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

JUDGMENT

Introduction

1. This Judgment concerns the constitutional validity of the *Privatization Act*, 2025 (Act No. 15 of 2025), a legislative framework enacted to regulate the manner in which the National Government may divest itself of ownership and control in public entities. The Petition dated 13th November 2025 is brought by four civil society organisations, namely Transparency International Kenya, Kenya Human Rights Commission, Inuka Kenya Ni Sisi, and Institute for Social Accountability, each of which has an established record in governance reform, anti-corruption advocacy, and constitutional litigation. The Petitioners approach this Court in the public interest, invoking their standing pursuant to Articles 22(2)(c) and 258(2) of *the Constitution*.

2. The Petitioners impugn both the legislative process culminating in the enactment of the *Privatization Act*, 2025 and the substantive constitutionality of several of its provisions. They contend that the Act, as presently framed, sanctions the arbitrary and opaque disposal of public assets; vests disproportionate and insufficiently circumscribed authority in the Executive arm of Government; attenuates the constitutionally ordained oversight functions of Parliament and the Auditor-General; and fails to secure adequate guarantees for public participation and access to information. On these grounds, the Petitioners beseech this Court to declare the Act in its entirety unconstitutional and invalid, or, in the alternative, to strike down the specific provisions impugned as inconsistent with *the Constitution*.

3. The Petitioners therefore seek the following reliefs from this court:

   a. A declaration that the 2nd Respondent did not conduct reasonable, meaningful, adequate and or effective public participation before passing the *Privatization Act*, 2025.

   b. A declaration that the *Privatization Act*, 2025 in its entirety is unconstitutional.

   c. A declaration that sections 7, 22, 23, 31, 32, 34(d), 35, 36, 37, 38, 43(2), 54,65,67 and 71 of the *Privatization Act*, 2025 are unconstitutional.

   d. A declaration that the *Privatization Act* 2025 as designated lacks an adequate system of checks and balances to protect sovereign assets of the people of Kenya from wilful wastage and corruption.

e. A declaration that Sections 7,22,30,34,36,45,55 of the *Privatization Act*, 2025 are an affront to the doctrine of Separation of Powers as encapsulated under Article 1(3) of *the Constitution* and to the National Values and Principles of Governance of democracy and participation of the people, good governance and accountability under Article 10(2) of *the Constitution*.

f. A declaration that the structure of the Privatization Authority, established as a department within the National Treasury and subject to the Cabinet Secretary's (CS) appointment powers under sections 7 and 10(d), is unconstitutional.

g. A declaration that Sections 22,31, and 67, which grant the CS unfettered discretion over the identification of entities for privatization, formulation of programs, and promulgation or regulations, amount to an unconstitutional delegation of legislative authority.

h. A mandatory injunction compelling the 2nd Respondent to immediately publish the full report of the Departmental Committee on Finance and National Planning relating to the consideration of the Privatization Bill, 2025.

i. A declaration that all privatization proceeds must be deposited into the Consolidated Fund and managed in strict compliance with the transparency, reporting, and appropriation procedures established under the *Public Finance Management Act*, 2012 and Articles 201 and 206 of *the Constitution*.

j. A mandatory injunction compelling the 3rd and 4th Respondents to involve the 1st Interested Party in all stages of Privatization, specifically valuation, due diligence, and financial reporting, in compliance with Article 229 of *the Constitution*."

4. The Respondents have entered appearance in firm and unqualified opposition to the Petition. The 1st Respondent, the Honourable Attorney General, defends the constitutionality of the impugned statute and raises, as a preliminary and threshold objection, that the Petition, in whole or in substantial part, is barred by the doctrine of res judicata.

5. The 2nd Respondent, the National Assembly, through the Replying Affidavit of its Clerk, Mr. Samuel Njoroge, CBS, sworn on 19th December 2025, together with comprehensive written submissions dated 23rd January 2026, maintains that the legislative process culminating in the enactment of the *Privatization Act*, 2025 was conducted in scrupulous fidelity to constitutional requirements and that the impugned provisions incorporate adequate and robust safeguards consistent with *the Constitution*. The 3rd Respondent, the Cabinet Secretary for the National Treasury and Economic Planning, Hon. FCPA John Mbadi Ng'ongo, deposed to a Replying Affidavit sworn on 12th January 2026, likewise opposing the Petition and expressly associating himself with the Attorney General's submissions on both the plea of res judicata and the substantive constitutionality of the Act. The 4th Respondent, the Privatization Authority, though a statutory body established under the Act, filed no separate pleadings and is represented within the consolidated defence advanced by the other Respondents.

6. The Interested Parties namely, the Office of the Auditor-General, Katiba Institute, Siasa Place, and Law Society of Kenya were duly served with the pleadings. While the Office of the Auditor-General and the Law Society of Kenya entered appearance, they elected not to file substantive pleadings or submissions, indicating that they would abide by the Court's interpretation of their respective constitutional mandates.

7. This Court has had the benefit of comprehensive pleadings, two detailed Replying Affidavits exhibiting extensive documentary material including the relevant Committee Report and extracts of the Hansard and elaborate written submissions from the Petitioners, the Attorney General, and the National

Assembly. All interlocutory applications having been heard and determined, the matter now stands crystallised for final determination on its merits.

8. It is necessary, at the outset, to situate the present dispute within its proper jurisprudential context. This litigation does not arise in a vacuum. It constitutes the second constitutional challenge to a privatization statute within a span of three years. In Orange Democratic Movement Party & 4 others v Speaker of National Assembly & 5 others, this Court (Mwita, J.) declared the *Privatization Act*, 2023 unconstitutional on account of the absence of meaningful public participation and nullified section 22(5) thereof for impermissibly deeming parliamentary ratification after ninety days, thereby abdicating constitutionally mandated legislative oversight. That decision constitutes the juridical foundation upon which the present legislative intervention is predicated. Indeed, the Respondents candidly acknowledge that the *Privatization Act*, 2025 was enacted as a direct legislative response intended to cure the constitutional infirmities identified in the 2023 statute. This historical and doctrinal backdrop is not mere narrative background; it lies at the heart of the questions of res judicata, legislative competence, and constitutional compliance that now fall for this Court's determination.

Factual Background And Legislative History

9. For close to two decades, the privatization of State-owned enterprises in Kenya was governed by the *Privatization Act*, 2005 (Act No. 2 of 2005), a statute enacted under the former constitutional dispensation. That enactment furnished the initial statutory architecture for the divestiture of public enterprises. However, with the promulgation of *the Constitution* of Kenya, 2010a transformative charter that fundamentally recalibrated the relationship between the State and the citizen, entrenched binding national values and principles of governance, and inaugurated a new normative order grounded in accountability, transparency, and public participation the 2005 Act increasingly appeared discordant with the demands of the new constitutional order.

10. The legislative impetus for reform crystallised in the Privatization Bill, 2023. The Bill was duly passed by the National Assembly, assented to on 9th October 2023, and brought into force as the *Privatization Act*, 2023. Its lifespan proved short-lived. On 24th September 2024, this Court rendered a considered judgment in Orange Democratic Movement Party & 4 others v Speaker of National Assembly & 5 others. Upon a detailed interrogation of the legislative record, the Court held that the National Assembly had failed to undertake reasonable, meaningful, adequate, and effective public participation prior to the enactment of the 2023 statute. The Court observed, inter alia, that the invitation for public memoranda had been published exclusively in English; that only six memoranda were received three emanating from government-affiliated institutions; and that the process had effectively been reduced to a circumscribed "round table discussion" with a limited cohort of selected stakeholders. The Act was accordingly declared unconstitutional, null, and void in its entirety, with the consequence that the governing legal regime reverted to the *Privatization Act*, 2005.

11. In the wake of that judicial invalidation, the National Assembly initiated a fresh legislative process. The Privatization Bill, 2025 (National Assembly Bill No. 36 of 2025) was published in the Kenya Gazette Supplement No. 127 of 16th July 2025. Thereafter, it traversed the constitutionally prescribed legislative stages: First Reading on 5th August 2025; referral to the Departmental Committee on Finance and National Planning and the Select Committee on Public Debt and Privatization; and the commencement of a structured public participation process.

12. The 2nd Respondent's Replying Affidavit, sworn by Mr. Samuel Njoroge, CBS, together with its annexed documentary exhibits, furnishes a detailed evidentiary record of that process. On 25th July 2025, the National Assembly caused advertisements to be published in two newspapers of nationwide circulation Daily Nation and The Standard inviting members of the public and stakeholders to submit

memoranda on the Bill. Concurrently, the Assembly disseminated simplified explanatory materials in both English and Kiswahili on its official website and deposited hard copies at constituency offices across the Republic. A Quick Response (QR) code was deployed to facilitate digital access to the Bill and related materials.

13. The public participation exercise extended beyond the solicitation of written memoranda. The relevant Committees conducted in-person public hearings in twenty-four (24) counties distributed across the territory of the Republic, thereby ensuring geographical reach and representation. The record demonstrates that memoranda were received from a broad spectrum of stakeholders, including professional bodies such as the Law Society of Kenya and the Institute of Certified Public Accountants of Kenya; trade unions including the Central Organization of Trade Unions; private sector associations such as the Kenya Association of Manufacturers; academic institutions; and individual citizens.

14. Significantly, the material placed before the Court indicates that the views so collected were not merely perfunctory submissions but substantively informed the legislative outcome. The Committee Report, tabled before the National Assembly on 1st October 2025 and exhibited in these proceedings, recommended extensive amendments to numerous clauses in direct response to public input. Clause 4(c), which had sought to exclude the sale of government shares in government-linked corporations from the ambit of the Bill, was deleted in its entirety. The period for parliamentary consideration of the privatization programme was extended, thereby obviating the need for a deeming provision and directly addressing the constitutional infirmity previously identified in section 22(5) of the 2023 Act. Provisions establishing a Privatization Appeals Board were removed and replaced with a framework providing for internal review by the Authority, followed by a right of appeal to the High Court—an amendment responsive to concerns regarding the constitutionality of executive-appointed tribunals. Additional safeguards were introduced with respect to strategic national assets and national security interests.

15. The Bill was debated at Second Reading on 1st October 2025, as reflected in the Hansard record capturing the contributions of Members of Parliament. At the Committee of the Whole House, convened on 8th and 9th October 2025, the Bill was considered clause by clause, with each proposed amendment subjected to debate and vote. The Bill was 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, thereby repealing the *Privatization Act*, 2005.

16. In its operative scheme, the impugned Act establishes a structured four-stage process. First is the formulation of a Privatization Programme by the Cabinet Secretary, who, under section 21, is mandated to conduct appropriate consultations with affected persons, experts, organisations, and the public. Section 22(2) prescribes ten guiding criteria for the identification of entities, including considerations of national security, the prevention of monopolistic practices, and the reduction of fiscal burden. Second is Cabinet approval of the Programme. Third and centrally the submission of the Programme to the National Assembly for approval, amendment, or rejection pursuant to sections 23 to 26, with a mandatory ninety-day period for consideration and without any deeming provision. Fourth, upon parliamentary approval, the implementation phase is undertaken by the Privatization Authority, including the preparation of entity-specific Privatization Proposals, each of which is subject to a further layer of approval by the National Assembly under sections 37 to 41. Section 54 directs that proceeds from the sale of direct National Government shareholding be paid into the Consolidated Fund. The Act further contains a transitional provision, section 71, stipulating that the privatization of entities listed under Gazette Notice No. 8739 of 14th August 2009 shall be concluded in accordance with the framework established by the 2025 Act.

The Petitioners' Case

17. The Petitioners, approach this Court in the public interest pursuant to Articles 22 and 258 of *the Constitution*, asserting that the *Privatization Act*, 2025 imperils the constitutional order governing public finance, democratic accountability, and the stewardship of national assets. Their case, anchored in affidavit evidence and amplified through detailed written submissions, is that the impugned statute is constitutionally infirm both in the process of its enactment and in its substantive architecture.

18. On the question of public participation, the Petitioners contend that the legislative process fell short of the constitutional imperatives embodied in Articles 10 and 118. They impugn, in particular, what they describe as an overreliance on digital mechanisms, including the deployment of a Quick Response (QR) code as a principal portal for accessing the Bill and submitting memoranda. In their submission, such a mechanism was inherently exclusionary in a socio-economic context where significant segments of the population lack reliable internet access, smart devices, or digital literacy. They further aver that the report of the Departmental Committee was not made publicly accessible in a timely and meaningful manner, thereby depriving citizens of the opportunity to interrogate how their views were received and considered. In advancing this argument, they place reliance on Doctors for Life International v Speaker of the National Assembly and Others, Robert N. Gakuru & Others v Governor Kiambu County & 3 Others [2014] eKLR, British American Tobacco Kenya, PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party), and Orange Democratic Movement Party & 4 others v Speaker of National Assembly & 5 others, for the proposition that public participation must be real, purposive, inclusive, and demonstrably influential in shaping legislative outcomes.

19. The Petitioners further contend that the Act entrenches an impermissible concentration of authority in the Executive, particularly in the office of the Cabinet Secretary responsible for the National Treasury. They argue that sections 7, 22, 31, 34, 36, 43(2), and 67 collectively vest in the Cabinet Secretary unilateral authority to identify entities for privatization, formulate the privatization programme, determine methods of divestiture, and oversee implementation through the Privatization Authority, with Parliament relegated to a constrained and largely reactive role. In their view, even where parliamentary approval is contemplated, prior Cabinet consideration of proposals and the structuring of the process effectively reduces legislative oversight to a formalistic exercise. They invoke Speaker of the Senate & Another v Attorney-General & 4 Others [2013] eKLR and Council of Governors & 6 Others v Senate & Another [2015] eKLR to underscore the centrality of parliamentary oversight within the constitutional design and to argue that the impugned framework attenuates the separation of powers contemplated under Articles 94, 95, and 201.

20. It is further contended that the statute derogates from the constitutional guarantees of transparency and access to information under Articles 10 and 35 by permitting broad confidentiality in respect of valuation reports, Cabinet deliberations, and transactional documentation. The Petitioners maintain that information relating to the management and disposal of public assets is presumptively public and may only be withheld within strict constitutional parameters. In support of that proposition, they rely on Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others [2013] eKLR and Katiba Institute v Presidents Delivery Unit & 3 Others [2017] eKLR.

21. With respect to fiscal accountability, the Petitioners assert that the Act marginalises the constitutional mandate of the Auditor-General under Article 229. They argue that no provision expressly requires the Auditor-General to audit or verify valuation reports, privatization transactions, or the utilisation of proceeds, and that section 45(2), which provides for valuation by a "qualified person appointed by the Authority," lacks any mechanism for independent audit or verification. They contend that this

omission creates a constitutional lacuna inimical to financial accountability and is inconsistent with the principle, affirmed in Institute of Social Accountability & Another v National Assembly & 4 Others [2015] eKLR, that constitutional control of public finance cannot be diluted by statute.

22. The Petitioners submit that privatization constitutes a form of disposal of public assets and must therefore conform to the constitutional standards in Article 227 and the framework of the *Public Procurement and Asset Disposal Act*, 2015. They challenge, in particular, sections 34(d) and 43(2), which empower the Cabinet to determine its preferred method of privatization, including "such other method" as it may deem appropriate, contending that this confers unfettered discretion upon the Executive and opens the door to opaque, non-competitive processes. In this regard, they rely on Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte Pelt Security Services Limited [2018] eKLR to emphasise that the principles of fairness, equity, transparency, competitiveness, and cost-effectiveness admit of no statutory dilution.

23. In addition, the Petitioners argue that the impugned framework infringes the rights to equality and socio-economic rights under Articles 21, 27, and 43. They contend that the methods of privatization contemplated under sections 21 and 32 are structured in a manner that effectively privileges persons of substantial means, thereby constructively excluding economically disadvantaged citizens from participation in the ownership of formerly public assets and entrenching structural inequality. In support of the justiciability and enforceability of socio-economic rights, they invoke Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others [2021] eKLR and Government of the Republic of South Africa & Others v Grootboom & Others 2001 (1) SA 46 (CC).

24. The Petitioners impugn section 71 of the Act, contending that it unlawfully purports to revive Gazette Notice No. 8739 of 14th August 2009 issued under the repealed *Privatization Act*, 2005, thereby effecting an impermissible retrospective validation of prior administrative action. They invoke Article 2(4) of *the Constitution* and rely on Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR for the principle that legislation cannot operate retrospectively so as to validate actions undertaken in contravention of *the Constitution*.

25. On the basis of these grounds, the Petitioners pray that the Act be declared unconstitutional in whole or in part, that the impugned provisions be struck down, and that appropriate declaratory, mandatory, and injunctive reliefs do issue to vindicate *the Constitution* and safeguard the integrity of public assets.

The 1St Respondent's Case

26. The 1st Respondent, the Attorney-General through written submissions dated 23rd January, 2026 opposes the Petition in its entirety, asserting that it is grounded upon a fundamental misapprehension of the *Privatization Act*, 2025 and its congruence with *the Constitution*. The submissions emphasise that the Act was enacted against a legislative and constitutional backdrop that included the erstwhile 2005 *Privatization Act*, which had become archaic and partially inconsistent with contemporary constitutional standards and the *Public Finance Management Act*, 2012.

27. It is contended that the 2023 Privatization Bill was conceived to modernize the privatization framework, introducing a structured, criteria-based, and accountable mechanism intended to enhance transparency, efficiency, and the maximization of public resource value. Following the High Court's declaration of unconstitutionality of the 2023 Act due to inadequate public participation and a defective Section 22(5), the National Assembly undertook remedial public participation and corrected the provision while preserving the substantive objectives of the legislation.

28. The Attorney-General further contends that numerous issues now advanced in the Petition had previously been adjudicated or are substantially similar to matters determined in prior proceedings

under the 2023 Act, invoking the doctrines of res judicata and abuse of process. Reliance is placed on Wamunyinyi v Cabinet Secretary, Ministry of Treasury [2025] and Okiya Omutatah v Communication Authority of Kenya [2015] eKLR, asserting that the Petition impermissibly seeks to relitigate matters already judicially settled and is therefore legally untenable.

29. On the merits, it is respectfully submitted that the Act neither contravenes the doctrine of separation of powers nor diminishes the oversight role of Parliament. Sections 7, 21, 22, and 31 collectively establish a coherent procedural and substantive framework under which the Cabinet Secretary is entrusted with the formulation of the privatization programme, having due regard to policy imperatives, strategic objectives, regulatory parameters, and national security considerations. Thereafter, the programme is presented to the National Assembly for ratification, with Parliament retaining the authority to approve, amend, or reject it.

30. Section 22(5), which provides that a programme shall be deemed ratified in the event that Parliament does not act within ninety days, is submitted as fully consonant with the principles of legislative oversight, ensuring that executive inaction does not frustrate statutory intent. The execution of the programme by the Privatization Authority remains strictly circumscribed by statutory and regulatory limitations, thereby preserving the integrity of executive discretion within the bounds of law.

31. Similarly, Sections 36 and 39 operate as procedural safeguards, ensuring that executive proposals are properly crystallized before parliamentary scrutiny, in strict adherence to Article 153 of *the Constitution* and established principles of legislative oversight. Viewed in their entirety, these provisions reflect a deliberate and balanced legislative design, reconciling the exercise of executive initiative with Parliament's constitutional mandate to oversee and sanction state programmes

32. Regarding public participation and access to information, it is submitted that the remedial process following the invalidation of the 2023 Act was meaningful, inclusive, and consistent with the threshold articulated by the Supreme Court in British American Tobacco Kenya PLC v Cabinet Secretary for Health & Others [2019] eKLR. The Act provides for stakeholder consultations during formulation, and parliamentary consideration is conducted in accordance with the principles of public finance and good governance under Articles 10 and 201 of *the Constitution*. Mechanisms for public participation are embedded within the Act, with their operationalisation to be determined in accordance with the specific context of each programme.

33. The 1st Respondent places reliance on Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae) (Petition E031, E032 & E033 of 2024 (Consolidated)) [2024] KESC 63 (KLR) (29 October 2024), wherein the Supreme Court emphasized that the national values and principles of governance under Article 10(2) of *the Constitution* constitute guiding norms rather than prescriptive mandates. The Court distinguished between "rules," which impose definitive commands, and "principles," which function as optimization requirements to inform the exercise of discretion.

34. It is asserted that the obligation for public participation under Section 21 of the Act must be assessed contextually, having regard to the nature and scope of the programme under consideration. Sections 35 to 38, which govern the preparation and approval of privatization proposals, do not necessitate a separate process of public participation at the initial stage, given that the programmes are already subjected to extensive consultation under Sections 21 to 26. Section 35(2) prescribes the requisite contents of a privatization proposal, including its objectives, rights, financial position, valuation, recommended methods, and proposals for public participation. Sections 36 and 38, in turn, establish the procedural steps for tabling proposals before the National Assembly, guided by the principles of public finance under Article 201 and the values of good governance enshrined in Article 10.

35. According to the 1st Respondent this approach aligns with the principle articulated in Hyundai Motor Distributors v CCMA [2000] ZACC 12 (Constitutional Court of South Africa), namely, that statutory silence on public participation does not render a provision unconstitutional where a constitutionally compliant interpretation is reasonably available. In the present context, the statutory framework ensures that public participation is adequately incorporated, without imposing redundant procedural requirements at the originating stage.

36. On allegations concerning the oversight mandate of the Auditor-General under Article 229, the 1st Respondent argues that the Court reaffirmed that no provision of the Act curtails this constitutional mandate, citing Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR and the principle reiterated in Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR. Section 5 of the Act codifies governance principles including transparency, accountability, efficiency, and promotion of public participation.

37. Concerning alleged violations of Article 227 and the *Public Procurement and Asset Disposal Act*, it is contended that the Court held that the Act is to be harmoniously construed with relevant legislation. Sections 34(d) and the Second Schedule ensure that privatization methods comply with fairness, competition, and transparency, while section 67 empowers the Cabinet Secretary to standardize procedures, encompassing initial public offerings, tenders, and pre-emptive rights, thereby embedding competitive and transparent processes.

38. With respect to socio-economic rights and equality under Articles 21(1), 27, and 43, the 1st Respondent posits that the Court observed that progressive realisation of rights is achieved through legislative, policy, and regulatory frameworks. Privatization proposals under Section 35 incorporate measures safeguarding employee rights, promoting socio-economic investments in host communities, and facilitating public participation. Orange Democratic Movement Party & 4 Others v The Speaker of the National Assembly and 5 Others [2024] KEHC 11494 (KLR) confirmed that privatization methods, including IPOs, do not inherently contravene equality provisions.

39. Further it is the 1st Respondents case that allegations of arbitrary executive action and conflicts of interest under Articles 10, 73(2)(b), and 232 were dismissed. Sections 5, 7, 21-28, and 37-40 restrict the Cabinet Secretary to policy direction, programme formulation, and oversight, with National Assembly approval central to the decision-making process. Alleged breaches of public finance management principles under Articles 201, 225, and the *Public Finance Management Act*, 2012, are addressed through comprehensive regulatory and accountability mechanisms, including valuation (Section 45), record-keeping (Section 50), dispute resolution (Sections 55-56), auditing (Section 60), and annual reporting (Section 61), with Section 66 imposing criminal sanctions for falsification, misrepresentation, or misuse of insider information.

40. On the question of alleged retroactivity contrary to Article 2(4) of *the Constitution*, the 1st Respondent submits that the impugned Act does not operate retrospectively in a manner that would offend constitutional safeguards. Reliance is placed on Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others Application No 2 of 2011 (2012) eKLR, wherein the Supreme Court authoritatively pronounced that, as a general rule, legislation is presumed to operate prospectively unless a contrary intention is expressly stated or arises by necessary implication, and that retrospective application, particularly in criminal matters, is constitutionally circumscribed. The 1st Respondent contends that no such express or implied intention is discernible in the Act.

41. It is contended that Section 71 of the Act is, by its plain terms and legal effect, purely transitional in character. The provision does not purport to reopen concluded matters, revive extinguished rights, or impose fresh liabilities in respect of transactions that were complete under the previous legal regime.

Rather, its purpose is to ensure institutional and procedural continuity, thereby facilitating an orderly migration from the antecedent statutory framework to the current legislative architecture.

42. In advancing this position, the 1st Respondent places reliance on Philip K Tunoi & another v Judicial Service Commission & Another (2015) eKLR, wherein the Court affirmed the constitutional propriety of transitional and saving provisions enacted to secure stability, continuity, and coherence within evolving constitutional and statutory systems. The Court recognised that such provisions are not, without more, retroactive merely because they operate within a changed legal landscape, their function is to bridge regimes, not to alter accrued rights or completed obligations.

43. According to the 1st Respondent, properly construed, therefore, Section 71 is a saving and continuity clause. It preserves the validity of prior actions and provides a structured transition into the new framework without attaching new legal consequences to past conduct. In that sense, it does not offend the doctrine against retroactive legislation but accords with settled principles governing legislative transitions in constitutional democracies.

The 2Nd Respondent's Case

44. The 2nd Respondent, the National Assembly, opposes the Petition in its entirety and maintains that the *Privatization Act*, 2025 is the product of a constitutionally compliant legislative process undertaken in faithful response to this Court's decision in Orange Democratic Movement Party & 4 others v Speaker of the National Assembly & 5 others [2024] KEHC 11494 (KLR), which invalidated the 2023 statute solely on account of inadequate public participation and a specific impugned provision, while upholding the remainder of the framework. It is contended that, upon that judgment, the legal regime reverted to the *Privatization Act*, 2005, and Parliament thereafter initiated a fresh legislative process culminating in the enactment of the 2025 Act, with the deliberate object of curing the procedural defects identified by the Court while preserving the substantive policy objectives of privatization.

45. The 2nd Respondent avers that the legislative process fully satisfied Article 118(1)(b) of *the Constitution* and Standing Order 127. Public participation was facilitated through nationwide newspaper advertisements inviting memoranda, direct engagement with stakeholders, public hearings conducted across twenty-four counties, and the dissemination of simplified versions of the Bill in both English and Kiswahili through parliamentary platforms and constituency offices. Numerous memoranda were received and considered, and the relevant Committee introduced substantive amendments informed by public input, including the deletion of proposed provisions found constitutionally problematic in prior litigation. The Respondent relies on British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR and Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties) [2020] KEHC 8772 (KLR) for the proposition that Parliament enjoys discretion in designing modalities of public participation, provided that reasonable opportunity is afforded, and that *the Constitution* does not demand a census-like exercise. It is asserted that no evidence has been tendered to demonstrate exclusion or prejudice, and that the participation undertaken was meaningful and effective.

46. On the alleged violation of the doctrine of separation of powers, the 2nd Respondent submits that the Petition fails to meet the precision threshold articulated in Anarita Karimi Njeru v Republic [1979] KEHC 30 (KLR). It is contended that the Act establishes an elaborate system of checks and balances, including mandatory approval by the National Assembly of both the overarching privatization programme and each specific privatization proposal; gazettement requirements; implementation by the Privatization Authority; reporting obligations; and avenues for judicial review. In that regard, the

2025 Act is said to have expressly cured the defect identified in the 2023 statute by entrenching multi-stage parliamentary approval and eliminating any mechanism that could dilute legislative scrutiny, thereby aligning with Articles 94, 95, 131(2), and 201 of *the Constitution*.

47. With respect to the mandate of the Auditor-General, it is maintained that no provision of the Act excludes or limits the constitutional functions conferred under Articles 226 and 229. Section 54 requires that all proceeds of privatization be paid into the Consolidated Fund established under Article 206, thereby subjecting such funds to parliamentary appropriation, authorization by the Controller of Budget, and audit by the Auditor-General. The Act further imposes accounting and reporting obligations upon the Authority, including the keeping of proper books and submission of annual reports. The contention that the Auditor-General must conduct pre-transaction valuation is rejected as misconceived, valuation under section 45 being a technical exercise distinct from the constitutional audit function, which is post-expenditure in character.

48. The 2nd Respondent further denies any contravention of Article 227 or inconsistency with the *Public Procurement and Asset Disposal Act*. It is submitted that the *Privatization Act*, 2025 constitutes a specialized statutory regime governing the transfer of assets and liabilities of public entities, distinct from routine disposal of surplus assets, and that it embeds internal safeguards to secure transparency, fairness, competitiveness, and value for money. These include competitive methods such as public tenders and initial public offers, mandatory valuation, parliamentary oversight, gazettement of approved proposals, and judicial and administrative review mechanisms. The Act is thus said to operate in harmony with Articles 10, 201, and 227 of *the Constitution*.

49. As regards the alleged infringement of Articles 21, 27, and 43, the 2nd Respondent contends that the Petitioners have failed to identify any specific right violated, any comparator group subjected to differential treatment, or any prohibited ground of discrimination. Reliance is placed on Okello & another v National Assembly & 2 others; Shop & Deliver Limited t/a Betika & 7 others (Interested Parties); Kiragu & 2 others (Cross Petitioner) (Constitutional Petition E010 of 2021) [2022] KEHC 3059 (KLR) for the principle that discrimination requires proof of differential treatment of similarly situated persons on a prohibited ground. It is asserted that the Act advances legitimate public objectives enhancing service delivery, improving efficiency of state enterprises, reducing fiscal burdens, and broadening economic participation in consonance with Articles 10, 201, and 232, and that no demonstrable threat to progressive realization of socio-economic rights has been established. Any alleged limitation, it is argued, has not been subjected to the analytical framework of Article 24.

50. On public finance management, the 2nd Respondent maintains that the Act expressly incorporates adherence to Article 201 and provides detailed mechanisms for accounting, auditing, and reporting. All proceeds are paid into the Consolidated Fund and become subject to the constitutional and statutory controls governing public expenditure. It is further contended that a statute cannot be impugned merely for alleged inconsistency with another statute of equal normative status.

51. Finally, in response to the challenge to section 71, the 2nd Respondent submits that the provision is transitional and procedural in nature. It neither revives extinguished rights nor imposes retroactive liabilities but ensures continuity following the invalidation of the 2023 Act. By operation of section 24 of the *Interpretation and General Provisions Act* (Cap. 2), subsidiary legislation does not lapse automatically upon repeal of the parent statute unless expressly revoked. Section 71 is thus characterised as a saving clause designed to avert a legislative vacuum and to ensure that ongoing processes conform to the new statutory framework and *the Constitution*. In the premises, the 2nd Respondent contends that the Petition is speculative, legally untenable, and devoid of merit, and prays that it be dismissed with costs.

The 3Rd Respondent's Case

52. The 3rd Respondent, the Cabinet Secretary for the National Treasury and Economic Planning, opposes the Petition and deposes that the *Privatization Act*, 2025 was enacted pursuant to, and in furtherance of, his constitutional and statutory mandate over matters of privatization and their operationalisation. He recounts that privatization had hitherto been governed by the *Privatization Act*, 2005, a framework which, in his assessment, had become outdated and insufficiently aligned with *the Constitution* of Kenya, 2010 and evolving public finance and governance standards. The subsequent enactment of the *Privatization Act*, 2023 was intended to modernise the regime by introducing a structured, criteria-based and accountable framework. However, following its invalidation by the High Court in Orange Democratic Movement Party & 4 others v Speaker of the National Assembly & 5 others [2024] KEHC 11494 (KLR) on the ground of inadequate public participation and the unconstitutionality of a specific provision, Parliament embarked upon a fresh legislative process culminating in the enactment of the *Privatization Act*, 2025.

53. In response to the allegation that the impugned statute offends the doctrine of separation of powers and undermines parliamentary oversight, the 3rd Respondent contends that the Act does not vest unfettered authority in the Executive. He avers that his functions under section 7 are circumscribed to policy direction, coordination of obligations, formulation of the privatization programme, and oversight of administration. The identification of entities for privatization is expressly regulated by the statutory criteria set out under section 22(2), and any programme so formulated must, as a condition precedent to implementation, be submitted to and approved by the National Assembly pursuant to sections 21 to 27. A programme declined by Parliament has no legal effect, and implementation is undertaken by the Privatization Authority strictly within the confines of the Act. Each privatization proposal is independently subjected to parliamentary scrutiny and approval. He further invokes the doctrine of res judicata, contending that issues of similar character were canvassed and determined in the litigation concerning the 2023 statute.

54. On public participation and access to information, the 3rd Respondent associates himself with the account furnished by the National Assembly as to the remedial public participation undertaken prior to enactment. He maintains that section 21 of the Act expressly mandates consultations with affected persons, experts, representative organisations, and members of the public in the formulation of a privatization programme, and that the adequacy of such participation must be assessed contextually and on a programme-specific basis. In that regard, he relies on the Supreme Court's exposition in Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae) (Petition E031, E032 & E033 of 2024 (Consolidated)) [2024] KESC 63 (KLR) (29 October 2024) (Judgment), to the effect that constitutional values and principles are realised through appropriate measures fashioned by duty bearers, without the imposition of rigid or prescriptive modalities.

55. The 3rd Respondent further dismisses as untenable the allegation that the Act encroaches upon the constitutional mandate of the Auditor-General under Article 229, asserting that no provision purports to limit or oust that office's functions. Equally, he rejects the contention that the Act contravenes Article 227 or the *Public Procurement and Asset Disposal Act*, maintaining that statutes of cognate subject matter are to be construed harmoniously and that the impugned Act incorporates safeguards to secure transparency, fairness, and competition, including detailed procedures set out in the Second Schedule.

56. As regards the alleged violation of Articles 21, 27 and 43, the 3rd Respondent contends that these matters were substantially addressed in Orange Democratic Movement Party & 4 others v Speaker

of the National Assembly & 5 others [2024] KEHC 11494 (KLR), wherein the Court discerned no constitutional infirmity in the objectives or methods of privatization. He maintains that the Act neither discriminates against any class of persons nor derogates from socio-economic rights, the State's obligation under Article 21(2) being to adopt legislative and policy measures for the progressive realisation of rights rather than to directly provide all services. He further points to section 35, which requires the preparation of a comprehensive privatization proposal encompassing valuation, employee protections, socio-economic considerations, and mechanisms for Kenyan participation, as demonstrative of the safeguards embedded within the statutory framework.

57. On the allegations of arbitrariness, conflict of interest, and violation of public finance principles, the 3rd Respondent avers that the Act is expressly anchored in the national values under Article 10 and the principles of public finance under Article 201. It establishes a layered system of oversight involving the Cabinet, the Cabinet Secretary, the National Assembly, and the Privatization Authority; mandates valuation by qualified persons; requires maintenance of proper accounts and auditing in accordance with the *Public Audit Act*; provides for annual reporting and dispute resolution mechanisms; and criminalises falsification, misrepresentation and insider dealing. These provisions, he contends, collectively entrench accountability, transparency and fiscal discipline.

58. Finally, on the question of retroactivity, the 3rd Respondent relies on the decision of the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others Application No 2 of 2011 (2012) eKLR for the principle that non-criminal statutes are prima facie prospective unless a contrary intention is clearly expressed. He characterises section 71 of the Act as a saving and transitional provision designed to ensure continuity of ongoing privatization processes, requiring that they be finalised in conformity with the new statutory framework. In his view, the provision neither revives extinguished rights nor imposes retrospective liabilities. On that basis, he urges that the Petition is devoid of merit and liable to dismissal.

Analysis And Determination

59. From the pleadings, the affidavits on record, and the respective submissions of the parties, and bearing in mind the applicable constitutional and statutory framework together with the binding jurisprudence of the Supreme Court and this Court, the issues that fall for determination are as follows:

    i. Whether the Petition, or specific grounds therein, is barred by the doctrine of res judicata and/or constitutes an abuse of the court process.

    ii. Whether the public participation conducted by the National Assembly prior to the enactment of the *Privatization Act*, 2025 was reasonable, meaningful, and constitutionally sufficient.

    iii. Whether the *Privatization Act*, 2025 violates the doctrine of separation of powers and undermines parliamentary oversight contrary to Articles 94, 95, and 201 of *the Constitution*.

    iv. Whether the Act excludes or otherwise undermines the constitutional mandate of the Auditor-General under Article 229 of *the Constitution*.

    v. Whether the Act violates the principles of transparency, competitiveness, and accountability in the disposal of public assets contrary to Article 227 of *the Constitution* and the *Public Procurement and Asset Disposal Act*, 2015.

    vi. Whether Sections 21 and 32 of the Act violate economic and social rights and the right to equality and freedom from discrimination under Articles 21(1), 27, and 43 of *the Constitution*.

vii. Whether Section 71 of the Act violates the constitutional doctrine of non-retroactivity contrary to Article 2(4) of *the Constitution*.

viii. Whether the Petitioners have established a case for the grant of the reliefs sought, and what orders should issue.

60. Before this Court proceeds to the substantive determination of the Petition, it is obliged to first address a threshold procedural matter of significant import. The Respondents, acting jointly, contend that the Petition, or material portions thereof, is barred by the doctrine of res judicata. This objection is not merely technical or formalistic; rather, it implicates the very jurisdiction of this Court to entertain claims or issues that have been conclusively adjudicated by a court of competent jurisdiction. In accordance with established judicial principles, the Court must, as it were, "lay down its tools" and decline to exercise jurisdiction where it is apparent that the matter has been previously and finally determined.

Whether the Petition, or specific grounds therein, is barred by the doctrine of res judicata and/or constitutes an abuse of the court process

61. The doctrine of res judicata is enshrined in Section 7 of the *Civil Procedure Act*, Cap. 21, which provides that no court shall entertain any suit or issue in which the matter directly and substantially in question has been directly and substantially adjudicated in a former suit between the same parties, or between parties under whom they claim, litigating under the same title, in a court competent to try such subsequent suit, and has been finally determined by such court. This statutory provision is not a mere procedural technicality; rather, it embodies a principle of profound public policy, grounded in the maxim interest reipublicae ut sit finis litium that is, the public interest demands that litigation must ultimately come to an end.

62. The Supreme Court of Kenya, in John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR), undertook an exhaustive exposition of this doctrine. The Court held that res judicata encompasses not only cause of action estoppel, where the entire cause of action is identical, but also issue estoppel, which precludes the re-litigation of a particular issue of law or fact that was necessarily and finally decided between the parties or their privies in prior proceedings, even if the subsequent suit raises a different cause of action. The Supreme Court quoted with approval from Halsbury's Laws of England, Volume 12 A, 5th Edition, 2015 on the Doctrine of Res Judicata which provides as follows: -

> " The doctrine of res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot reopened by parties bound by the decision, save on appeal. It is most closely associated with the legal principle of 'cause of action estoppel', which operates to prevent a cause of actions being raised or challenged by either party in subsequent proceedings where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties (or privies), and having involved the same subject matter. However, 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, one of the parties seeks to reopen that issue. For this reason, res judicata has been described as a portmanteau term which is used to describe a number of different legal principles with different juridical origins upon

which the courts have endeavoured to impose some coherent scheme only in relatively recent times…"

63. The Supreme Court further elucidated, in a manner directly pertinent to the present dispute, that in matters of public interest litigation, a determination on the constitutionality of a national process or legislative framework operates in rem, extending beyond the immediate parties to the proceedings. Once a court of competent jurisdiction has pronounced upon the constitutional validity of a legislative scheme or process, that determination is binding on all persons and on all courts of coordinate jurisdiction. To permit otherwise would invite a perpetual cycle of litigation, whereby successive petitioners or civil society organizations could continually seek to re-litigate issues that have been conclusively resolved, undermining the finality and stability of judicial pronouncements.

64. This Court has consistently applied the principle of res judicata with rigorous adherence to its underlying public policy. In Gitonga v Njuguna & another [2025] KEHC 8387 (KLR), the High Court (Magare, J.) dismissed a constitutional petition on the ground of res judicata, notwithstanding that the prior suit had been struck out on a preliminary point of limitation rather than fully determined on the merits. The Court held that a legal issue, once settled even at an interlocutory stage binds the parties and may not be re-litigated.

65. More recently, in Karungu & another v Taifa Gas Investment Sez Limited; National Environment Management Authority (Interested Party) [2025] KEELC 7753 (KLR), the Environment and Land Court applied res judicata to bar a petition challenging an environmental licence, notwithstanding that the petitioners were not named parties in the earlier proceedings. The Court reasoned that, by virtue of their membership in the same community whose representatives had already litigated the matter, the petitioners were litigating under a shared interest or title, thereby extending the doctrine to encompass communal or derivative claims.

66. Applying these authorities to the present Petition, this Court is satisfied that several of the Petitioners' challenges are barred by issue estoppel. The prior suit, Orange Democratic Movement Party & 4 others v Speaker of the National Assembly & 5 others (supra), was a final determination on the merits by a court of competent jurisdiction (Mwita, J.). Upon meticulous examination, it is manifest that the judgment conclusively resolved the very issues which the Petitioners now seek to re-litigate, thereby rendering such challenges impermissible under the well-established principles of res judicata, as further illustrated hereinafter.

Separation of powers and parliamentary oversight

67. In the 2023 Petition, the Petitioners contended that Sections 19(2)(a), (c) and (d), read together with Sections 21(1), 30, 31 and 32 of the 2023 Act, violated the doctrine of separation of powers and undermined parliamentary oversight. The Court, at paragraphs 125 to 134, undertook a comprehensive analysis of these provisions. At paragraph 130, it observed: 'There does not, in my view, seem to be a problem in section 21(1) insofar as the identification of entities for privatization is concerned.' The Court concluded that the Cabinet Secretary's role in the identification and formulation of the privatization programme was constitutionally compliant. The sole provision invalidated was Section 22(5), the deeming provision, which the 2025 Act expressly omits."

Equality and non-discrimination (Article 27)

68. The petitioners in the 2023 case argued that Section 29 of the 2023 Act (on methods of privatization) violated the principle of equality and freedom from discrimination because poor citizens would not be able to purchase shares. The Court, at paragraphs 143-144, held: "The petitioners have not

demonstrated how these methods would result into discrimination and, therefore, violate article 27. Initial Public Offers (IPOs) have been used before in the privatisation of public entities without any questions being raise. For my part, I do not see any constitutional infringement."

Socio-economic rights (Article 43)

69. In the 2023 Petition, the Petitioners contended that the objects and purposes of privatization as set out in Section 6 of the 2023 Act contravened Article 43 of *the Constitution*. The Court, at paragraph 118, observed: 'Privatization entails that the State would be divesting itself, in whole or in part, of ownership in public entities. The objects and purposes of privatization, as articulated in Section 6, cannot, in my respectful view, be said to contravene Article 43(1) when read together with Article 19 of *the Constitution*, as the Petitioners suggest. Moreover, the Petitioners have not demonstrated that, absent the purposes of privatization in Section 6, the rights under Article 43(1) would be otherwise achievable.'"

70. The Petitioners in the present proceedings, though formally distinct from those in the 2023 litigation, are litigating in an identical capacity as public interest actors challenging the constitutionality of a privatization statute. They advance the same issues under the same constitutional provisions, seeking substantially similar declarations. This scenario falls squarely within the cautionary principle articulated by the Supreme Court in John Florence Maritime Services Ltd (supra). To permit such re-litigation would amount to an abuse of the court process, enabling successive petitioners to take "serial shots" at the same legislative target until a favourable determination is obtained. The finality of judicial pronouncements, a foundational pillar of the rule of law, cannot be subordinated to the ingenuity of litigants in reframing previously adjudicated arguments.

71. The Petitioners' attempt to distinguish the 2025 Act from its predecessor is unavailing. While the Acts differ in particular provisions, the 2025 Act expressly omits the unconstitutional deeming clause and introduces additional safeguards. The core constitutional question whether the framework whereby the Executive identifies entities for privatization subject to parliamentary approval violates the doctrine of separation of powers remains identical. The 2024 judgment did not invalidate the Executive's role in identification; it invalidated the mechanism that allowed such identification to circumvent parliamentary oversight. The 2025 Act, having excised that mechanism, conforms to constitutional requirements. To hold otherwise would impose a rule whereby every successor statute, notwithstanding remedial improvements, would be subjected to de novo constitutional scrutiny on the same theoretical grounds a result clearly contrary to settled law.

72. In the premises, this Court finds and holds that the Petitioners' challenges predicated upon (a) alleged violation of the doctrine of separation of powers, (b) alleged undermining of parliamentary oversight in relation to the identification function, (c) alleged contravention of Article 27 (equality and non-discrimination), and (d) alleged violation of Article 43 (socio-economic rights), are barred by the doctrines of issue estoppel and res judicata. These grounds of the Petition are accordingly struck out.

73. This finding, however, does not dispose of the Petition in its entirety. The Petitioners also advance several distinct challenges that were neither directly nor substantially in issue in the 2023 proceedings, namely: (i) the adequacy of public participation in the legislative process for the 2025 Act; (ii) the alleged encroachment upon the Auditor-General's constitutional mandate; (iii) the purported conflict with the *Public Procurement and Asset Disposal Act*; (iv) the constitutionality of Section 71 concerning retroactivity; and (v) challenges to specific provisions, including Section 65 on confidentiality, which were not part of the 2023 Act or otherwise adjudicated. These issues are properly before this Court and shall be determined on their substantive merits.

Whether the public participation conducted by the National Assembly prior to the enactment of the *Privatization Act*, 2025 was reasonable, meaningful, and constitutionally sufficient.

74. Public participation is not a peripheral procedural formality, it constitutes a foundational pillar of Kenya's constitutional democracy. The people of Kenya, in exercising their sovereign power under Article 1 of *the Constitution*, delegated legislative authority to Parliament, yet did not abdicate their inherent right to participate in the formulation of laws that affect them. Article 10(2)(a) elevates patriotism, national unity, sharing and devolution of power, the rule of law, democracy, and the participation of the people to the status of binding national values and principles of governance. Furthermore, Article 118(1)(b) imposes a specific and non-derogable duty on Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

75. The jurisprudence on what constitutes constitutionally sufficient public participation is now well settled. The Supreme Court, in British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party) (supra), provided an authoritative exposition. The Court held that the test is not whether every single citizen was personally consulted a practical impossibility but whether a reasonable opportunity was afforded to members of the public and interested parties to know about the matter and to have an adequate say. The Court further identified the key ingredients of constitutionally adequate public participation: clarity of the subject matter; clear and simple structures and processes; balanced opportunity for influence; commitment to the process; inclusive and effective representation; integrity and transparency; and the capacity of the public to engage, including prior sensitization.

76. This Court, in the Orange Democratic Movement Party (supra) judgment, applied these principles to the 2023 Act and found the public participation process materially wanting. The deficiencies identified included:

    (a) the notice and Bill were published exclusively in English, thereby excluding non-English speakers;

    (b) only six memoranda were received, three of which emanated from government-affiliated institutions;

    (c) the process was effectively reduced to a "round table discussion" involving a few selected stakeholders; and

    (d) there was no evidence of dissemination of information beyond a solitary newspaper advertisement. The Court concluded that such a process fell "far below the constitutional threshold of reasonable, meaningful and effective public participation."

77. It is against this specific judicial denunciation that the 2025 process must be assessed. The 2nd Respondent had the benefit of the Court's detailed critique and was duty-bound to rectify the identified deficiencies. The question for this Court is whether it did so.

78. Having meticulously examined the exhibit bundle, including the published notices, the Committee Report, the Hansard records, and the comprehensive documentary trail of public engagement, this Court is satisfied to return an unequivocal finding: the public participation conducted in respect of the *Privatization Act*, 2025 was not merely constitutionally sufficient; it stands as a commendable exemplar of legislative responsiveness, demonstrating diligence, transparency, and fidelity to the principles of

meaningful and effective public engagement as enunciated by this Court and the Supreme Court in the jurisprudence cited above.

79. First, the National Assembly addressed the language barrier head-on. The Petitioners' primary grievance that the process was conducted only in English is factually incorrect. The record contains the official "explainers" on the Bill, published in both English and Kiswahili. These documents were uploaded to the Parliamentary website and, critically, hard copies were deposited at constituency offices nationwide. This is a direct, demonstrable remediation of the specific defect identified in the 2023 Act.

80. Second, the allegation that the process was confined to a "QR code" is a distortion of the record. The QR code was an additional, supplementary access portal. It was not the exclusive or even primary mechanism. The advertisements placed in the Daily Nation and The Standard on 25th July 2025 invited submissions of memoranda by email, post, and through physical delivery.

81. More significantly, the Committees conducted physical public hearings in twenty-four counties, a level of geographic penetration that cannot be dismissed as tokenism. The Petitioners have adduced no evidence of a single individual or organization that was unable to submit views due to the QR code or any other barrier. In constitutional litigation, particularly where public participation is in issue, generalized assertions of exclusion unsupported by specific evidence are insufficient to vitiate a demonstrably extensive process.

82. Third, the process was not merely for show. It was substantive and efficacious. The Committee's Report, meticulously documents the views received and, crucially, the amendments proposed in direct response to those views. The deletion of Clause 4(c), which sought to exempt government-linked corporations from the ambit of the Act, was a direct concession to public concerns. The deletion of the entire Appeals Board framework and its replacement with an internal review mechanism plus a right of appeal to the High Court was a direct response to submissions of various individuals and stake holders. The introduction of safeguards for strategic national assets and national security interests was a direct legislative uptake of public submissions.

83. The principle emerging from the jurisprudence is that public participation is not a numbers game. It is not about how many memoranda are received, but about the quality of the opportunity afforded and the seriousness with which the views are considered. The Supreme Court in British American Tobacco Kenya, PLC (supra) explicitly rejected the notion that a "census-like exercise" is required. What is required is a demonstrable commitment to facilitating input and a demonstrable engagement with that input. Both are manifestly present in this record.

84. The Petitioners' complaint regarding the accessibility of the Committee Report is equally without foundation. The 2nd Respondent's uncontroverted evidence is that the Report was uploaded to the Parliament website. In any event, the Petitioners have not demonstrated that they invoked the *Access to Information Act*, 2016, a statutory mechanism specifically designed to address claims of non-disclosure before approaching this Court.

85. Constitutional litigation is not a surrogate for statutory remedies that are adequate, accessible, and efficacious. The principle of constitutional avoidance, affirmed by the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] KESC 53 (KLR), counsels that where a matter can be resolved without venturing into constitutional questions, that course should be adopted. In the present case, the Petitioners' failure to first exhaust the mechanisms provided under the *Access to Information Act* before asserting a purportedviolation of Article 35 renders this ground untenable and unsustainable in law.

86. Accordingly, this Court finds and holds that the public participation conducted by the National Assembly for the *Privatization Act*, 2025 was reasonable, meaningful, constitutionally sufficient, and in full compliance with Articles 10 and 118 of *the Constitution* and the binding precedent of the Supreme Court. This ground of the Petition fails.

Whether the *Privatization Act*, 2025 violates the doctrine of separation of powers and undermines parliamentary oversight contrary to Articles 94, 95, and 201 of *the Constitution*.

87. Notwithstanding this Court's finding that this issue is res judicata, it is appropriate, for the sake of completeness and to demonstrate the legislative evolution between the 2023 and 2025 Acts, to examine the Petitioners' substantive arguments.

88. The separation of powers is not a rigid, mathematical formula but a dynamic principle of checks and balances. *The Constitution* of Kenya, 2010, does not mandate a hermetic seal between the Executive, Legislature, and Judiciary. It envisions a system of inter-dependence and mutual oversight. The Executive proposes policy and implements law; the Legislature scrutinizes, amends, and approves; the Judiciary interprets and adjudicates. Each arm must respect the functional space of the others, but none may claim absolute exclusivity over any function.

89. The Petitioners' argument that Sections 7, 22, and 31 unconstitutionally concentrate power in the Executive proceeds from a fundamental misreading of the Act. Section 7 does not grant the Cabinet Secretary carte blanche. It defines a role that is administrative and coordinative. Section 22(2) does not grant unfettered discretion, it prescribes ten specific, judicially-reviewable criteria that the Cabinet Secretary must take into account, including the strategic nature of the public entity, national security interests, the need to avoid a privatization that may result in a monopoly, and the need to reduce budget drain on government resources. This is not whimsical, irrational, or arbitrary power. It is structured, criteria-bound discretion.

90. More fundamentally, the Petitioners' characterization ignores the Act's architecture of dual parliamentary control. Under Section 25, the National Assembly possesses the conclusive authority to approve the programme for implementation, approve the programme with reservations or proposed amendments, or decline the programme. This is not a rubber-stamp, it is a veto. The Executive cannot proceed with any privatization without the affirmative, express approval of the people's representatives.

91. Under Sections 37 to 41 of the Act, approval is required not once but twice. Even after a programme has secured initial endorsement, each individual privatization proposal for a specific entity must be submitted to the National Assembly for a second, distinct round of approval. In this subsequent stage, the National Assembly retains the authority to approve, amend, or decline the proposal. Section 41 explicitly provides that where the National Assembly proposes amendments, the Cabinet Secretary "shall" revise the proposal and resubmit it for approval. The legislative scheme leaves no ambiguity. The Executive does not possess the final say, Parliament does.

92. Far from representing a procedural anomaly, this multi-stage approval process reflects the constitutional norm. Article 95(4)(c) empowers the National Assembly to exercise oversight over national revenue and its expenditure, Article 95(4)(a) vests in the Assembly the authority to determine the allocation of national revenue between the levels of government; and Article 95(5)(b) mandates legislative oversight of State organs. The *Privatization Act*, 2025 faithfully integrates these constitutional functions into the privatization process. Rather than undermining parliamentary oversight, the Act constitutionalizes and operationalizes it in accordance with *the Constitution*'s vision of checks, balances, and democratic accountability.

93. This Court takes judicial notice of the fact that the *Privatization Act*, 2025 has been in operation for several months. The Petitioners have not pointed to a single instance where the National Assembly has been reduced to a passive observer. They have not pointed to a single instance where a privatization programme has been "forced through" against parliamentary will. Their challenge is entirely theoretical, premised on a suspicion of what the Executive might do, not on evidence of what the Act actually does.

94. In Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others (supra) the Supreme Court articulated the principle of constitutional avoidance and deference to legislative choice. The Court held that where *the Constitution* does not prescribe a specific mechanism for achieving a legitimate objective, the Legislature enjoys a margin of appreciation in designing that mechanism. So long as the mechanism does not transgress constitutional limits, the Court should not substitute its policy preferences for those of the elected representatives of the people. The *Privatization Act*, 2025, with its dual-layer parliamentary approval, its ten mandatory criteria, its public consultation requirements, and its judicial review pathways, falls squarely within this margin of appreciation.

95. Even assuming, arguendo, that this ground of the Petition is not barred by res judicata, it would, in any event, fail on the merits.

Whether the Act excludes or otherwise undermines the constitutional mandate of the Auditor-General under Article 229 of *the Constitution*

96. The Office of the Auditor-General constitutes one of the independent constitutional commissions established under Chapter Fifteen of *the Constitution*. Article 229(4) mandates the Auditor-General to audit and report, within six months of the conclusion of each financial year, on the accounts of the national and county governments; all funds and authorities of the national and county governments; all courts; every commission and independent office established by *the Constitution*; the National Assembly and the Senate; the county assemblies; political parties funded from public resources; the public debt; and, additionally, "any entity that legislation requires, and any entity that is funded from public funds." This constitutional mandate underscores the Auditor-General's pivotal role in safeguarding public accountability and ensuring financial transparency across all organs and entities of government.

97. The Petitioners' contention that the Act wholly excludes the Auditor-General is hyperbolic and unsupported by the text of the Act. The Petitioners point to the absence of the phrase "Auditor-General" in specific sections, particularly Section 45 on valuation and argue that this constitutes ouster of mandate. This argument confuses two distinct constitutional functions: valuation and audit.

98. Valuation, as contemplated in Section 45, is a pre-transaction commercial exercise. Its purpose is to establish a reserve price, the minimum acceptable consideration for the sale of shares or assets. This is a specialized function typically performed by professional valuers, investment bankers, or financial advisors. The Auditor-General does not, has never, and should never conduct commercial valuations of entities slated for sale. The Auditor-General is an auditor, not an investment advisor. *The Constitution* does not mandate the Auditor-General to certify that the Government sold an asset at the right price; it mandates the Auditor-General to certify that the proceeds of that sale were lawfully and effectively applied.

99. The distinction is constitutionally significant. Article 229(6) provides that the Auditor-General's audit report shall confirm whether or not public money has been applied lawfully and in an effective way. The Auditor-General audits the application of money after it has been received and expended. The Auditor-General does not audit the valuation that determined how much money should have been received.

The Petitioners' demand that the Auditor-General be involved in all stages of privatization, specifically valuation, due diligence, and financial reporting is not a demand for constitutional compliance; it is a demand for the expansion of the Auditor-General's constitutional mandate beyond its textual and historical limits. This Court cannot rewrite *the Constitution*.

100. Moreover, the Petitioners' assertion of exclusion ignores the explicit accountability mechanisms embedded in the Act. Section 54 mandates that proceeds from the sale of direct National Government shareholding "shall be paid into the Consolidated Fund." The Consolidated Fund, established by Article 206(1), is the apex public fund of the national government. All money paid into the Consolidated Fund is subject to the full audit jurisdiction of the Auditor-General under Article 229(4)(a). Money cannot be withdrawn from the Consolidated Fund without appropriation by an Act of Parliament (Article 206(2)(a)) and without the prior approval of the Controller of Budget (Article 206(4)). These are not optional safeguards; they are constitutional commands binding on all State organs.

101. Section 60 of the Act reinforces this provision. It requires the Board of the Privatization Authority to cause to be kept proper books of accounts of the income, expenditure, assets and liabilities undertakings, activities, transactions and other business of the Authority. It then provides that the accounts of the Authority shall be audited in accordance with the *Public Audit Act* (Cap. 412B). The *Public Audit Act*, 2015 is the legislation that operationalizes the Auditor-General's constitutional mandate. A provision requiring audit "in accordance with the *Public Audit Act*" is a provision requiring audit by the Auditor-General.

102. Section 61(3) further provides that the annual report of the Authority, which must include information on activities undertaken under the Privatization Programme in each financial year, shall form part of the annual report on privatization which shall be tabled in Parliament by the Cabinet Secretary. Tabling in Parliament subjects the report to scrutiny by the Public Accounts Committee and the Public Investments Committee, committees that rely heavily on Auditor-General reports in their oversight work.

103. When distilled to its essence, the Petitioners' argument is not that the Act excludes the Auditor-General; rather, it is that the Act does not explicitly reference the Auditor-General in the valuation chapter. Such omission, however, does not constitute a constitutional violation. *The Constitution* does not require that every statute recite, as a liturgical refrain, the names of all constitutional commissions. What is required is that the statute, read as a whole and in harmony with *the Constitution*, neither ousts nor impedes the exercise of constitutionally mandated functions. The *Privatization Act*, 2025 satisfies this standard: it neither excludes nor diminishes the Auditor-General's authority, and it both implicitly and explicitly preserves the Auditor-General's jurisdiction over public funds generated by privatization

104. This Court therefore finds and holds that the Act does not violate Article 229 of *the Constitution*. This ground of the Petition fails.

Whether the Act violates the principles of transparency, competitiveness, and accountability in the disposal of public assets contrary to Article 227 of *the Constitution* and the *Public Procurement and Asset Disposal Act*, 2015

105. Article 227(1) of *the Constitution* provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Article 227(2) mandates that an Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented.

106. The *Public Procurement and Asset Disposal Act*, 2015 (PPADA) is the generic framework enacted pursuant to Article 227(2). It applies to all State organs and public entities with respect to procurement planning, procurement processing, inventory and asset management, disposal of assets, and contract management. Section 5(1) of the PPADA provides that the Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal.

107. The Petitioners argue that privatization is a form of "asset disposal" and that the *Privatization Act*, 2025, by failing to reference or align with PPADA, creates a "conflict of laws" and permits "opaque and non-competitive" processes.

108. This argument fails at the first hurdle of statutory interpretation. The *Privatization Act*, 2025 and the *Public Procurement and Asset Disposal Act*, 2015 are not in conflict, they operate in distinct, non-overlapping spheres. The PPADA governs the disposal of assets by public entities. The *Privatization Act* governs the disposal of ownership in public entities. The distinction is not semantic, it is structural and substantive.

109. When a public entity disposes of an asset for instance a motor vehicle, a piece of office furniture or a parcel of land, it remains a public entity. Its ownership structure is unchanged, its legal personality is unchanged, its relationship with the National Government is unchanged. The transaction is one of sale, not of privatization.

110. When the National Government privatizes a public entity, it is not selling an asset. It is selling its ownership stake in a corporate entity. The entity itself may continue to exist, but its controlling shareholder changes from the Government to private investors. The transaction is one of divestiture, not merely disposal. The distinction is recognized in corporate law, public finance law, and comparative privatization jurisprudence.

111. The Legislature is entitled, indeed constitutionally mandated, to provide a specialized framework for this distinct category of transaction. The *Privatization Act*, 2025 is that specialized framework. Its procedures are not opaque; they are prescribed in detail in the Second Schedule. For initial public offerings, the Act mandates compliance with the *Capital Markets Act* and the regulations of the Capital Markets Authority, a regulatory regime administered by an independent statutory body. For public tenders, the Act mandates a detailed, multi-stage competitive process: invitation of expressions of interest, advertisement on the government tenders' portal and in at least two newspapers of nationwide circulation, evaluation by a technical committee, shortlisting, issuance of request for proposals, evaluation of proposals against pre-disclosed criteria, approval by the Board, and final approval by the Cabinet Secretary.

112. This Court fails to discern how this exhaustive, multi-layered competitive framework violates the principle of transparency and competition. On the contrary, it exemplifies it. The fact that the framework differs from the generic PPADA framework is not evidence of unconstitutionality. It is evidence of legislative tailoring to the specific exigencies of capital markets transactions.

113. The Petitioners' reliance on Okoiti v Portside Freight Terminals Limited & 12 others [2025] KESC 67 (KLR) is misplaced. That case concerned a procurement for the construction and operation of a container terminal, a classic public procurement contract. The Supreme Court's holding that procuring entities have the discretion to choose any one of the methods depending on diverse factors and that once the entity settles on a method, the process must comply strictly with the law applies equally to the *Privatization Act*, 2025. The Act has settled on specific methods and prescribed strict procedures for each. There is no constitutional deficiency.

114. This ground of the Petition fails.

Whether Sections 21 and 32 of the Act violate economic and social rights and the right to equality and freedom from discrimination under Articles 21(1), 27, and 43 of *the Constitution*

115. This issue, as previously held, is res judicata. The Court in Orange Democratic Movement Party (supra) specifically considered and rejected the argument that the methods of privatization constructively discriminate against the poor. The Court held, at paragraph 144: "The petitioners have not demonstrated how these methods would result into discrimination and, therefore, violate article 27. Initial Public Offers (IPOs) have been used before in the privatisation of public entities without any questions being raise. For my part, I do not see any constitutional infringement."

116. This Court is bound by its prior determination. There exists no material distinction between Section 29 of the 2023 Act and Section 32 of the 2025 Act that would justify a departure from the earlier finding. Both provisions enumerate the same primary methods of privatization;initial public offering (IPO), public tender, and pre-emptive rights and both contain a residual clause. The Petitioners have not identified any new evidence or circumstances that would warrant revisiting this settled question.

117. Even if that this issue were not res judicata, this Court would nonetheless find no constitutional infringement. The right to equality under Article 27 does not confer upon every citizen the financial capacity to acquire shares in every public entity. Rather, it guarantees that the State shall not discriminate on prohibited grounds in determining eligibility to participate. Section 32 does not discriminate on any such prohibited basis. It does not exclude individuals on account of race, sex, religion, disability, or any other enumerated category. Its limitation based on financial capacity is not constitutionally impermissible; indeed, it reflects a distinction inherent in any commercial transaction.

118. Moreover, Section 32 contains an affirmative action mechanism. Subsection (2) empowers the Cabinet Secretary to direct the Authority to limit participation in the privatization to Kenyan citizens or to provide for a minimum level of participation by Kenyan citizens. This is not discrimination against non-citizens; it is constitutionally permitted preference for citizens in the allocation of national resources. Article 65 itself restricts land ownership by non-citizens; Section 32(2) extends this principle to share ownership.

119. The Petitioners' invocation of Article 43 (socio-economic rights) is even more attenuated. They have not demonstrated any causal link between the enactment of the *Privatization Act*, 2025 and the denial of the right to health, housing, food, water, social security, or education. Privatization, by generating revenue for the Consolidated Fund, may in fact enhance the State's capacity to progressively realize these rights. The Petitioners' argument proves too much; if accepted, it would render unconstitutional any fiscal policy that generates revenue through any means other than direct taxation. That is not the law.

120. This ground of the Petition fails.

Whether Section 71 of the Act violates the constitutional doctrine of non-retroactivity contrary to Article 2(4) of *the Constitution*

121. Section 71 of the *Privatization Act*, 2025 provides as follows:

> "Upon commencement of this Act, the privatization of entities published under Gazette Notice No. 8739 of 14th August, 2009 shall be finalized in accordance with this Act."

122. The Petitioners contend that this provision unconstitutionally "revives" a defunct privatization programme and operates retrospectively. They assert that Gazette Notice No. 8739, having been issued pursuant to the repealed *Privatization Act*, 2005, lapsed upon the repeal of that Act and, consequently, cannot be resuscitated under the 2025 Act.

123. This contention misconceives the operation of law upon the repeal and re-enactment of statutes. The governing provision is Section 24 of the *Interpretation and General Provisions Act* (Cap. 2), which provides:

> "Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder."

124. When this Court declared the *Privatization Act*, 2023 unconstitutional on 24th September 2024, the legal effect was not to create a legislative vacuum. The nullification of the 2023 Act operated to restore the previously-repealed *Privatization Act*, 2005, together with all subsidiary legislation enacted thereunder, including Gazette Notice No. 8739. This aligns with the common law principle that a statute void ab initio is treated as if it never existed, leaving prior law in full operation.

125. Gazette Notice No. 8739 was therefore valid and in force at the time of the enactment of the *Privatization Act*, 2025 on 15th October 2025. Section 71 does not "revive" a defunct notice; it merely confirms that the execution of a notice already legally extant shall proceed under the procedural framework established by the 2025 Act. This constitutes lawful transitional regulation, not retrospective legislation.

126. The distinction is constitutionally material. A retroactive law operates retrospectively, altering the legal consequences of acts or transactions completed prior to its enactment. Section 71, in contrast, operates prospectively. It applies solely to privatization processes ongoing at the time of the Act's commencement and continuing thereafter. It does not validate past unlawful acts, impose new penalties for pre-existing conduct, or divest vested rights. Its effect is confined to ensuring that, from the commencement date of the Act, all steps taken to finalize privatizations listed in the 2009 Gazette Notice comply with the procedures mandated by the 2025 Act.

127. The Petitioners' reliance on Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR is inapposite. The Court in that case held that a retroactive law is not unconstitutional unless it: (i) constitutes a bill of attainder; (ii) impairs contractual obligations; (iii) divests vested rights; or (iv) contravenes a constitutional prohibition. The Petitioners have demonstrated none of these effects. They have identified no contract impaired, no vested right divested, and no constitutional provision prohibiting such transitional measures.

128. For these reasons, this Court finds and declares that Section 71 of the *Privatization Act*, 2025 is a lawful and constitutionally valid transitional provision. This ground of the Petition fails.

Whether the Petitioners are Entitled to the Reliefs Sought

129. The Petitioners have not demonstrated any constitutional breach in either the enactment or the substantive provisions of the *Privatization Act*, 2025. The Act was promulgated following extensive, inclusive, and meaningful public participation. It incorporates robust, multi-layered safeguards for parliamentary oversight, including two distinct approval stages. Far from excluding constitutional

oversight, the Act fully accommodates the mandate of the Auditor-General with respect to public funds. Its procurement framework is detailed, competitive, and in strict compliance with Article 227 of *the Constitution*. Furthermore, its transitional provisions constitute a lawful exercise of legislative authority, designed to ensure orderly implementation and governance.

130. In the absence of any established constitutional violation, the reliefs sought including declarations of unconstitutionality, mandatory injunctions, and structural interdicts cannot be granted. Constitutional remedies are not granted as a matter of course; they depend upon a demonstrated infringement of constitutional rights or principles. The Petitioners have failed to discharge this burden.

Conclusion

131. This Court is acutely conscious of the profound public interest that attaches to the privatization of State-owned enterprises. Such assets are not the property of any government, administration, or political party, they constitute the sovereign wealth of the Republic of Kenya, held in trust for the people of Kenya, both current and future generations.. Their disposal must be, and must be seen to be, conducted with the highest standards of integrity, transparency, and accountability.

132. The *Privatization Act*, 2025, when measured against the exacting standards of *the Constitution*, fully satisfies those requirements. It is the product of a legislative process that faithfully observed the constitutional mandate of public participation and heeded the judicial guidance of this Court. The Act establishes a framework that not only preserves but strengthens the oversight role of Parliament. It subjects Executive discretion to clear, judicially-reviewable criteria, mandates procedures that are both competitive and transparent, and directs all proceeds into the Consolidated Fund, where they remain fully accountable to constitutional appropriation and audit.

133. This judgment should not be read as an endorsement of privatization as an economic policy. That is not the Court's role. The wisdom or folly of privatization is a question for the political branches; the Executive, which proposes policy, and the Legislature, which approves it. The Court's role is limited to, but constitutionally vital, ensuring that whatever policy is chosen is implemented through lawful means and within constitutional limits. The *Privatization Act*, 2025, survives that scrutiny.

134. The Petition is dismissed. In the exercise of this Court's discretion under Section 27 of the *Civil Procedure Act* and the principle that costs follow the event, but mindful that this is public interest litigation brought in good faith by organizations dedicated to constitutionalism, each party shall bear its own costs.

135. Accordingly, for the reasons set out above, this Court makes the following orders:

    a. The Petitioners' challenges to the *Privatization Act*, 2025 based on the alleged violation of the doctrine of separation of powers, the alleged undermining of parliamentary oversight (in so far as it relates to the Cabinet Secretary's identification function), the alleged violation of Article 27 (equality and freedom from discrimination), and the alleged violation of Article 43 (socio-economic rights) are barred by the doctrine of res judicata and are hereby struck out.

    b. The public participation conducted by the National Assembly prior to the enactment of the *Privatization Act*, 2025 is hereby declared to have been reasonable, meaningful, and constitutionally sufficient, and in full compliance with Articles 10 and 118 of *the Constitution*.

    c. The *Privatization Act*, 2025 is hereby declared to be constitutional and valid in its entirety. None of the provisions impugned by the Petitioners specifically Sections 7, 21, 22, 23, 31, 32, 34(d), 35, 36, 37, 38, 39, 43(2), 45, 54, 55, 65, 67, and 71 are inconsistent with *the Constitution* of Kenya, 2010.

d. The *Privatization Act*, 2025 contains adequate systems of checks and balances to protect the sovereign assets of the people of Kenya.

e. The structure of the Privatization Authority, as established under the Act, is constitutional. The appointment of its members by the Executive does not violate Articles 10, 73, or 232 of *the Constitution*.

f. Sections 22, 31, and 67 of the Act do not constitute an unconstitutional delegation of legislative authority. The Cabinet Secretary's discretion under these provisions is structured, criteria-bound, and subject to judicial review and parliamentary oversight.

g. The prayer for a mandatory injunction compelling the National Assembly to publish the Departmental Committee Report is declined, the said report having already been published and being in the public domain.

h. A declaration is hereby issued that all proceeds from privatization must be deposited into the Consolidated Fund and managed in accordance with the *Public Finance Management Act*, 2012 and Articles 201 and 206 of *the Constitution*. The *Privatization Act*, 2025, by Section 54, already so provides.

i. The prayer for a mandatory injunction compelling the involvement of the Auditor-General in valuation and due diligence is declined. The Auditor-General's constitutional mandate under Article 229 is to audit the application of public funds post-expenditure, not to conduct pre-transaction commercial valuations.

j. The Petition dated 13th November 2025 is hereby dismissed in its entirety.

k. Each party shall bear its own costs.

Orders accordingly. File closed accordingly.

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

BAHATI MWAMUYE MBS

JUDGE

In the presence of: -

Counsel for the Petitioners – Mr. Lempaa Suyianka

Counsel for the 1st , 3rd and 4th Respondents – Mr. Kaumba

Counsel for the 2nd Respondent- Ms. Nganyi

Court Assistant – Ms. Lwambia