REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
APPLICATION NO. E199 OF 2024

KENYA HUMAN RIGHTS COMMISSION (KHRC)……1ST APPLICANT
LAW SOCIETY OF KENYA (LSK)……...…….2ND APPLICANT
-VERSUS-
KENYA AIRPORTS AUTHORITY…...……..1ST RESPONDENT
AIRPORTS INFRASTRUCTURE PLC……..2ND RESPONDENT
GLOBAL AIRPORTS OPERATOR LLC……..3RD RESPONDENT
ADANI ENTERPRISES LIMITED…….....……4TH RESPONDENT
ADANI AIRPORT HOLDING LIMITED……...5TH RESPONDENT
KENYA AVIATION WORKERS
UNION (KAWU)……1ST INTERESTED PARTY
TRANSPORT WORKERS UNION (TAWU)…2ND INTERESTED PARTY

RULING

Applicants' case

1. By a motion dated 10 September 2024, the applicants initiated judicial review proceedings against the respondents seeking a declaration that the privately initiated proposal for development and operation of Jomo Kenyatta International Airport (hereinafter "the Adani proposal") submitted in March 2024 by Adani Airports Holdings Limited (also referred to hereinafter as simply "Adani"), violates articles 10, 27 and 201 of the Constitution and is, therefore, a nullity. The other judicial review reliefs they have sought against the respondents are orders for prohibition, certiorari and mandamus.
2. The order for prohibition is sought to restrain the respondents or their agents, or any other person for that matter, from implementing or further

implementing or acting on the Adani proposal for the development and operation of Jomo Kenyatta International Airport (or "JKIA") submitted in March 2024 by Adani Airport Holdings Ltd. They seek the order of certiorari to bring to this Honourable Court and quash the Adani proposal for development and operation of Jomo Kenyatta International Airport submitted in March 2024 by Adani Airport Holdings Ltd while the order of mandamus is sought for the Court to direct Kenya Airports Authority, the 1st respondent in this suit, to supply the applicants with the information sought in applicants' letters respectively dated 23 July 2024 and 1 August 2024 within 14 days of the Court's order.

3. The application is based on a statutory statement dated 9 September 2024 and a verifying affidavit sworn on even date by Davis Malombe, verifying the facts relied upon.
4. According to Malombe, in July 2024, the applicants learned, from a source he has described as "*a whistle blower accounts*", about an ongoing plan to sell Jomo Kenyatta International Airport, a profitable and strategic national asset built in 1978, to Adani and its subsidiaries. The sale is said to be illegal because it is without consideration, and besides the risk with which it is fraught, the sale is at unaffordable cost to the taxpayer.
5. The applicants were concerned about this transaction which, in their opinion, was illegal. They, therefore, wrote to Jomo Kenyatta International Airport seeking the following information:

a. Copies of all correspondence and minutes of all meetings held by KAA on the deal particularly the correspondence with Adani Group and with the Public Private Partnership Committee;

b. Information on how Adani Group was procured for the deal;

c. Information on how ALG: Global was procured as transaction advisor;

d. A copy of the feasibility study or report on the financial sustainability of the deal by ALG the transaction advisor;

e. A copy of the contract between KAA and ALG: Global;

f. A copy of the project proposal or contract between KAA and Adani Group;

g. Justification why the project is not suitable for open competitive procurement;

h. A preliminary operating plan for the proposed project;

i. A copy of the letter submitting the Adani proposal to the PPP Directorate for assessment and approval; and,

j. Evidence of Adani's payment of zero-point-five per cent of the estimated project cost or fifty thousand United States dollars, whichever is lower.

6. The applicants' quest for this information was anchored on article 35(1) and (3) of the Constitution and section 4 of the Access to Information Act, 2016. Nevertheless, their efforts were rendered fruitless as JKIA did not provide the information sought.
7. The applicants contest the concession of Jomo Kenyatta International Airport to the Adani and its subsidiaries for 30 years. It is their position that Kenya can independently raise the estimated 1.85 Billion USD or 238 Billion Kenya Shillings needed to expand JKIA without leasing JKIA for 30 years. Thus, the Adani proposal is unaffordable; it threatens job losses; and has a disproportionate aggregated fiscal risk exposure to the public without offering any value for money to the taxpayer.
8. In the applicants' view, leasing the strategic and profitable JKIA to a private entity is irrational under article 47 of the Constitution and violates the principles of good governance, accountability, transparency, and prudent and responsible use of public money under articles 10 and 201 of the Constitution.
9. In any event, Adani submitted the proposal on 1 March 2024, yet the Cabinet only approved the National Aviation Policy and the JKIA Medium-Term Investment Plan on 11 June 2024, some three months later. The timing of the proposal, it is contended, points to a possible collusion between the respondents to tip off and give a head start to Adani on the

planned expansion of JKIA contrary to Article 10 of the Constitution on good governance.

10. Even then, the 1st respondent is alleged to have violated section 41 of the Public Private Partnerships Act (or "PPPA") cap. 430 by commencing to evaluate the Adani proposal before due diligence despite the assurance given to the public on 24 July 2024 by the 1st respondent that the Adani proposal "*would be subjected to technical, financial, and legal review*" in compliance with the PPPA. Beside KAA, Honourable Musalia Mudavadi, the Prime Cabinet Secretary, confirmed on 30 July 2024, that the Adani proposal was undergoing *"requisite due process, reviews, and negotiations"*.

11. Notwithstanding these assurances, on 2 September 2024, officers from Adani were spotted at JKIA conducting a stock- taking exercise at the airport and on 4 September 2024, Dr. Alfred Mutua, the Cabinet Secretary for Labour and Social Protection met aviation workers at JKIA to persuade them to take up the proposal to hand over their job contracts to Adani.

12. Malombe has sworn that Adani's corporate and governance history is riddled with investigations for corruption, bribery, and human rights abuses worldwide. For example, in 2011, the Parliamentary Ombudsman of the Indian State of Karnataka investigated Adani for corruption, concerning the illegal export of 7.7 million tons of iron ore.

13. Adani's proposal, it is sworn, is unaffordable and offers no value for money. Kenya would surrender the operational and profitable JKIA to Adani for 30 years (in exchange for 1.85 Billion USD equivalent to 238 Billion Kenya Shillings). In the applicants' estimation, Kenya can afford to raise 238B without leasing the airport to Adani for 30 years. If Adani's proposal is taken on board, it would deprive the public of and transfer to Adani all the current revenues, receipts, expenditures, and other financial transactions over JKIA. Although the project is dubbed a Built-Operate Transfer, KAA would be handing over an existing and operational airport to Adani.

14. According to the proposed scheme, Adani is not obligated to build a new runway because according to its proposal, the runway is sufficient until 2048 and would only need a few rapid exits, parallel taxiways, and runway entry taxiways. Yet At the end of these 30 years, Adani would, in perpetuity, retain an 18% equity stake in the aeronautical business at JKIA. Thus, after 30 years, Adani would be entitled to 18% a concession fee starting at 6 Billion Kenya Shillings and increasing by 10% every five years forever. In this way, the Adani proposal violates Article 201(c) of the Constitution which demands that the burden and benefits of the use of resources and public borrowing must be shared equitably between present and future generations.

15. That notwithstanding, the Adani proposal forbids KAA from building a competing facility (that is, any airport or aerodrome within a 150-kilometre radius of JKIA) for 30 years. The proposal also disproportionately transfers the aggregated fiscal risk and contingent liabilities to KAA; with Adani bearing no or minimal risk. Thus, the proposal would leave KAA worse off.
16. It is the applicants' contention that the proposal, thus, violates section 40(2)(f) of the PPPA and article 201 of the Constitution which demand value for money and an efficient transfer of risk from the public sector.
17. According to the impugned proposal, Adani would also acquire nearly 30 acres of unencumbered land next to JKIA for airport property investment and development business. Besides, the proposal entitles Adani to operate tax-free for 10 years, import labour, and obtain free work visas, thus depriving Kenyan workers of their livelihood, contrary to Articles 26, 41, and 43 of the Constitution.
18. At the time of filing the application, KAA had a 31 October 2024 deadline to meet the conditions for the concession. On 30 August 2024, Adani incorporated Airports Infrastructure PLC as a Kenyan subsidiary to take over the JKIA. The same week, Adani conducted a stock-taking exercise at JKIA. At the same time, KAA officials visited Adani headquarters in India indicating that the Adani deal was imminent.

Preliminary objection and respondents' case

19. The 1st respondent objected to the hearing of the suit by way of a preliminary objection dated 7 October 2024. The objection was based on the grounds that the jurisdiction to hear and determine any complaint arising from a privately initiated proposal lies with the Petition Committee established under Section 75 of the Public Private Partnerships Act.

20. It is also the 1st respondent's position that the application violates provisions of Section 75 of the Public Private Partnerships Act, 2021. Under section 75(1), the Act establishes the Petition Committee with jurisdiction to hear and determine any petitions regarding the decisions of the Public Private Partnership Committee, the Directorate of Public Private Partnerships or a contracting authority. Section 75(2)- (7) provides an elaborate process of challenging the decision of a contracting authority before the Petition Committee. Section 75(8) provides that an appeal from the decision of the Petition Committee shall be lodged in this Honourable Court.

21. The 1st respondent contends that the applicants have failed to exhaust the dispute resolution mechanism stipulated in the law and, therefore, this Honourable Court lacks jurisdiction to hear and determine this matter.

22. The 2nd to 5th respondents filed grounds of objection in response to the application. The grounds are more or less in the same terms as the grounds in the 1st respondent's preliminary objection.

23. In addition to what the 1st respondent has stated, the 2nd to 5th respondents have cited the Court of Appeal decision in the **Speaker of the National Assembly v James Njenga Karume (1992) eKLR)** on the exhaustion of the review and appellate mechanisms. They have also pleaded that the respondents are private entities and that the orders of judicial review sought against the respondents' privately-initiated proposal dated 1st March 2024 cannot issue.

24. It is also contended on behalf of the 2nd and 5th respondents that the Adani proposal is under negotiations and due diligence stage in compliance with the provisions of Public Private Partnerships Act. The orders sought to declare the privately initiated proposal as a nullity or prohibit the parties from proceeding with the project as set out in the Act are premature and without basis. Again, there is no jurisdiction to issue a declaration in the circumstances of the case or at all.

25. Judicial review remedies, it is urged, are discretionary and the court ought not to exercise its discretion in the applicants' favour having regard to the facts. In particular, Mandamus is not available to the applicants in view of Article 35 of the Constitution; and, certiorari and prohibition are employed primarily to control decision makers. According to the 2nd to 5th respondents, these reliefs lie in cases of excess of jurisdiction, error on the face of the record and exceptional circumstances. They cannot issue to stop a process initiated in accordance with the law.

26. Besides the preliminary objection, the 1st respondent filed a replying affidavit sworn by Henry Ogoye who introduced himself in the affidavit as the 1st respondent's acting managing director and chief executive officer. He has sworn that the Kenya Airports Authority is a State Corporation established under the Kenya Airports Authority Act, cap. 395 and that under Section 12 of the Act, it is mandated to, *inter alia;* construct, operate and maintain aerodromes and other related facilities; construct or maintain aerodromes on an agency basis on the request of any Government department; and, provide such other amenities or facilities for passengers and other persons making use of the services or the facilities provided by the 1st respondent as may appear to the Board of the 1st respondent as necessary or desirable.

27. As far the privately initiated proposal by the 5th respondent is concerned, it is deposed that its consideration is consistent and aligned with Kenya's public policy of expansion and modernization of Jomo Kenyatta International Airport (JKIA) as a strategic infrastructure and as the regional gateway of choice. Currently, JKIA is facing a capacity crisis and is in urgent need of investment to meet increasing demand and retain its competitive edge. Further, the 1st respondent has complied with the Constitution and the Act in consideration of the proposal.

Cancellation of the Adani Proposal

28. More pertinent to this ruling is the 1st respondent's further affidavit sworn by Nicholas Bodo on 5 May 2025. Like Ogoye, Bodo has sworn that he is the acting managing director and chief executive officer of the 1st respondent. The assumption is that Bodo must have taken over from Ogoye as the managing director and chief executive officer of the 1st respondent.
29. Ogoye has sworn that he is aware that the 5th Respondent submitted to the 1st Respondent a privately initiated proposal for the development, expansion and operation of the Jomo Kenyatta International Airport. He has been informed by the 1st respondent's counsel, which information he verily believes to be true, that section 6 of the Public Procurement Private Partnership Act provides at Section 6 that the functions of the Public Private Partnerships Committee include approving the cancellation of procurements or termination of project agreements.
30. At its 51st Ordinary Public Private Partnership Committee meeting, the Committee approved the cancellation request subject to the approval of the Attorney General. The Attorney General approved the cancellation of the Adani proposal and by a letter dated 26 February 2025, the 1st respondent informed the 5th respondent of the approval and cancellation of the proposal by the 5th respondent.
31. The 1st respondent's letter cancelling the proposal reads as follows:

"KAA/13/10/2 VOL. 1 (73)

26th February, 2025 Mr. Alok Patni

Adani Airport Holdings Ltd,

Commerce House 6, 80ft Corporate Road, Off.SC Highway Next to SNP Global House Prahalad Nagar

Ahmedabad Gujarat, 380051, India alok.gatn i@adani.com

Dear Sir,

RE: CANCELLATION OF THE PUBLIC PRIVATE PARTNERSHIP PROJECT FOR THE CONSTRUCTION OF A NEW PASSENGER TERMINAL BUILDING AND ASSOCIATED WORKS AT THE JOMO KENYATTA INTERNATIONAL AIRPORT (JKIA)

We refer to our letter Ref: KAA/13/10/2 VOL. 1 (42) dated 8th August 2024, along with prior correspondence concerning the above-referenced project.

We wish to inform you that the Public-Private Partnership Committee (PPPC) approved the cancellation of the PPP project for the construction of a new passenger terminal building at Jomo Kenyatta International Airport in line with Section 62 of the Public Private Partnership (PPP) Act 2021. The decision follows an assessment of the project, during which it was

determined that the project does not meet the public interest criteria due to material governance concerns that have arisen during the procurement process.

We further take note that the Heads of Terms gives KAA the right to terminate negotiations in connection with the project.

Yours Sincerely,

Signed,

Nicholas Bodo

Ag. Managing Director/CEO"

32. The introduction of this letter into these proceedings is against the background that on 17 December 2024 when the matter was scheduled for highlighting of submissions on the 1st respondent's preliminary objection and the application to set aside conservatory orders. Mr. Chebon, the learned counsel holding brief for Mr. Otieno for the 2nd applicant informed the court that he was not ready to proceed with the matter because, earlier, in his presidential address to the nation, the President of the Republic of Kenya had cancelled the Adani contract. Mr. Chebon wanted documentary evidence from the respondents that indeed the Adani deals had been cancelled so that he could advise his clients accordingly. He also wanted

proof of the costs expended in the Adani deals. He suggested that the 1st respondent be granted time to present the necessary documentation.

33. Ms. Oduor, the learned counsel holding brief for Mr. Ochieng Oduol for the 1st respondent confirmed that the 1st respondent was in the process of formalisation of the cancellation of the privately initiated proposal following the address by the Head of State on 2 December 2024. The 1st respondent's Board had approved the cancellation on 2 December 2024 but that the approval was subject to the approval of Ministry of Finance and the Ministry of Transport. It was also subject to the approval of the Private Public Partnership Directorate which met on 11 December 2024.

34. Counsel informed the court that the necessary documentation was to be concluded by the end of December 2024. Accordingly, counsel had no objection to the mater being adjourned to enable her file the necessary documents on the status of the 5th respondent's privately initiated proposal after which the applicants would consider whether they were still intent on proceeding with their case.

35. The matter was adjourned to 6 March 2025. On this date, the court was informed that the 1st respondent's further affidavit on which a copy of the 1st respondent's letter had been exhibited had been filed. Despite this development, the applicants' counsel insisted that the case proceeds to its logical conclusion since the 1st respondent's letter did not render it moot. It is against this background that the court directed that parties proceed to

highlight their submissions on the preliminary objection and the application to set aside the conservatory orders. The court also directed that, assuming the suit was properly before court, parties were to submit on whether it had been rendered moot in the wake of the cancellation of the Adani proposal.

36. This ruling is primarily on the 1st respondent's preliminary objection and, depending on the answer to that question, whether the suit has been rendered moot.

1st respondent's submissions

37. In prosecution of the 1st respondent's preliminary objection, it has been submitted that this court lacks jurisdiction to entertain this suit because the applicants have ignored, circumvented or failed to pursue and exhaust alternative dispute resolution mechanisms relating to grievances under the Private Partnership Act, 2021 as provided for under Section 75(4) of the Act. According to the provisions of section 75, a petition committee is seized of the jurisdiction to hear and determine petitions against public private partnership committee decisions and this Honourable Court is only seized of jurisdiction to entertain appeals from the petition committee.

38. It is submitted on behalf of the 1st respondent that the issue in contention in these proceedings is the decision of the 1st respondent, as a contracting authority, to consider the privately initiated proposal of the 5th respondent. This is said to fall within the jurisdiction of the Petition Committee as provided in Section 75(1) of the Act.

39. In this submission, the 1st respondent has invoked the doctrine of exhaustion and cited **Speaker of National Assembly vs Karume (1992) KLR 21** where the Court of Appeal applied this doctrine and stated as follows:

> ***"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure followed by any law must be strictly adhered to since there are good reasons for such special procedures".***

40. In the same breath, the 1st respondent relied on ***Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others (2015) eKLR*** where, again, the Court of Appeal reiterated that where a dispute resolution mechanism exists outside courts, the same must be exhausted before the jurisdiction of the Court is invoked.

41. This doctrine has a statutory backing in section 9 (2) and (3) of the Fair Administrative Actions Act which states as follows:

> ***(2) The High Court or a Subordinate Court under sub section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***

(3) The High Court or a Subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

42. Under section 9(4), on an application by the applicant, one may be exempted from exhausting the internal mechanisms for appeal or review in exceptional circumstances before invoking the jurisdiction of the court. It is urged that in the applicant's case, no application for exemption has been filed before this Court prior to the filing of the application for leave or the substantive motion; and, even if the same had been filed, no exceptional circumstances have been shown to exist as to merit an order for exemption.

43. That notwithstanding, the 1st respondent cited the case of **Nicholus v Attorney General & 7 others (2023) KESC 113 (KLR)** where, in interpreting section 9(2) of the Fair Administrative Action Act, the Supreme Court endorsed a *"nuanced approach"* in safeguarding a litigant's right to access to justice but at the same time embracing the efficiency and specificity of the alternative dispute resolution mechanisms.

44. The 1st respondent has also relied on the Court of Appeal decision in **Capital Markets Authority v. Jonathan Ciano & Uchumi Supermarkets(2023) KECA 581(KLR)** (para 28) where the Court held

that where proceedings for judicial review offend the doctrine of exhaustion, the Court ought to decline to exercise its jurisdiction.

45. The 1st respondent urges that having failed to approach the petition committee to address its grievances or, having failed to seek exemption from exhausting the remedies available under the Act, these proceedings are an abuse of the court process. It does not matter that the applicant seeks a declaration that articles 10, 27 and 201 of the Constitution have been violated; the applicants were still enjoined to exhaust the statutory remedies or seek exemption from exhausting those remedies.

46. The case of **Okiya Omtata Okoiti Vs The Accounting Officer Kenya Electricity Generating Company PLC and Others Petition (2023) 567 (KLR)** was cited where the petitioner was held to have by-passed the prescribed procedure in the Public Procurement and Asset Disposal Act, 2015. In that case, the court held, *inter alia*, that where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain such a dispute.

47. For the same argument, the 1st respondent relied on **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another (2016) eKLR**. Here, the court held, *inter alia*, that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum.

1st respondent's submissions on mootness

48. As far as the question of mootness of the suit is concerned, the 1st respondent anchored its arguments on the further affidavit of Nicholas Bodo sworn on 5 March 2025 and reiterated that following the institution of multiple cases challenging the Adani proposal on the development and operation of Jomo Kenyatta International Airport and *"a robust public discourse*", the 1st respondent's Board convened a special meeting on 2 December 2024, and resolved to cancel consideration of the Adani proposal.

49. In short, the cancellation of the proposed Public-Private Partnership agreement with Adani Airport Holdings Ltd for the development and management of Jomo Kenyatta International Airport, which agreement was the subject of the challenge, has rendered the suit purely academic, as there is no longer a live controversy requiring adjudication by this Honourable Court.

50. In view for these developments, the 1st respondent has urged that the case is moot and, to that end, it has been urged that mootness occurs when the issue in a court case is no longer relevant or capable of being resolved, usually because the circumstances that gave rise to the dispute have changed or ended.

51. For a court to hear a case, there must be a current and live controversy, ensuring that any decision made will have a meaningful impact on the parties involved. On this particular point, the 1st respondent has relied on **Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] KECA 589 (KLR) (at para 6)** where the court cited Mativo, J. as he then was in **Daniel Kaminja & 3 others (suing as Westland Environment Caretaker Group) vs County Government of Nairobi [2019] e KLR**; the learned judge held that:

> ***"A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case and any ruling by the court would have no actual practical impact".***
>
> ***And***
>
> ***"No court of law will knowingly act in vain … a Suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity."***

52. For the same argument, counsel for the 1st respondent cited the Supreme Court in **Institute for Social Accountability & Another v. National Assembly & 3 Others [2022] KESC 39 (KLR); Dande & 3 Others v. Inspector General, National Police Service & 5 Others [2023] KESC 40 (KLR)**; and, **Kenya Railways Corporation & 2 others v Okoiti &3 others [2023] KESC 38 (KLR)**. In this latter case the court held, *inter alia,* that the doctrine of mootness enquires whether events subsequent to the filing of a suit would have eliminated the controversy between the parties.

53. The other Supreme Court decision which the 1st respondent relied upon is that of **Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae) [2024] KESC 63 (KLR) particularly at paragraphs 188-190** where he Court reiterated that the doctrine of mootness serves to preserve the judicial economy and ensure that courts confine themselves to disputes where actual rights and obligations of parties are at stake.

54. Against this legal and factual background, the 1st respondent submits that this matter has been overtaken by events and is, therefore, an academic exercise. This is because the core issue, which is whether the Privately Initiated Proposal by Adani Airport Holdings Ltd for the concession of JKIA violated constitutional and statutory requirements, has been rendered moot by the formal cancellation of the proposal. There is no longer a live controversy for this Court to resolve.

55. The original dispute over whether the respondents acted lawfully in considering and progressing the Adani proposal now relates to a process that has been abandoned and extinguished. As such, continued proceedings on this application serve no practical or legal purpose.

56. That notwithstanding, the 1st respondent has acknowledged and submitted that courts may, in limited circumstances, depart from the doctrine of mootness where the matter, although no longer live, raises issues of great public importance or where the dispute is capable of repetition but evading judicial review. The Supreme Court in **Institute for Social Accountability & Another v National Assembly & 3 Others** (supra) recognised this exception and approved the principle from the South African case of **AAA Investments (Pty) Ltd v Micro-Finance Regulatory Council & Another 2007 (1) SA 343 (CC),** where it was held that a court may determine a technically moot matter if the issue remains unsettled and is of critical importance to the operation of government.

57. But in **National Assembly & Another v Okoiti & 55 Others [2024] KECA 876 (KLR),** the discretion to entertain moot cases is limited to instances where a purely legal issue arises, requiring no factual analysis, and where a determination would have clear practical or jurisprudential impact. This position was upheld in the South African case of **Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC)**,

where it was held that a court may only entertain a moot matter if any order issued would have a tangible effect on the parties or others.

58. And in ***National Assembly & Another v Okoiti & 55 Others [2024] KECA 876 (KLR***), the Court of Appeal articulated the proper approach to determining whether a suit should be dismissed on grounds of mootness and in this regard, the court adopted a two-step analysis. The first step is to consider whether the tangible and concrete dispute between the parties has ceased to exist; and, secondly, whether the court should nonetheless exercise its discretion to hear the matter on the basis of overriding public interest or constitutional importance.

59. According to the 1st respondent, the applicants have failed to meet this threshold for the simple reason that there is no longer a live dispute and, second, the applicants have not demonstrated that the Court's intervention would produce any practical or binding effect, either on the parties or on the broader public interest.

60. The 1st respondent has also submitted that the applicants have not shown that any order of this Court would produce a meaningful result and, secondly, the issues raised, relating to alleged procedural violations in a specific Private Partnership Proposal transaction—are grounded in facts unique to the now-defunct Adani proposal. The constitutional concerns raised, it is urged, do not rise to the level of novelty or national importance warranting exemption from the doctrine of mootness.

61. It is further urged that none of the prayers transcend the specific factual circumstances of that terminated proposal, nor do they raise any forward-looking or continuing constitutional issue that would justify this Honourable Court's intervention. The applicants' claims are said to be wholly tied to a proposal that no longer exists and, therefore, present no futuristic or residual implications capable of sustaining a live controversy.

62. The 1st respondent also relied on **Cabinet Secretary for the National Treasury and Planning & 4 Others v Okoiti & 52 Others; Bhatia (Amicus Curiae) [2024] KESC 63 (KLR)** where (at para 191) the Court warned against litigating hypothetical or anticipated executive or legislative actions.

Applicants submissions:

(a) Preliminary objection

63. Responding to the 1st respondent's submissions on the question of jurisdiction to entertain the instant suit, it has been submitted on behalf of the applicants that there is no doubt that this Honourable Court has the requisite jurisdiction. To begin with, the applicants have invoked this Honourable Court's order granted on 25 October 2024 in which the court noted, *inter alia*, as follows:

> ***"The matter is of immense public importance and has unique significance in our constitutional democracy under Article 10***

of the Constitution…The Applicant has identified the applicability of Articles 10, 201, and 227 to the Public Private Partnerships Act, 2021 and also raised the issue of the apparent conflict between the Public Private Partnership Act on the one hand, and Article 227 and the Public Procurement and Asset Disposal Act, Cap 412C."

64. Taking this point further, the applicants have invoked article 165(4) of the Constitution which is to the effect that:

Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being at least three, assigned by the Chief Justice.

65. It is submitted that in the context of Article 165(4) the word "shall" is mandatory and not optional- in this regard the applicants have cited **Adopt A Light Limited v Ochieng, Onyango, Kibet & Ohaga Advocates [2016] KECA 387 (KLR)** where the word "shall" in article 165(4) is said to have been held to mean "mandatory." The 1st respondent, it is urged, had raised its concerns about the forum at the certification stage. The court overruled those concerns and certified the matter for a bench to hear it.

66. By questioning the jurisdiction of this Honourable Court, the 1st respondent, it is urged, is seeking to undo leave granted by the court, upset the conservatory orders, and dismiss this suit *in limine*.

67. As far as section 9 of the Fair Administrative Act is concerned, it is urged that a dispute can be resolved only under an alternative procedure where that alternative procedure offers an efficacious remedy. It is submitted that the doctrine of exhaustion has exceptions and that this suit meets those exceptions. These exceptions were stated in **William Odhiambo Ramogi & 3 others v Attorney General & 4 others and Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR** where this Honourable Court held that, first, the High Court may, in exceptional circumstances, consider and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it.

68. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised. The second exception is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not

be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively.

69. In this case, the exhaustion requirement would undermine constitutional values. Narrowly interpreting section 75(4), the court should consider this an exceptional case warranting direct access to the court. The 1st respondent has countered the argument that the applicants need have applied for exemption with the argument that the Supreme Court and Court of Appeal have read section 9(4) disjunctively. Thus, the court can find exceptional circumstances either suo moto or on application. This was sold held by the Court of Appeal in **Kenya Revenue Authority & 2 others v Darasa Investments Ltd [2018] eKLR.** The same position is said to have been adopted by the Supreme Court in *Nicholus case* (supra) where it stated:

> ***"nothing that precludes the adoption of a nuanced approach that safeguards a litigant's right to access justice".***

70. Citing **Mark Ndumia Ndung'u v Nairobi Bottlers Ltd & Coca Cola Central, East & West Africa Ltd [2018] KEHC 8934 (KLR**), it is urged on behalf of the applicants that where a party argues that a matter is inadmissible before the court because alternative remedies have not been exhausted, that party bears the burden of demonstrating the existence of such remedies and that they have not been exhausted.

71. The applicants have relied on the **Mark Ndumia case (supra)** to submit that the remedy sought is not available, effective or sufficient under section 75(4) of the Public Private Partnerships Act. In that case Onguto, J. cited **Dawd K.Jawara versus Gambia 147/95-149/96** where it was held that a remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint. A remedy is considered available only if the applicant can make use of it in the circumstance of his case.

72. The process provided by section 75(4) is not applicable because first, the Petition Committee has power over a *"decision"* from *"a tender process or project agreement.*" In contrast, here there is no "*decision"* over **"***a tender process"* or "*a project agreement*". According to the applicants, Adani did not tender, and this court's order ensured there was no project agreement. Second, the 1st applicant challenges the unconstitutional *"failure to tender"* competitively for the JKIA project, seeking to stop the unconstitutional *"decision"* from being taken. For this reason alone, the Petition Committee lacks jurisdiction over this dispute.

73. To this end the applicants cited **HCIG-Energy Investment Co. Ltd and Liketh Investment Kenya Limited (HCIG Consortium) v Ministry of Energy & Petroleum Contracting Authority [2014] KEHC 1458 (KLR),** where this Honourable Court asserted that a petitioner could only

come before this court by way of a constitutional petition if it could demonstrate a violation or threatened violation of a constitutional right. The respondents in that case had argued that this court lacked jurisdiction. Mumbi Ngugi, J. (as she then was) found jurisdiction and issued a conservatory order.

74. Third, it is urged that Adani's unconstitutional conduct has equally aggrieved 1st respondent and for this reason, the 1st respondent has sued Adani as a primary respondent and sought relief against Adani's company. Section 75 of the Act restricts the Petition Committee's jurisdiction to *"a decision of the Directorate, Committee, or a contracting authority."* Adani is not the Directorate, Committee, or contracting authority under section 75 of the PPPA. In that regard, the Petition Committee lacks jurisdiction ratione personae over Adani.

75. Fourth, the applicants have relied on **William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR** and **Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR** for the argument that the Petition Committee lacks jurisdiction over the violation of Article 35 in ignoring the 1st respondent's request for information. According to these decisions, the jurisdiction of the courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience

before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted.

76. It is submitted that Section 75 of the Act does not permit the Petition Committee to usurp this court's exclusive constitutional interpretation or application mandate. This case, it is urged, is an exception to the exhaustion doctrine.

77. Overall, the 1st respondent bore the burden of demonstrating the existence of such remedies and that they have yet to be exhausted. The 1st respondent is said not to have discharged this burden in this case.

78. The applicants have also submitted that even if the Petition Committee had jurisdiction, this case demands a nuanced approach that safeguards a litigant's right to access justice. This is so for several reasons.

79. First, the case has been certified as one raising substantial questions of constitutional interpretation and application, hence the empanelment of a bench to decide those weighty constitutional questions. The Petition Committee cannot supplant the bench, thus ousting this court's jurisdiction. Second, the unconstitutional processing of the Adani proposal, the applicants question KAA's violation of the right to access information and to publicise the Adani proposal under Article 35 of the Constitution. The applicants would have to split the dispute and pursue one limb at the Commission on Administration of Justice while pursuing another limb at the Petition Committee, an approach the Supreme Court has forbidden.

80. A court's jurisdiction is determined by examining the pleadings to appreciate the gist of the case. Relying on **National Bank of Kenya Staff Retirement Benefits Scheme & another v Murigi & 135 others [2024] KECA 1689 (KLR)** it is submitted that if "*the Court's jurisdiction is challenged in limine, the applicant's pleadings are the determining factor…the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is"*.

81. Likewise, in **Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others [2023] KESC 14 (KLR),** the Supreme Court held that *"where the dispute transcends into the constitutional sphere",* then one "*is free to access courts and have their day in court. A court of law cannot turn a blind eye to alleged constitutional breaches to invoke the principle of party autonomy that binds parties to their agreements"*. In that case, the question was whether failure to exhaust arbitration ousted the court's jurisdiction where the petitioner had pleaded constitutional violations.

82. As far as the declaration sought is concerned, it is urged that this prayer is for a constitutional relief; the particulars of the unconstitutionality have been pleaded in paragraphs 39 to 62 of the Statutory Statement. Reviewing those particulars of constitutionality at the threshold, this court has declared this case to be of "*unique significance in our constitutional democracy under Article 10 of the Constitution"*. The court has also identified the

question *"applicability of Articles 10, 201, and 227 to the Public Private Partnerships Act, 2021"* as ripe for determination.

83. The applicants have cited **William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR** where it was held that: where a suit primarily seeks to enforce fundamental rights and freedoms, and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because enforcing fundamental rights or freedoms is a question which can only be determined by the High Court.

84. The applicants have urged this Honourable Court not to cede jurisdiction to the petition committee more so because nothing in section 75(4) of the Act enables the Petition Committee to interpret the applicability of articles 10,201, and 227 of the Constitution to the Public Private Partnerships Act, 2021 or to grant the constitutional reliefs the 1st respondent seeks.

(b) Mootness

85. On the question of mootness, it has been urged on behalf of the applicants that this case falls within the exceptions to the doctrine of mootness. It is the applicants' position that this case involves weighty questions of law, voluntary cessation, and the threat of repetition, and, for this reason, the suit should be heard on merits.

86. The applicants have relied on the **Institute for Social Accountability & Another v National Assembly of Kenya & 5 Others [2022] KESC 39 (KLR)** for the submission that even in cases that can be said to be technically moot, it is good practice for the court to seize jurisdiction in a matter where the law on a particular issue is not settled and the question is of critical import to the operation of the government.

87. And in **Borowski v The Attorney General of Canada [1989] 1 SCR 342**, the court observed that in the furtherance of judicial economy, a court will sustain a suit or appeal and find against mootness:

> *i. where factual situation has disappeared but functional competence of the court remains,*
>
> *ii. if the probability of recurrence is high,*
>
> *iii. if the temporary cessation or abandonment of the conduct is capable of repetition yet evasive of judicial review,*
>
> *iv. where continued uncertainty in law will have a harmful effect on the society,*
>
> *v. if the court's determination of the questions of law for future guidance of the parties is desirable,*
>
> *vi. where public interest is served by a judicial decision,*

vii. where recurrence may result in parallel litigation of the same question at an increased cost of judicial resources.

88. The applicants have submitted that the doctrine of mootness is a complex doctrine which should be applied with caution and not mechanistically in every factual situation. Indeed, the line between what constitutes a moot question and a live controversy is often blurred and context-specific. In **Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi [2019] KEHC 2059 (KLR)** the court affirmed that the doctrine of mootness is not absolute.

89. A court may be compelled to determine a matter, despite its apparent mootness, where it raises weighty constitutional issues requiring the articulation of guiding principles for the judiciary, legal profession, and the public. Moreover, where an issue is likely to recur yet consistently elude judicial review, or where the public interest demands resolution, the court may justifiably proceed to hear the case.

90. It has also been submitted that the Court of Appeal in **National Assembly of Kenya & Another v Institute for Social Accountability & 8 Others [2017] KECA170 (KLR),**has underscored that even where mootness is presumed, jurisprudence does not treat the "*moot and academic principle*" as a rigid or automatic bar to judicial inquiry. Rather, the Court affirmed

that the presence of broader legal or constitutional questions may justify adjudication despite the apparent absence of a live controversy. In so holding, the Court followed the Philippine decision in **Greco Antonious Beda B. Belgica & 4 Others v Hon. Executive Secretary Paquito N. Ochoa Jr & 2 Others (G.R. No. 208566, consolidated with G.R. Nos. 208493 & 209251)**.

91. Thus, courts will decide case otherwise considered moot if :

i. there is a grave violation of the Constitution;

ii. the exceptional character of the situation and paramount public interest is involved;

iii. when the constitutional issue raised requires formulation of the controlling principles to guide the bench, the bar, and the public;

iv. the case is capable of repetition yet evading review.

92. It is urged that the issues raised in this case involve serious allegations of constitutional violations, particularly concerning public procurement processes, principles of good governance transparency, accountability, and the equitable use of public money under articles 10 and 201 of the Constitution. These, it is submitted, are not minor procedural disputes but they are issues that strike at the core of constitutional governance and the

rule of law. Where allegations of this nature arise, especially involving high-value public contracts, courts have a duty to pronounce themselves to protect constitutional integrity, even after the original dispute has ostensibly been overtaken by events.

93. Moreover, the exceptional character of the Adani case cannot be overstated. This is the first time in Kenya's constitutional history that a public-private partnership of such magnitude has come under direct judicial scrutiny.

94. The sheer scale of the transaction, the powerful identity of the private party involved, and the glaring absence of public consultation ignited widespread public debate and concern. Therefore, this case presents an unprecedented opportunity for the Court to assert its constitutional role as a guardian of transparency, accountability, and the rule of law in state contracting.

95. Beyond the immediate dispute, the case raises fundamental and unresolved questions about the outer limits of executive discretion in Public Private Partnerships arrangements, the scope of public participation in mega infrastructure projects, and the standards by which government entities should be held accountable when dealing with public assets. In the absence of judicial intervention, these critical issues risk being relegated to political expediency.

96. Given its singular nature, this case provides a unique and necessary forum for the Court to lay down clear, authoritative principles to govern future

Public Private Partnerships in Kenya. It is submitted that without such guidance, the door remains open to executive impunity, opaque deal-making, and the erosion of public trust. The Court's voice is, therefore, not only appropriate but it is also essential.

97. It is also urged on behalf of the applicants that this case presents a valuable opportunity for the Court to articulate guiding principles on how constitutional standards apply to public-private partnerships, procurement decisions, and executive accountability.

98. Notably, the legal questions raised are not only novel but also likely to arise in future contexts involving major public projects. A decision in this matter would serve as precedent, offering much-needed clarity to the bench, the bar, government agencies, and the public at large.

99. The applicants submit that the circumstances surrounding the cancellation of the Adani contract on 26 February 2025 suggest a troubling pattern whereby contentious contracts can be withdrawn at the eleventh hour to avoid judicial scrutiny. If this trend is allowed to stand, it would effectively immunize future conduct from legal challenge. These types of disputes are inherently time-sensitive and often resolved or cancelled before the courts can fully address them. Without a judicial pronouncement, the legal issues remain unresolved and are likely to recur in similar fashion, perpetually evading review.

100. The applicants have also submitted that in constitutional and public interest litigation, the doctrine of voluntary cessation is a well-established exception to mootness. It provides that a party cannot simply avoid judicial scrutiny by voluntarily ceasing the challenged conduct, especially where there is a reasonable likelihood that the offending behaviour could recur.

101. The applicants have, in this submission relied on the U.S. Supreme Court decision of **LLC v Nike, Inc., 568 U.S. 85, 91 (2013**) where it was held that a defendant cannot automatically moot a case by simply ending its unlawful conduct once sued. Consequently, the mere fact that the impugned contract was cancelled does not automatically strip this Court of its jurisdiction, nor does it render the underlying legal issues moot.

102. In conclusion, the applicants have urged that despite the cancellation of the contract on 26 February 2025, the issues raised continue to bear legal significance, carry practical consequences for the parties, and raise broader questions that implicate the public interest and constitutional governance.

2nd applicant's submissions

103. The 2nd applicant's submissions are more or less in the same tenor as the 1st applicants' arguments. In particular, it has been emphasised and urged on behalf of the 2nd applicant that this Honourable Court ought to determine this suit because it will have practical effect on future Privately Initiated Proposal to be executed by the government. Just like the 1st applicant, the 2nd applicant has submitted that the cancellation of the privately Initiated

Proposal between the 1st respondent and the 5th respondent does not resolve all the controversies in the suit. In particular, the controversy on whether the 1st respondent violated the provision of Articles 35 and 47 of the Constitution by declining to accede to request for access to information lodged by the applicants remain unresolved.

104. This Court, it is urged, ought to determine whether government entities and parastatals can rely on non-disclosure clauses in the Head of Terms and in the Privately Initiated Proposal while initiating a public private partnership agreement. The court also needs to determine whether the proposal by the 5th respondent met the public interest criteria, project feasibility criteria and, therefore, violated article 42(3) of Public private Partnership Act.

105. Further, the question whether the 1st respondent entered into privately initiated proposal with an entity which has been stated to have been engaged in acts of corruption and, thus, article 41 of the Private Partnership Act was violated remains unresolved. According to the 2nd applicant, this Court ought to determine this suit in order to resolve questions relating to the manner in which the government can enter into Privately Initiated Proposal with third parties and provide future guidance to future proposals to be entered by government.

106. Finally, the Court ought to determine whether the 1st respondent conducted due diligence before commencing evaluation of the proposal by

the 5th respondent and whether the proposal was unaffordable and offered no value for money.

107. In support of these submissions, the 2nd applicant has relied on **Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi** (supra); **Miscellaneous Civil Application No. 480 of 2016- Evans Kidero v Speaker of Nairobi City County Assembly & Another (2015) EKLR; Supreme Court of Kenya Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (consolidated)- Dande & 3 Others v Inspector General, National Police Service & 5 others ([2023) KESC 40 (KLR) (supra**); **Civil Appeal No. 13 of 2015- Okiya Mmtatah okoiti and Wyclife Gisebe Nyakina versus Attorney general and 4 others (supra)** and **National Assembly & Another v Okoiti & 55 Others (Civil Appeal E003 of 2023 & . E016, E021, E049, E064 & E080 of 2024 (consolidated)) [2024] KECA 876 (klr)(31 July 2024) (judgment).**

108. Others **are Civil Appeal 92 & 97 of 2015 (consolidated)- National Assembly of Kenya & Another v Institute for Social Accountability & 8 others (Civil Appeal 92 & 97 of 2015 (consolidated)) [2017] KECA 170 (klr) (24 November 2017) (judgment) (supra); Civil Appeal 242 of 2017- Council of Legal Education v Tusasirwe & 13 Others (civil appeal 242 of 2017)(2025] KECA 459 (KLR) (7 March 2025) (judgment).**

109. Many of these decisions have been cited by the 1st applicant and they all go to demonstrate when a case is considered moot and circumstances where case may be exempted from the doctrine of mootness. These are issues that the 1st applicant alluded to in submissions filed on its behalf and which we have already considered at length.

110. On whether this Honourable Court has jurisdiction to determine this matter, the 2nd applicant has similarly echoed the 1st applicant's submissions and reiterated that the issues raised in this suit go beyond the jurisdictional remit of the Petition Committee established pursuant to the provisions of Section 75 of the Public Private Partnership Act.

111. According to the 2nd applicant, the present suit raises concerns on whether there was adequate public participation in the conceptualization of the privately initiated proposal; and as urged by the 1st applicant, whether the 1st respondent violated article 33 of the Constitution by declining to grant access to information requested by the applicant and whether the project deprives Kenyans a right to livelihoods thus violating article 26, 41 and 43 of the Constitution. The 2nd applicant has relied **on Nicholus v Attorney General & 7 Others** (supra) **National Environmental Complaints Committee & 5 others (**interested **parties (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023(Judgment)** (supra) and **Judicial Review No. 378 of 2017- Republic versus Independent Electoral and Boundaries Commission** (I.E.B.C.). Other decisions which

the 2nd applicant has pegged its submissions on are **Mombasa Petition No. 159 of 2018 consolidated with Constitutional Petition no. 201 of 2019- William Odhiambo Ramogi and 3 others versus the Attorney General and 4 others; Constitutional and Human Rights Division Petition No. E208 of 2021- Catherine Mwihaki Ngambi v International Leadership University (2022] eklr** where this Honourable Court held that the applicability of the Student Handbook's mechanism as maintained shouldn't purport to oust the jurisdiction of this Court as provided under Article 165(3) (d) of the Constitution to consider the petitioner's grievances. The court found that the circumstances of the case justified exemption from the mechanisms provided to resolve the dispute.

112. In conclusion, it has been urged that the cancellation of the Privately Initiated Proposal between the 1st and the 5th Respondent does not render this suit moot and this court has to consider questions relating to breaches of the Constitution and the Public Private Partnership Act by the 1st respondent and to avoid future recurrence of breaches of the Constitution and the Act.

Analysis and determination

113. The crux of the 1st respondent's preliminary objection is that the 1st respondent questions the jurisdiction of this Honourable Court to entertain this suit. We must state, at the very outset, that the proper question is not whether this Honourable Court is seized of jurisdiction; of course, under

article 165 (3) (a) and (e)of the Constitution, this Honourable Court has unlimited original jurisdiction in both civil and criminal matters; it also has any other jurisdiction, whether original or appellate, conferred on it by legislation. The right question is whether, out of deference to the Petition Committee created under section 75 (1), the dispute ought to have been filed before that committee before being escalated here by way of an appeal.

114. We think it is with this understanding in mind that under section 9(3) and (4) of the Fair Administrative Action Act, the Court will direct a party to exhaust the appeal or review mechanisms available before a subordinate court, a tribunal or a committee, such as the petition committee, before turning to this Honourable Court, or, in the alternative and only in exceptional circumstances, the court may as well proceed and entertain the dispute subject to an order exempting the applicant from exhaustion of the alternative remedies. If the court can hear and determine the application albeit in exceptional circumstances, the question whether it has jurisdiction or not appears to us to be out of place.

115. That said, central to the 1st respondent's preliminary objection is section 75 of the Public Private Partnership Act. This provision of the law reads as follows:

75. Petition Committee

(1) There is established a committee to be known as the Petition Committee which shall hear and determine petitions regarding any decision by the Committee, Directorate or a contracting authority under this Act.

(2) The Petition Committee shall consist of the following persons appointed by the Cabinet Secretary—

(a) the chairperson, who shall be a person qualified to be appointed as a judge of the High Court;

(b) four other persons with such relevant knowledge and experience as the Cabinet Secretary shall consider appropriate; and

(c) two persons, not being a member of county executive committees, and possessing such relevant knowledge and experience as the Cabinet Secretary shall consider appropriate, nominated by the Council of County Governors.

(3) The members of the Petition Committee shall hold office for a term of three years and may be eligible for re-appointment for one further term.

(4) A person who is aggrieved by a decision of the Directorate, Committee or a contracting authority regarding a tender process

or project agreement may lodge a petition to review the decision with the Petition Committee in the prescribed form and after paying the prescribed fee.

(5) A petition under this section shall be made within seven days from the date of the decision of the Directorate, Committee or a contracting authority.

(6) The Petition Committee shall hear and determine the petition within twenty-eight days from the date the petition was lodged.

(7) A person aggrieved by the decision of the Committee may, within seven days of the decision, make an application for review to the Committee in the prescribed form.

(8) A person aggrieved by the decision of the Petition Committee may appeal to the High Court within fourteen days from the date of the Committee's decision.

(9) The Cabinet Secretary may, by Regulations, provide for the procedure for hearing and determining a petition and the applicable fees under this section.

116. According to section 75(1), the Petition Committee is enjoined to hear petitions in respect of *any* decision by the Public Private Partnership

Committee established under section 6 of the Act, the Directorate or a contracting authority under the Act.

117. Subsection (4) is specific to decisions regarding a tender process or a project agreement. Our understanding of this provision is that while a petition on any decision may be made against a decision by the Directorate, Committee or a contracting authority, a petition against a decision by any of these entities on a tender process or a project agreement can only be lodged in the prescribed form and after payment of the prescribed fee.

118. To suggest, as the applicants have done in their submissions, that the impugned decision is neither a decision over a tender process nor a project agreement and, therefore, outside the jurisdiction of the petition committee, is contrary to the literal and plain reading of subsection (4) of section 75. It is also an interpretation that is inconsistent with section 75(1) which states, unambiguously, that the petitions committee is mandated to dispose of any decision, by the committee, the directorate and, for our purposes, the contracting authority. *"Any"* decision, in our humble view, would include the decision impugned in these proceedings. It is worth noting that the applicants have not addressed the import of section 75(1) of the Act in their submissions.

119. And even if it was to be argued, that the petition committee is only concerned with contracting authority's decisions on a tender process or project agreement, there is every reason to believe that the privately

initiated proposal which the 1st respondent had, no doubt, embraced, was a tender process as contemplated under the Act.

120. Section 37 (1)(b) of the Act singles out a public private initiated proposal as one of the means available to the contracting authority for procurement of a public private partnership project. It reads as follows:

> ***37. Procurement methods***
>
> ***(1) A contracting authority may procure a public private partnership project under this Act through—***
>
> ***(a) direct procurement;***
>
> ***(b) privately-initiated proposals; or***
>
> ***(c) competitive bidding;***
>
> ***(d) restricted biding. (Emphasis added)***

121. In his letter of 26 February 2025, the 1st respondent's chief executive, while communicating the decision to cancel the 1st respondent's dealings with the Adani wrote as follows:

> ***"The decision follows an assessment of the project, during which it was determined that the project does not meet the public interest criteria due to material governance concerns that have arisen during the procurement process."***

For all intents and purposes, the Adani proposal was a procurement process and thus, a tender process. Based on section 37(1)(b) of the Act, the argument that there was no tender process when it is apparent and

acknowledged that the applicants' grievances stem from the privately initiated proposal by Adani is not viable.

122. Turning to section 9(4) of the Fair Administrative Action Act, it is acknowledged in this provision of the law that there are circumstances when an aggrieved applicant may be excused and exempted from petitioning a body such as the petition committee for relief before moving to this Honourable Court. This section reads as follows:

> ***(4)Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

123. We understand this window of sidestepping the committee to be subject to two conditions; first it is only in exceptional circumstances that an aggrieved party may be exempted from exhausting the appeal or review process provided in the Act, and; second, the aggrieved party must move the court for the exemption order. If, upon consideration of the application for exemption, the court is satisfied that it would be in the interest of justice to by-pass the body which the statute has established as the forum of first instance for resolution of whatever dispute there may be, it will proceed to dispose of the matter accordingly.

124. We are unable to find any suggestion in section 9(4) that the court may, without being prompted and, on its motion, conclude that the circumstances under which an application has been filed are exceptional and ignore the question why an applicant has not submitted himself to the appellate and review mechanisms stipulated by the statute. And neither is it necessary to imply in a statute words that are contrary to the text and the intention of the legislature.

125. Courts presume that a legislature says in a statute what it means and means in a statute what it says there. If the language of the statute is clear, there is no need to look outside the statute or imply words into it in order to ascertain the statute's meaning. Differently put, when the words of a statute are plain and unambiguous, there is no need for a further judicial inquiry. It has been held by the United Kingdom Supreme Court that the general approach of focussing on the words which Parliament has used in a provision is justified by the principle that those are the words which Parliament has chosen to express the purpose of the legislation. (**see For Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent) [2025] UKSC 16**).

126. The rationale behind the establishment of such quasi-judicial bodies, as the petition committee, as the first port of call is, in part, to benefit from of the wide spectrum of expertise offered by members who ordinarily constitute such bodies. More often than not, the decision-making process or

the ultimate decision to be made by the decision-making bodies require some expert knowledge on the issues that arise out of the dispute with which these bodies are confronted. It is partly for this reason that a statute would enjoin the court to defer its jurisdiction and allow these bodies the first opportunity to resolve the dispute.

127. In the case before us, for instance, section 75 (2) specifies the personalities that constitute the petition committee. This section reads as follows:

> ***75. Petition Committee***
>
> ***(2) The Petition Committee shall consist of the following persons appointed by the Cabinet Secretary—***
>
> ***(a) the chairperson, who shall be a person qualified to be appointed as a judge of the High Court;***
>
> ***(b)four other persons with such relevant knowledge and experience as the Cabinet Secretary shall consider appropriate; and***
>
> ***(c) two persons, not being a member of county executive committees, and possessing such relevant knowledge and experience as the Cabinet Secretary shall consider appropriate, nominated by the Council of County Governors***.

128. Emphasis is on knowledge and experience of the appointees to the committee. Thus, the committee cannot be overlooked at whim and we suppose it is for this reason that under section 9(4) of the Fair Administrative Act, it is incumbent upon an applicant to move the court as and when circumstances demand that he should be exempted from presenting his case to the body designated by statute to hear it first. No doubt, if, for reasons to be given, the court is of the firm view that the justice of the case demands that it should intervene despite the existence of the statutory prescribed means of disposing of the dispute, it will intervene and entertain the applicant's application.

129. Reiterating the need to allow sufficient latitude to statutory organs to exercise their mandate and acknowledge their expertise, the court in **Pevans East Africa Limited & another v. Chairman, Betting Control and Licensing Board and 7 Others (2013) eKLR; Civil Appeal No. 11 of 2018** held as follows:

> ***"Where the Constitution has reposed specific functions in an institution or organs of state, the court must give those organs sufficient leeway to discharge their mandate and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the Constitution, the law or that their decisions are so perverse, so manifestly irrational***

that they cannot be allowed to stand under the principles and values of our Constitution. Courts must decline to intervene at will in the Constitutionals spheres of other organs, particularly when they are invited to substitute their judgment over that of other of the organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the court do not normally have."

130. Speaking of alternative procedure or remedy, in **R v IRC, ex p Opman International UK [1986] 1 All ER 328 at 330, (1986) 1 WLR 568 at 571**, Woolf, J. held that "*applicants should bear in mind that an application for judicial review is the procedure, so to speak, of last resort. It is a residual procedure which is available in those cases where the alternative procedure does not satisfactorily achieve a just resolution of the applicant's claim.*"

131. It has been held **in R versus Inland Review Commissioners, ex p Preston (1985) AC 835 that:**

"A remedy by way of judicial review is not to be made available where an alternative remedy exists…Judicial review is a collateral challenge: it is not an appeal. Where parliament has provided by statute appeal procedures, as in taxing statutes, it will

only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision…"

132. Addressing the same issue **in R versus Peterkin, ex p Soni (1972) Imm AR 253 Lord Widgery CJ had this to say:**

"Where Parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the applicant complains this court should in my judgement as a rule allow the appellate machinery to take its course. The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice were no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere."

133. This question has been discussed by David Foulkes in his book **Foulkes Administrative Law, 7th Edition.** Citing the case of **Customs and Excise Commissioners versus J.H. Corbitt (Numismatists) Ltd (1981) AC 22, (1980) 2 2ALL ER 72**, the learned author noted as follows:

"It is to be noted that an appeal lies from, whether to an appellate tribunal or to a court of law, only when and to the extent that statute so provides, and the powers of the appeal body to review, reconsider etc. the decision of the tribunal likewise depend on the statute.

To be contrasted with appeal is judicial review. The decision of tribunals, as bodies exercising judicial functions, have always been subject to review by the courts (that is, to judicial review) by means of the order of certiorari. This enables the court to quash a decision on certain grounds. Whereas appeal lies only when and to the extent that statute provides, the court's common law power of judicial review exists unless it is taken away or limited by statute. Thus where no appeal to the court is provided by statute the only possible challenge in the courts is by way of judicial review…" (at p.150-151).

134. And no doubt this was the principle applied by Lord Wright **in General Medical Council versus Spackman (1943) AC627, at 640** where he stated as follows:

"I have observed that Parliament has not provided for any appeal from the decisions of the council. The only control of the court to which the council is subject (apart from proceedings by way of

mandamus) is the power which the court may exercise by way of certiorari. Certiorari is not an appellate power."

135. The Court of Appeal held in **Speaker of the National Assembly v. Karume, Civil Application No. NAI 92 OF 1992** that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed**.** This decision was endorsed by the Supreme Court **in Albert Mumba Chaurembo & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions) v Munyao & 148 others (Suing on their own behalf and on behalf of the plaintiffs and other members/beneficiaries of the Kenya Ports Authority Pensions Scheme)) (Petition 3 of 2016) [2019] KESC 83 (KLR) (8 November 2019) (Judgment).** The Supreme Court went further to states as follows:

107. Where an Act of Parliament confers administrative power to an authority or a person, there is a presumption that it will be exercised in a manner which is fair. The court's role in such matters was explained in Judicial Review Handbook by Michael Fordham (Third Edition) p.249- 256 as hereunder:

"Every public body has its own role and has matters which it is to be trusted to decide for itself. The courts are careful to avoid usurping that role and interfering whenever it might disagree as regards those matters."

108. A similar position was taken in Council of Civil Service Unions vs. Minister for the Civil Service [1985] AC 374 HL to the effect that:

"It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show."

136. While addressing the appellate and review mechanisms inbuilt within the Retirement Benefits Act and emphasizing the procedures prescribed must be employed and exhausted before dispute are escalated to this Honourable Court, the Court held as follows:

115. In our considered view, the purpose of the RBA Act as a whole would be best served by reading the words as imperative terms that require, in the absence of any contrary laws, a strict interpretation of its provisions and that the administrative

resolution mechanisms and the appellate processes by the Retirement Benefits Appeal Tribunal is exhausted in the first instance before recourse can be taken to the superior courts. This position was well set out in the case of Tom Kusienya (supra), in which the High Court expressly recognized the dispute resolution mechanism under the RBA Act in stating the following.

"…the purpose of the Act as a whole and the specific dispute resolution provisions would be best served by reading the word "may" as an imperative term that requires that the appeal mechanism of the Tribunal is exhausted before recourse can be had to the High Court."

137. The court went on to state:

"the court must exercise restraint in exercising its jurisdiction under article 165. Where there exist alternative methods of dispute resolution, the court must exercise deference to the bodies statutorily mandated to deal with specific disputes in the first instance."

116. The foregoing verdict also finds support in an adage principle in administrative law of "Exhaustion of Administrative Remedies" and from the jurisprudence emanating from this court and the lower Courts, which has been restated with notoriety to

the effect that, where there exists an alternative method of dispute resolution established by legislation, the courts must exercise restraint in exercising their Jurisdiction conferred by the constitution and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance."

138. The statutory procedure provided is by way of an appeal to this Honourable Court after exhaustion of the review and appellate process before the petitions committee. Subsection (8) speaks to this procedure and states as follows**:**

(8) A person aggrieved by the decision of the Petition Committee may appeal to the High Court within fourteen days from the date of the Committee's decision.

139. From the foregoing decisions it is apparent that since the statute is express that the only means by which a person dissatisfied with the decision of the contracting authority may challenge that decision is through an appellate process; first to the petition committee and; secondly, to this Honourable Court. Judicial review is, thus, not available.

140. The final decision we find appropriate to cite on this point is the English decision in In **R (G) v Immigration Appeal Tribunal [2005] 1 WLR 1445**. In that case the Court of Appeal held that, although the introduction

of a new statutory procedure did not remove the judicial review jurisdiction, the new procedure was held to be an adequate and proportionate protection for the claimant's rights and it was therefore a proper exercise of the court's discretion to decline to entertain an application for judicial review of issues which were or could have been the subject of statutory review. Lord Phillips MR observed, at para 20:

> ***"The consideration of proportionality involves more than comparing the remedy with what is at stake in the litigation. When Parliament enacts a remedy with the clear intention that this should be pursued in place of judicial review, it is appropriate to have regard to the considerations giving rise to that intention. The satisfactory operation of the separation of powers requires that Parliament should leave the judges free to perform their role of maintaining the rule of law but also that, in performing that role, the judges should, so far as consistent with the rule of law, have regard to legislative policy."***

141. We find this decision to be consistent with the Supreme Court of Kenya decision in Albert Mumba Chaurembo Case(supra). In short tribunals or committees such as the petition committee established to dispose of disputes before they escalate to the court, such as the petition committee in the instant case, are established deliberately as a matter of policy and to

serve a particular purpose. Under article 169 (1) (d) of the Constitution tribunals are recognized as part of the system of courts in Kenya. They are considered as subordinate courts and, therefore, it cannot be argued submission to their dispute resolution processes torpedoes access to justice.

142. That said, we are minded that judicial review may be granted where the alternative statutory remedy is *'nowhere near so convenient, beneficial and effectual'* **(see R v Paddington Valuation Officer, ex p Peachey Property Corpn Ltd [1966] 1 QB 380 at 400**) or 'where there is no other equally effective and convenient **remedy (see R v Hillingdon London Borough Council, ex p Royco Homes Ltd [1974] QB 720 at 728).**

143. The applicants adopted this line of argument and cited the **Gambian case of Dawda K Jawara v Gambia (supra);** they urged that that "*the claimed remedy is not available, effective or sufficient*". It is on the same premise that the applicants proffered the argument that the Petition Committee lacks jurisdiction over the violation of article 35 in ignoring the 1st applicant's request for information. Citing **William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR** and **Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others (supra)**, the applicants have urged that the petition committee is ill-equipped to entertain the constitutional issues raised and provide adequate remedy.

144. We have found and held that the under section 75 of the Public Private Partnership Act, a challenge to the 1st respondent's decision would be subject to a petition committee. Even if the issues raised are beyond the petition committee's capability to handle and grant the appropriate remedy, we hold the view that under section 9(4) of the Fair Administrative Act, this would be a ground for an exemption order, on an application made for that purpose under that provision of the law. It is not for an applicant to subjectively conclude that certain issues are beyond the petition committee or that his case is an exceptional one and overlook the committee in his quest for a remedy for the grievances arising out of an impugned decision. Such a determination can only be made by the court on an application made under section 9(4) of the Act. If that were not the case, all an applicant would need to skirt around the appellate or review mechanisms provided by such bodies as the petition committee is simply to invoke the provisions of the Constitution in his application and argue that his application raises constitutional issues or is exceptional and, therefore, cannot be determined by such a committee.

145. Of course, we are not saying that the merits of an applicant's case will be considered at that stage of the application for exemption but the court will need to be satisfied that based on the material with which it has been presented and considering the peculiar circumstances of the case, the

applicant deserves a direct ticket to this Honourable Court without any reference to a tribunal or, for our purposes, the petition committee.

146. For the reasons we have given, we uphold the primary objection and strike out the applicants' suit. Having so held, the discussion of whether this case is moot is itself a moot discussion. This being a public interest litigation, we make no order as to costs. It is so ordered.

Signed, dated and delivered at Nairobi on 10 March 2026

Ngaah Jairus
JUDGE

Lucy Mwihaki Njuguna
JUDGE

Moses Ado
JUDGE