REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI HIGH COURT

CASE NUMBER: HCCHRPET/E491/2023

CITATION: ORANNGE DEMOCRATIC MOVEMENT VS STATE LAW

JUDGMENT

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. E 491 OF 2023

(Consolidated with E010 of 2024 and E025 of 2024)

ORANGE DEMOCRATIC MOVEMENT PARTY.....1ST PETITIONER

GITAHI NGUNYI.....2ND PETITIONER

KATIBA INSTITUTE.....3RD PETITIONER

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

AFRICAN CENTRE FOR OPEN GOVERNANCE.....5TH PETITIONER

VERSUS

THE SPEAKER OF NATIONAL ASSEMBLY.....1ST RESPONDENT

THE CABINET SECRETARY NATIONAL

TREASURY AND ECONOMIC PLANNING.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

NATIONAL ASSEMBLY.....4TH RESPONDENT

AUDITOR GENERAL.....5TH RESPONDENT

THE SENATE.....6TH RESPONDENT

JUDGMENT

Introduction

1. On 9th October 2023, the President assented to the Privatisation Bill, 2023 as the Privatisation Act, 2023 (the Act) with a commencement of 27th October 2023. The Act repealed the Privatization Act, 2005.
2. The Cabinet Secretary for Treasury and Planning (CS Treasury) then published a privatization programme, (the programme), identifying 10 public entities for privatization, under section 21 of the Act. Members of the public were invited to submit their views on the programme.
3. The entities identified for privatisation were; Kenyatta International Convention Centre (KICC); Kenya Pipeline Company (KPC); the New Kenya Cooperative Creameries (New KCC); Kenya Literature Bureau (KLB); National Oil Corporation of Kenya (NOCK); Kenya Seed Company Limited (KSC); Mwea Rice Mills Ltd (MRM); Western Kenya Rice Mills (WKRM); the New Kenya Cooperative Creameries Limited (NKCC); Numerical Machining Complex Limited (NMC) and Kenya Vehicle Manufacturers Limited (KVM).
4. The proposed privatisation programme generated intense public interest and three petitions were filed challenging the constitutionality of the Act as well as a number of sections the Act. The petitions are Nos: E 491 of 2023 by Orange Democratic Movement Party; E 010 of 2024 by Gitahi Ngunyi and E 025 of 2024 by Katiba Institute, Institute of Social Accountability and African Centre For Open Governance. The petitions were consolidated with petition E491 of 2023 designated as the lead file. For purposes of this judgment, the petitioner in E491 of 2023 will be the 1st petitioner, petitioner in E010, the 2nd petitioner and petitioners in E025, the 3rd, 4th and 5th petitioners.
5. The petitions are against Speaker of the National Assembly, the Cabinet Secretary, Ministry of Finance and Planning; the Attorney General; National Assembly; Auditor General and the Senate, as the respondents. Henceforth they will be referred to as the 1st to the 6th respondents, respectively.

1st petitioner's case -E 491 of 2023

1. The 1st petitioner argues that the legislative process leading to the enactment of the Act was unconstitutional as there was no meaningful public participation. That is, the 4th respondent violated Articles 10(2) (a) and 118(1) (b) of the Constitution and Standing Order No. 127(3) of its Standing Orders.
2. In this respect, the 1st petitioner argues that the purported public participation was not reasonable, meaningful and efficient and that the respondents have not shown that the invitation letters dated 16th August 2023 for stakeholder engagement by the 4th respondent was extended to the public at large. Out of the six special invitees, the report of the Departmental Committee that recommended adoption of the report shows that most of those invited were government entities with four being private entities that stood to benefit from

privatisation. Not a single citizen submitted views or memorandum on the Act.

3. The 1st petitioner argues that the invitation for submission of memoranda was limiting and may not have reached majority of Kenyans who cannot afford newspapers. The 1st petitioner relies on Articles 10 and 118 of the Constitution; Standing Order No. 127(3) of the National Assembly Standing Orders and decisions 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 (The Affected Party)* [2019] e KLR (*British American Tobacco Kenya case)* and *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] e KLR, on public participation.
4. The 1st petitioner urges the court to adopt a purposive interpretation of national values and principles of good governance which require that all legislation conform to their objects and intendments. Their significance cannot be subjective to economic perspectives of privatization. In this respect, the 1st petitioner relies on the decisions in *Stephen Wachira Karani & another v Attorney General & 4 others* [2017] e KLR; *United States International University (USIU) v Attorney General* [2012] e KLR; and *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others, Civil Appeal No. 224 of 2017;* [2017] e KLR, for the argument that, contrary to the argument that the Constitution does not support sentimental attachments as a consideration in the legislative functions of the National Assembly, there is an enduring duty on all state agencies to give effect to the underlying values and principles. In doing so, the 4th respondent has to take into account the history of the country, the issues in dispute, and the prevailing circumstances.
5. The 1st petitioner reiterates that under Articles 1, read with Articles 4(1), 10(2), 93(2), 94(1), & (4), 131 (2) (b) and 249, sovereign power belongs to the people; the historical significance of some public assets such as KICC, KPC, KLB and KSC cannot be privatised without consent of people and in certain instances, at a referendum. The Act as designed is intended to facilitate indiscrimination, whimsical, absolute and irrational decision making by the Cabinet.
6. According to the 1st petitioner, the Act also significantly concentrates power to the executive when identifying public entities to be privatised, to the exclusion of the 4th respondent and the people. It is the 1st petitioner's case, that under Articles 1(1), 4(1), 10(2), 93(2), 94(1 & 4), 131(2) (b) and 249 of the Constitution, people's sovereignty is supreme, so that any decisions taken pursuant to their delegated authority, must be in their best interest.
7. The 1st petitioner argues that some of the public assets are of historical significance; cultural symbol and national strategic hence cannot be privatised without the consent of the people and possibly a referendum. The 1st petitioner further argues that the design of the Act is deliberately intended to facilitate indiscriminate, whimsical, absolute and irrational decision-making by the cabinet.
8. The 1st petitioner takes the position, that the Act arrogates near absolute power to the Cabinet Secretary and, by extension the Cabinet, to identify and determine public assets to be privatised. The Privatisation Authority is a department within the National Treasury and all its members are appointees of the executive. The Act does not also provide for any, or adequate security systems, checks and balances and considerations to be taken into account in identifying and determining public entities to be privatised under section 21(2). This elevates subjective economic perspectives of privatization above established values and principles of good governance.
9. The 1st petitioner asserts that as a result of the foregoing, the Act is *ultravires* Article 1(1) of the Constitution and in passing it, the 4th respondent failed in its mandate donated under Articles 93, 94 and 139 of the Constitution.

10. The 1st petitioner seeks the following reliefs:
11. *A declaration that the National Assembly did not conduct adequate and/ or effective public participation before passing the Privatisation Act, 2023.*
12. *A declaration that the Privatisation Act, 2023 violates Article 1(1) of the Constitution of Kenya in so far as it elevates subjective economic consideration and perspectives above the principles of sovereignty, democracy and accountability.*
13. *A declaration that the delegated authority of the state cannot be invoked to sell or privatize public assets of strategic and cultural significance to the people and Republic of Kenya.*
14. *A declaration that some public assets including but limited to the Kenyatta International Convention Centre (KICC), the Kenya Pipeline Company (KPC), the Kenya Literature Bureau (KLB) and the Kenya Seed Company Limited (KSC) form part of the sovereign wealth of the Republic of Kenya with significant cultural and strategic importance to the people of Kenya and can only be privatized with the consent of the people at a referendum.*
15. *A declaration that the Privatisation Act as designated lacks an adequate system of checks and balances to protect sovereign assets of the people of Kenya from wilful wastage and corruption.*
16. *Such other orders and/or reliefs as the court may deem fit.*
17. *Costs of the petition.*

2nd petitioner's case -E 010 of 2024

1. The 2nd petitioner also challenges the constitutionality of various sections of the Act. He challenges section 6(a), 6(c)and 6(g) because the purpose therein is not in line with the Bill of Rights, thus contravene Articles 19(1) & (2) read with Article 43(1) of the Constitution. The sections also allow use of national resources in a manner inconsistent with Article 201(c) read with Articles 232(1) (b) and 73 (1) (a) of the Constitution.
2. The 2nd petitioner again argue that sections 19(2) (a), (c) & (d) read with sections 21 (1), 30, 31 and 32 offend the doctrine of separation of powers; national values and principles of good governance in Articles 1(3) and 10(2) as well as the role of the Senate under Article 96(1). The petitioner takes the view, that the sections allow a privatization process without involvement of Parliament; the Senate's concurrence was not sought and the Commission on Revenue Allocation which should have been involved in terms of Article 205 of the Constitution was excluded.
3. The 2nd petitioner again takes issue with section 45 that it violates the right to fair hearing (Article 50(1) and makes a mockery of the alternative dispute resolution mechanism under Article 159(2) by immunizing decisions of the Cabinet Secretary against any bonafide challenge by a potential objector.
4. The 2nd petitioner asserts that section 48 is inconsistent with Articles 160(1) and 169(1)(d) of the Constitution by granting the Cabinet Secretary powers to appoint members of the board; that Clause 8 of the Third Schedule to the Act makes the Cabinet Secretary a judge in his own cause and that the Cabinet Secretary has power to amend the procedures of both the Privatisation Authority and the Privatisation Review Board for purposes of hearing objections and appeals respectively.
5. The 2nd petitioner again takes issue with section 21 (2) arguing that it offends Articles 28 and 45 (1) of the Constitution for failing to prioritize the dignity of people and families of those likely to lose jobs due to privatisation of public entities.
6. The 2nd petitioner further assails section 29 for offending Article 27 (1) and (4) of the Constitution as it offers ownership of public entities to people with extreme wealth and income

inequality in the country thereby ignoring majority poor. The Act thus, constructively discriminates against the poor.

7. The 2nd petitioner takes the view, that the methods of acquiring interest under section 29 of the Act, are a transfer of the country's wealth into the hands of the privileged few in violation the right to equal protection and benefit to all under Article 27 (1), (4) of the Constitution.
8. The 2nd petitioner relies on annexures GN-13 & GN-14 and the decisions in *A Discussion of Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC) (Vol 23) [2020] PER 33; *Social Justice Coalition and Others v Minister of Police and Others* (EC03/2016) [2018] ZAWCHC 181;2019 (4) SA 82 (WCC) (14 December 2018); *Pretoria City Council v Walker* [1998] ZACC 1; 1998 2 SA 363 (CC) and *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment).
9. According to the 2nd petitioner, a legislation with a purpose that has the effect of systematically eliminating human rights protections and furthering marginalization of the interest of low-income earners, fails the reasonability test. Reliance is placed on *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) (*the Grootboom case*) and adopted in *Mitu-Bell Welfare society v Kenya airports Authority & 2others; Initiative for strategic Litigation in Africa (Amicus Curiae)* (Petition 3of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment).
10. The 2nd petitioner again relies on annexures GN-6, GN-8, GN-7, GN-9, GN-10, GN-11 & GN-12; Mubangizi, JC. - "*Democracy and development in the age of globalization: Tensions and contradictions in the context of Specific African challenges*" [2010] LDD Law, Democracy & Development Law Journal; and Annemarie Detlef "*The Role of the State in Development: Re-examining Neo-Liberal Recommendations*" E-International Relations website.
11. Reliance is again placed on Articles 10 (2) (d), 201(c) and 232(1) (b) of the Constitution and annexure GN-1 as well as the decisions in *John Muthui & 19 others v County Government of Kitui & 7 others* [2020] eKLR and *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46, for the argument that when it comes to use of resources, Parliament; the Cabinet Secretary Treasury or the Cabinet should use the trust bestowed upon them by the people to authorise the use of those resources in a manner that is in keeping with Articles 201(c) and 232 (1) (b) of the Constitution.
12. In support of his arguments in the petition, the 2nd petitioner relied on among others, the decisions *in the Matter of the Speaker of the Senate & another* [2013] e KLR; *in the Matter of Interim Independent Electoral Commission* [2011] e KLR; *Keroche Breweries Limited & 6 others v Attorney General & 10 others* [2016] e KLR; *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] e KLR; *Okoiti v Judicial Service Commission & 2 others; Katiba Institute (Interested party)* (Petition 197 of 2018) [2021] KEHC 461 (KLR) (Constitutional and Human Rights) (11 March 2021) (Judgment).
13. The 2nd petitioner seeks the following reliefs:
14. *A declaration be and is hereby made that sections 6(a), 6(c) & 6(g) of the Privatisation Act, 2023 are unconstitutional for establishing purposes that are not in line with the Bill of Rights in contravention of articles 19(1) & (2) as read together with article 43(1) of the Constitution.*
15. *A declaration be and is hereby made that to the extent that sections 6(a), 6(c) & 6(g) of the privatisation Act, 2023 actually speak to the purpose of the enacted law, they render the entire Privatisation Act, 2023 unconstitutional, null and void for advancing objectives that amount to a gross violation of the Constitution.*
16. *A declaration be and is hereby made that Sections 6(a), 6(c) & 6(g) of the Privatisation Act, 2023 are unconstitutional for allowing the use of national resources in a manner inconsistent*

with Article 201(c) as read together with Article 232(1)(b) and Article 73(1)(a) of the Constitution

17. *A declaration be and is hereby made that the policy of privatisation as a concept that aims at systematically and unreservedly shrinking the role of the state in the provision of basic social services amounts to a dereliction by the State of the social contract as encapsulated under Article 1(3) of the Constitution and is against the objects and purposes of the Constitution of Kenya, 2010.*
18. *A declaration be and is hereby made that Sections 19(2)(a), (c) &(d) as read together with Sections 21(1), 22(4) & (5), 30, 31 & 32 of the Privatisation Act, 2023 constitute a conspiracy to defeat the sovereign will and authority of the people as donated to Parliament under Article 94(2) of the Constitution;*
19. *A declaration be and is hereby made that Sections 19(2)(a),(c) &(d) as read together with Sections 21(1), 22(4) & (5), 30, 31 & 32 of the Privatisation Act, 2023 undermine the role of the National Assembly to exercise oversight of state organs under Article 95(5)(b) of the Constitution as well as its role to deliberate on and resolve issues of concern to the people under Article 95(2) of the Constitution;*
20. *A declaration be and is hereby made that Sections 19(2)(a), (c) &(d) as read together with Sections 21(1), 22(4) & (5), 30, 31 & 32 of the Privatisation Act, 2023 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;*
21. *A declaration be and is hereby issued that Unconstitutional to have designated the Privatisation Bill, 2023 a money bill whereas the Bill dealt with matters concerning the resources and public monies that are of interest to Counties in terms of Article 114(4) of the Constitution.*
22. *A declaration be and is hereby made that Parliament passing the Privatisation Act, 2023 without the involvement of The Senate was unconstitutional and a dereliction and/or the undermining of the role of the Senate to protect the interests of the Counties by considering, debating and approving Bills concerning counties in terms of Article 96(1) & (2) of the Constitution of Kenya, 2010;*
23. *A declaration be and is hereby made that Sections 19(2)(a), (c) & (d) as read together with Sections 21(1), 22(4) & (5), 30, 31 & 32 of the Privatisation Act, 2023, which essentially complete the privatization process without the involvement of the Senate are afoul of Article 96(1) of the Constitution;*
24. *A declaration be and is hereby issued Section 45 of the Privatisation Act is in violation of the right to fair hearing under Article 50(1) of the Constitution;*
25. *A declaration be and is hereby issued that Section 48 of the Privatisation Act, 2023 is in violation of the principle of separation of powers, in contravention of the right to fair hearing under article 50(1) of the Constitution and an infringement on the independence of the Judiciary as encapsulated under Article 160(1) of the Constitution;*
26. *A declaration be and is hereby issued that clause 8 of the Third Schedule to the Privatisation Act, 2023, is in violation of the right to fair hearing under Article 50(1) of the Constitution for making the Cabinet Secretary a Judge in his own case;*
27. *A declaration be and is hereby made that Section 21(2) of the Privatisation Act is therefore in violation of Article 28 of the Constitution for failing to prioritize the dignity of the people likely to lose jobs on account of the privatization of government entities;*
28. *A declaration be and is hereby made that Section 21(2) of the Act is also in violation of Article 45(1) of the Constitution for failing to prioritize the families and dependents of persons that*

lose jobs on account of the privatization of government entities;

29. *A declaration be and is hereby made that section 29 of the Privatisation Act, 2023 is therefore in violation of Article 27(1) of the Constitution that guarantees equal protection and equal benefit of the law;*
30. *A declaration be and is hereby issued that the entire concept and/or action of the state purporting to offer up ownership of public entities to the public despite the knowledge of the extreme wealth and income inequality in the country is discriminatory against a majority of Kenyans in terms of economic status, contrary to Article 27(4) of the Constitution;*
31. *An Order be and is hereby issued directing the Auditor-General of the Republic of Kenya, within timelines to be provided by this Court, to submit to the Court, for the benefit of the public, a comprehensive audit report of each special interest bearing account into which proceeds from the sale of State corporations' equity holdings were deposited from sales made in the period ranging from the date of enactment of the Privatisation Act, 2005 to the date of the Judgment of this Court in order to determine whether or not public money has been applied lawfully and in an effective way.*
32. *An Order be and is hereby issued directing the Cabinet Secretary, National Treasury & Economic Planning to, within timelines to be provided by the Court, to issue to both the Senate and the National Assembly, a comprehensive report of inter alia the manner and proceeds of all privatization processes that took place in the Republic of Kenya between July 1992 and the year 2008, when the Privatisation Act, 2005 was operationalized.*
33. *Such other Order (s) as this Honourable Court shall deem fit.*
34. *Costs of the Petition.*

3rd, 4th and 5th petitioners' case- E025 of 2024

1. The 3rd, 4th and 5th petitioners, challenge the decision to privatise the public entities as violating the principles of good governance under Article 10(2) (c) of the Constitution. They argue, in particular, that privatising KICC violates Articles 2(a), 10, 11(1) and, 40(1&2), 47 and 201 of the Constitution, article 15(1) (a) of the ICESR and sections 21(2) (b) (c) (d) (g) & (h) of the Act.
2. They again argue that under Articles 1, 10, 35 and Chapter Six of the Constitution, State organs, State officers, and public officers are bound by national values and principles of governance whenever they make or implement public policy decisions. Reliance is placed on *Re Matter of Kenya National Human Rights Commissions* [2014] eKLR and *Lichete v Independent Electoral and Boundaries Commission & another; Attorney General (Interested Party)* (Constitutional Petition E 275 of 2022) [2022] KEHC 13244 (KLR), on the holistic interpretation of the Constitution.
3. They 3rd , 4th and 5th petitioners further argue, that privatising KSC and KPC would violate Articles 10, 11, 26, 43 and 47 of the Constitution, article 11 of ICESR; risks violating principle 10 of the Stockholm Declaration, article 8(j) of the Convention on Bio diversity and sections 21(2) (b) (c) (d) (g) and (h) of the Act. The same argument is raised with regard to privatisation of KLB, NKCC, and NOCK, as disregarding the strategic role of price stabilization and ensuring adequate stock of oil products (oil reserves). Some of the public entities such as KICC, KPC, NKCC, KSC, KLB and NOCK, they assert, are of fundamental sentimental value to Kenya as sovereign wealth-built overtime after Kenyans were taxed to fund them.
4. Regarding public participation before the proposed privatisation, the 3rd, 4th and 5th petitioners argue, that the intended public participation is illusionary as the proposal is vague and omits information on the relevant considerations necessary for the public to make an informed

decision. They rely on Articles 10(2) (a) (b) and (c), 118 (1) of the Constitution, National Assembly Standing Order No. 127 (3), Principle 10 of the Rio Declaration and agenda 21, of the Plan of Action that accompanied the Rio Declaration, and the decision in *British American Tobacco Kenya case*, that the respondents have not demonstrated that there was sufficient and reasonable public participation on the Privatisation Bill during stakeholder engagements.

5. On section 7, the 3rd, 4th and 5th petitioners argue that it is vague, duplicative and offends Article 10 of the Constitution for allocating the Cabinet Secretary the same role to that given to the Privatization Authority under section 9 of the Act. They also assail the constitutionality of section 22 (5), arguing that it is against the principles of good governance for downplaying parliamentary oversight role under Article 95(2) (c) and (5) (b), by deeming ratification of the privatisation programme by the 4th respondent to have been given after ninety days.
6. The 3rd, 4th and 5th petitioners again take issue with sections 48(1) and 50 for being violative of Articles 10, 50, 169 (2) and 171 of the Constitution by allowing the Cabinet Secretary whose decisions may be challenged, to appoint members of the tribunal and its secretary thus, defying the decision of the court in *Okoiti v Judicial Service Commission & 2 others* [2021] KEHC 461 (KLR).
7. Regarding section 64, the 3rd, 4th and 5th petitioners take the position, that the section does not satisfy the requirements in Article 94(6) of the Constitution and the rule of law, as it delegates unbridled authority to the Cabinet Secretary to make subsidiary legislation in an arbitrary and unlawful manner contrary to Articles 47 and 94(6) of the Constitution.
8. On the respondents' assertion that the claim of violation of fundamental rights in Articles 27, 28, 43, 45 and 50 of the Constitution is premature and non-justiciable, the 3rd, 4th and 5th petitioners assert that the petition raises issues of fundamental human rights that deserve determination by the court. They rely on the Zimbabwean case of *Mawawire v Mugabe NO & Others;* CCZ 1/2013.
9. Overall, the 3rd, 4th and 5th petitioners maintain that sections 7, 22(5), 48(1), 50 and 64 are unconstitutional, and rely on Article 2 and the decision in *Katiba Institute v Attorney General & 9 others*; Petition No. 17 of 202 (2023) KESC47 (KLR), for the proposition that a statute is unconstitutional if it has an unconstitutional purpose or effect. They argue that section 7 is vague and duplicative for allocating the Cabinet Secretary the same role given to the Privatization Authority under section 9 of the Act.
10. Based on the above arguments, they seek the following reliefs:
11. *A declaration be and is hereby issued that sections 7, 22(5), 48(1), 50 and 64 of the Privatisation Act, 2023 are unconstitutional.*
12. *A declaration be and is hereby issued that the notice calling for public participation about the privatisation programme and any public participation purportedly carried out under the force of that notice is constitutionally infirm.*
13. *A declaration be and is issued that the proposal to privatise Kenyatta International Convention Centre (KICC), Kenya Pipeline Company Limited (KPC), New Kenya Cooperative Creameries Limited (NKCC), Kenya Seed Company Limited (KSC), Kenya Literature Bureau (KLB), and the National Oil Corporation of Kenya (NOCK) is unconstitutional and invalid.*
14. *An order that each party bears their costs in the public interest.*

Respondents' case

1st and 4th respondents' case

1. Thet 1st and 4th respondents have filed replying affidavits and written submissions. The

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affidavits were sworn by Samuel Njoroge, C.B.S, Clerk of the National Assembly and Jeremiah Ndombi, M.B.S, Deputy Clerk of the National Assembly.

2. Through these affidavits, the 1st and 4th respondents state that they followed the procedure required by the Constitution and relevant laws in enacting the Act. The 4th respondent also conducted comprehensive public participation by, first; publishing the Bill in the Kenya Gazette; placing newspaper adverts, committing the Bill to the relevant Committee and inviting key stakeholders to submit views on the Bill.
3. They rely of on several decision, including; *British American Tobacco Kenya case; Minister of Health v New Clicks South Africa (PTY) Ltd* (2006) (2) SA; *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR; *Republic v County Government of Kiambu Ex parte Robert Gakuru & Another* [2016] eKLR and *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).
4. Responding to the allegation that sections 7 and 21(1) of the Act are unconstitutional for giving the Cabinet Secretary unfettered discretion, the 1st and 4th respondents argue that sections 19, 20, 20(2), 21 and 30 provide for adequate checks and balances.
5. They argue that they acted in accordance with Article 71(2) of the Constitution, and the 4th respondent exercised its legislative authority under Articles 93, 94 and 95 of the Constitution as donated to it by the people. The 4th respondent further complied with the requirements of public participation under Articles 10 and 118 of the Constitution.
6. The 1st and 4th respondents deny the contention that the Act violates human rights and maintained that sections 6, 30(2) (g), (h) and (i) protect fundamental rights which might be affected during privatisation. The fear of potential loss of jobs due to privatisation is premature and hypothetical because section 30 requires the Privatisation Authority to provide a proposal on how to deal with employees to be affected by privatisation. The effect of privatisation will also vary from one entity to another, depending on the economic circumstance of each entity. There is also no guarantee that all privatisation proposals would be successful.
7. Regarding the petitioners' argument that sections 19(2) (a), (c) & (d) read with sections 21(1), 30, 31 & 3 of the Act exclude Parliamentary oversight, they maintain that sections 19, 21, 22(1), 22(3) and 22(4) are clear that the 4th respondent is the final authority to determine whether the programme is to be implemented or not. The 4th respondent did not, therefore, abandon its oversight role since the timelines provided in sections 22(3) and 22(5) are reasonable and are meant to prevent delays in the implementation the privatisation process.
8. The 1st and 4th respondents also maintain that delegation of power under Article 95(6) of the Constitution allows Parliament to delegate some of its legislative power. Section 64 of the Act which empowers the Cabinet Secretary to make regulations generally for the better carrying out of the provisions of the Act, is thus, constitutional.
9. Regarding the Senate's concurrence, it is the 1st and 4th respondents' position that the Privatisation Bill did not concern county governments within the meaning of Article 110 of the Constitution, thus did not require such concurrence. The Bill did not also deal with functions and powers of the county governments set out in the Fourth Schedule to the Constitution, or finances of county governments. They rely on the long Title to the Act, sections 2 and 3 of the Act and the decisions in *Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR and *Speaker of the National Assembly & another v Senate & 12 others* (Civil Appeal E084 of 2021) KECA 282 (KLR) (19 November 2021) (Judgment).
10. It is the 1st and 4th respondents' position that allowing the Cabinet Secretary to appoint

members of the Review Board and the Secretary, does not vitiate the Board's independence to afford parties appearing before it the right to fair hearing. This is because, the Board is established under section 47 of the Act and its establishment and appointment remain has not been challenged.

11. It is their further case, that section 48 does not infringe on the independence of the judiciary since the Review Board is not a tribunal or subordinate court within the meaning of Article 159 of the Constitution. Consequently, appointment of its members is not the mandate of the Judicial Service Commission but a preserve of the Cabinet Secretary under sections 48(1) and 50 of the Act as donated by the National Assembly pursuant to Article 94(5) of the Constitution.
12. On the alleged duplication of roles, the 1st and 4th respondents take the view, that the role of the Cabinet Secretary is different from that of the Authority but interdependent. They are intended to create effectiveness and efficiency in achieving the objectives of the Act.

2nd and 3rd respondents' case

1. The 2nd and 3rd respondents oppose the petitions through a replying affidavit and supplementary affidavit both sworn by Prof. Njuguna Ndung'u. the 2nd respondent. Through these affidavits, the 2nd and 3rd respondents state that the impugned Act repealed the Privatization Act, 2005 because the latter was not facilitative to privatization and was also out of tune with the Constitution and other laws enacted after 2010.
2. According to 2nd and 3rd respondents, the impugned Act seeks to enhance transparency, accountability, efficiency, sustainability and value in public resources in the privatisation process as underscored in sections 19, 20, 21, 22, 23, 30, 31, 32, and 33.
3. They maintain that in coming up with the programme and identifying the entities to be privatised, the 2nd respondent complied with sections 7 (c), 19 and 21(2) of the Act. The 2nd respondent also complied with section 20, when he issued a notice, inviting members of the public to submit views on the privatisation, though the exercise did not take place due to the suspension of implementation of section 21(2) of the Act by the court.
4. The 2nd and 3rd respondents assert that the programme was developed in accordance with the Constitution and the relevant law, and that section 21(1) of the Act mandates the 2nd respondent to identify and determine entities to be in the programme in accordance with the criteria set out in section 21(2). In this respect, the entities were identified for privatisation.
5. The 2nd and 3rd respondents further assert, that Article 1(1) of the Constitution has not been violated as the petitioners have misconstrued the object and purpose of the Act. They maintain that by virtue of sections 5, 19, 20,21, 22, 30, 43, 45, 46, of the Act, there are adequate security guarantees to assure the integrity of the programme.
6. The 2nd and 3rd respondents further assert that there was extensive public participation during the development of the Bill, in Eldoret, Kisumu, Mombasa, Nyeri, Machakos, Garissa and Nairobi on 31st January 2023. The report on the stakeholders' comments was to guide on the changes to be included in the draft Bill.
7. It is the 2nd and 3rd respondents' case that Article 1(3)(a) delegates exercise of the sovereign authority to Parliament, and in exercising this authority, Parliament is vested with the authority to ratify the use of resources; sale; dispose of, or acquire national assets by virtue of Articles 71, 94(1), 94(2), 94(5), 95(1), 95(4) (b) and 227(2) of the Constitution.
8. Under Article 1(3)(b), they argue, the executive has the mandate to implement laws and policies passed by Parliament by virtue of Articles 131(1) (b), 132(3) and 132(4) (a) of the Constitution. The petitioners' challenge to the authority delegated to the 2nd respondent to

make regulations for the better implementation of the Act by virtue of Article 94(6) is misguided.

9. On the lack of concurrence from the Senate, they argue that the Act does not concern Counties as contemplated by Article 110 of the Constitution. Reliance is placed on Articles 96(1) & (2) and 110(1) of the Constitution; the preamble to the Act and section 2 of the Act to urge that the Act does not concern county governments thus, concurrence of the Senate was not necessary.
10. The 2nd and 3rd respondents maintain that section 41 of the Act guards against potential monopoly in privatisation; section 22(5) is in line with the principle in Article 115(6) of the Constitution and section 15 of the Statutory Instruments Act; that the design of the Act provides sufficient check and balances in sections 5, 7, 8, 19, 20, 21, 22, 30, 43, 45, 46, 47, 53, 57, 58, 59, 63; and that Article 95(5) of the Constitution read with section 22 of the Act reinforces the oversight role played by the 4th respondent.
11. The 2nd and 3rd respondents associate themselves with the submissions of the 1st and 4th respondents that there was extensive public participation. They rely on the decisions in *Minister of Health and Another vs New Clicks South Africa (Pty) Ltd* and Others [2005] ZACC 14(supra) and the *British American Tobacco Kenya case*.
12. The 2nd and 3rd respondents further agree with the 1st and 4th respondents that section 45 does not violate Article 50 of the Constitution; that there is no duplication of roles between the Cabinet Secretary and the Authority; the Cabinet Secretary is responsible for formulating policy directions and overseeing the overall implementation of the Act while the Authority serves as the technical arm. Further, that sections 48 and 64 are constitutional.
13. The 5th & 6th respondents, though served, did not take part in these proceeding.

Determination

1. Upon considering these consolidated petitions, responses and arguments by parties, I have identified two main issues for determination, namely: whether there was meaningful and effective public participation during the legislative process and whether the impugned sections are constitutionally invalid.

Public participation

1. The petitioners have argued that there was no reasonable, meaningful and efficient participation during the legislative process leading to the enactment of the Act, a violation of the principles in Article 10 of the Constitution. The respondents have denied this contention, maintaining that the law-making process complied with the constitutional and legal requirements.
2. Public participation is one of the founding values and principles of our democratic State (Art. 4(2). These values and principles bind all State organs, State officers, public officers and all persons whenever they apply or interpret the Constitution; *enact*, apply or interpret any law; or make or implement public policy decisions (Art. 10(1). The national values and principles must be observed by everyone when they exercise and discharge of their functions and mandate.
3. The legislative process leading to enactment of the impugned Act fell within the ambit of Article 10 and for that reason, the 4th respondent was bound to comply with the requirement of public participation. Further, Article 118 also requires Parliament (in this case the 4th respondent), to conduct its business in an open manner. Its sittings and those of its committees must also be open to the public and it should facilitate public participation and

peoples' involvement in the legislative process and other business, including the business of the committees.

4. The petitioners' argument that the legislative process that midwifed the impugned Act did not comply with the requirements of public participation turns the burden on the 4th respondent to demonstrate that it complied with the constitutional requirement of public participation, a core value in our Constitutional architecture.
5. The Constitution does not provide to what extent public participation would be reasonable, meaningful and effective. However, decisions from courts have expounded on this and emphasized the threshold and standards to be applied in determining whether the body responsible to conduct public participation met these standards.
6. In Robert N. Gakuru & others v Kiambu County Government & 3 others [2014] eKLR, the court stated that "*p**ublic participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates…it behoves the Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively."***
7. On appeal, (Kiambu County Governent & 3 others v Robert N. Gakuru & Others [2017] eKLR), the Court of Appeal affirmed the decision and stated:

[20]…The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in ***Article 10*** which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation.

1. The Court of Appeal went on to state that public participation must include, and be seen to include, the dissemination of information, invitation to participate in the process and consultation on the legislation. That is, people must be accorded an opportunity to participate in the legislative process, a fact to be proved by the party that was required to comply with this constitutional requirement that indeed there was compliance.
2. Addressing the same issue in ***Minister for Health v New Chicks South Africa Pty Ltd*** CCT 59/04, the Constitutional Court of South Africa observed that the forms of facilitating an appropriate degree of participation in the law-making process are of infinite variation. "What matters is that at the end of the day, a reasonable opportunity is offered to the members of the public and all interested parties to know about the issue and to have an adequate say."
3. In the words of Ngcobo, J**.** in Doctors for Life International v Speaker of the National Assembly & Others (CCT 12/05) [2006] ZACC 11, 2006(12) BCLR 1399(CC), 2006 (6) SA 416 (CC)), "merely allowing public participation in the law-making process is not enough. More is required and measures need to be taken to facilitate public participation in the law-making process."

(See also the British American Tobacco case.)

1. These decisions make the point, that public participation must be real, reasonable and meaningful both qualitatively and quantitively. The public must be given an opportunity to participate in the legislative process. The body responsible must take reasonable measures to facilitate public participation and has the burden to demonstrate that it discharged this obligation.
2. Once the petitioners attacked the legislative process on grounds that it did not meet the constitutional threshold of public participation, the burden fell on the 4th respondent to show

to the satisfaction of the Court, that the legislative process complied with the constitutional requirements. This is because it is the 4th respondent's constitutional obligation to ensure that there is public participation during the conduct of its business and those of its committees: a constitutional burden that the 4th respondent must discharge.

3. I have gone through the affidavits filed on behalf of the respondents, as well as their bundle of documents to demonstrate that public participation was conducted in compliance with the Constitution.
4. One of the documents in the bundle of documents is annexture CAN 2, "Notice for public participation" dated 12th June 2023, issued by the 4th respondent's Clerk and published in the Daily Nation of 12th June 2023. This was a general notice calling on the members of the public to submit memoranda on four Bills, namely; Regional Development Authorities Bill, No. 7 of 2023; Conflict of Interest Bill, No.12 of 2023; Food and Feed Safety Control Bill, No. 21 of 2023 and the Privatisation Bill, No. 22 of 2023. The memoranda on the four Bills were to be received on or before 26th June 2024, (a 14-day period).
5. There is also annexture CAN 3, titled "Call for stakeholder's engagement." The document contains letters dated 16th August 2023 addressed to, (1) Chief Executive officer of KPMG; (2) Chief Executive officer, PricewaterhouseCoopers; (3) Mr. Kwame Owino, Chef Executive Officer, Institute of Economic Affairs and (4) James Muraguri, Chief Executive officer, Institute of Public Finance. The letters "Headed Stake Holders Engagement on Privatisation Bill, 2023 by the Departmental Committee of Finance and National Planning", invited these organisations to prepare comprehensive submission an any representation they may have on the Bill, send a soft copy by email and attend a meeting on 22nd August 2023 and give their submissions and comments on the Privatisation Bill. They were to appear at designated times between 3pm and 4pm as indicated in their letters.
6. The third document is annexture CNA4, a report by the Departmental Committee on Finance and National Planning on public engagement over the Privatisation Bill. According to the report, a public notice was issued on 12th June 2023 calling on the public to submit memoranda on the Bill. In addition, the Committee sent out a letter to key stakeholders to submit views on the Bill and attend public participation forum of 23rd August 2023.
7. According to the report, following the public participation exercises, the Committee received six memoranda from six institutions, namely; National Treasury, the Privatisation Commission, PricewaterhouseCoopers Limited, The Institute of Certified Public Secretaries, the Public Procurement Regulatory Authority and the Nairobi Securities Exchange.
8. The report again states that on 22nd August 2023, four stakeholders appeared before the Committee, namely; National Treasury, through Director General, Public investment and Portfolio Management; Privatisation Commission; Public Procurement Regulatory Authority; and Institute of Certified Public Accountants and made presentations.
9. The stakeholders that submitted memoranda and also attended on 22nd August 2023 were; National Treasury; Privatisation Commission and Public Procurement Regulatory Authority. These are government institutions. The only institution from outside government that attended was the Institute of Certified Public Accountants. In other words, out of the six memoranda that the Committee received, three were from the government and three from outside government.
10. The report notes that majority of the stakeholders stressed the need for provisions to improve governance in the privatisation process and speedy procedures. Some of the stakeholders suggested changes were accepted while other proposed changes were rejected. At the end, the Committee recommended that the Bill be approved with amendments.
11. From the evidence placed before court, the question that arises is whether there was

reasonable, meaningful and effective public participation. The petitioners argue that this was not the case, while the respondents maintain that there was meaningful and effective public participation.

12. The Constitution is the supreme law and binds all persons, State organs and public officers in the discharge of their duties. (Art 2). Article 3(1) obligates every person to respect, uphold and defend the Constitution. Every "person", includes the 4th respondent, as a State organ.
13. Public participation as a founding value, is central in governance and legislative processes. In this regard, the Clerk of the National Assembly issued a public notice dated 12th June 2023 and published in the Daily Nation of the same date, calling on members of the public to submit memoranda in respect of four Bills that were before the 4th respondent, including the Privatisation Bill, 2023. The memoranda were to be received on or before 26th June 2023. The notice also indicated that the Bills could be obtained at the National Assembly Table office, Main Parliament Buildings or its website. The memoranda were to be forwarded to the Clerk of the National Assembly by postal address, hand delivery or email.
14. The notice did not indicate that the Committee would hold meetings and, if so, when, and whether members of the public who wished to attend and make presentations could do so. However, the report shows that four private institutions were invited to submit memoranda, attend and make submissions on 22nd August 2023 before the Committee. The report confirms that the Committee held a meeting on 22nd August 2023 when four institutions were represented and made presentations on the Bill. These were; National Treasury; Privatisation Commission; Public Procurement Regulatory Authority and the Institute of Certified Public Accountants.
15. Except for the specific stakeholders who had been invited to attend, there is no indication that the 4th respondent issued a notice informing the general public that the Committee would hold public participation meeting on 22nd August 2023 and that members of the public and or any institution(s) wishing to attend and give views could do so.
16. That notwithstanding, the report shows that the National Treasury; Privatisation Commission; Public Procurement Regulatory Authority and Institute of Certified Public Accountants attended and made submissions. It is not clear from the record; the criteria used to pick and allow these entities to attend and give their views on the Bill. It is was not wrong to have attended: Rather how these entities knew of the meeting and attended without evidence of being invited. There is also no explanation on what standard was used to favour these entities over everyone else in such an important exercise.
17. Further, apart for the National Treasury which was represented by Director General Public Investment and Portfolio Management, the report does not show who represented the Privatisation Commission; Public Procurement Regulatory Authority and Institute of Certified Public Accountants and made submissions on behalf of those institutions.
18. This country is founded on national values and principles of governance one of which is public participation. The constitutional text in Article 118(1) leaves no doubt, that Parliament (National Assembly) must conduct its business in an open manner; its sittings and those of its committees be open to the public and it should "*f*acilitate public participation and involvement in the legislative and other business of parliament and its committees."
19. The 1st and 4th respondents have argued that National Assembly Standing Orders give guidelines on how the 4th respondent should conduct public participation which was complied with when invites were sent out on 15th August 2023. Standing Orders are procedural rules which guide and inform how the 4th respondent should at, a minimum, conduct its business, including public participation. Standing Orders do not, however, override the Constitution and are not a substitute to constitutional edict on public participation as expounded by courts, that

the 4th respondent should facilitate public participation that is reasonable, meaningful and effective both qualitatively and quantitatively.

20. To facilitate public participation would man and include taking deliberate positive measures and steps that would make it possible for the public to attend and, thereafter, accord them an opportunity to contribute their views on the Bill. That is, public participation must be reasonable and meaningful so that those interested are given an equal opportunity to know about the Bill and have adequate say on it.
21. When conducting public participation, the 4th respondent does not do a favour to the public but fulfils a constitutional command. In this respect, the 4th respondent was required to disseminate information to the public about the Bill; invite those interested to know about the Bill and give them reasonable opportunity participate and have a say on it. There is no evidence for example, that information was disseminated before the notice was put out in the newspaper on 12th June 2023, inviting members of the public to submit memoranda. The 1st and 4th respondents merely stated that that the Bill was published.
22. Again, the copy of the Bill attached to the replying affidavit is the one that was published in the Kenya Gazette and is in English Language. Similarly, the notice dated 12th June 2023 and published in the Dily Nation of the same day calling on members of the public to submit memoranda, was in English language. It is not clear whether there was a Kiswahili version of that Bill and the notice at least for those who do not understand English language for effective dissemination of information. For this reason and from the report, only six memoranda were received and out of those six, three were from institutions affiliated to the government.
23. The 4th respondent seems to have put more focus on a few specific and targeted stakeholders, not more than six, without explaining the reasons why and how they were selected. In other words, the 4th respondent reduced public participation on such an important legislation to selected few at round table discussion and completely ignored and shut out members of the public who may not have heard about the Bill or could not send memoranda by post or email, but would still have had something to say on the legislation if they had been given a reasonable opportunity to do so. Failing to indicate to the public that it would hold a session for public participation was a significant omission on the part of the Committee.
24. It is possible to argue, and it is understandable, that not every member of public must attend and give views during public participation. However, the Constitution contemplates that the public must take centre stage in governance issues. They must, therefore, be given a reasonable opportunity to participate in the affairs that affect them, including legislative processes. Public participation must not be reduced to a ritual meant to merely fulfil a constitutional requirement. It must be real, meaningful and effective so that it can influence that legislative process: Anything less, if accepted, would make the whole essence of public participation a farce.
25. In the circumstances of these consolidated petitions, the 4th respondent has not demonstrated that the primacy of Articles 10 and 118(1) (b) of the Constitution was met during the legislative process leading to enactment of the impugned Act. Limiting public participation to selected few stakeholders, and four participants to be precise, majority of them representing government institutions could not, by any stretch of imagination, be considered reasonable, meaningful and effective public participation both quantitatively and qualitatively as envisioned by the Constitution and elaborated in court pronouncements.
26. I must emphasize that in dispersing power among State organs, the Constitution conferred on Parliament the exclusive mandate to make laws. In that regard, the 4th respondent is not beyond the reach of national values and principles in Article 10(2) read with Article 118. The 4th respondent is bound to conduct reasonable, meaningful and effective public participation

that meets the constitutional threshold before enacting laws.

27. From the record and my analysis above, there is no doubt, that the impugned legislation, as important as it is to the country, did not meet an important constitutional threshold of public participation. The 4th respondent failed in its constitutional obligation to conduct real, reasonable, meaningful and effective public participation during the legislative process.
28. I agree with the petitioners on this issue: That the National Assembly violated an important constitutional step in the legislative process thus, the Act fails the constitutional validity test on this ground

Constitutional validity of sections of the Act

1. The petitioners have also impugned the constitutionality of a number of sections of the Act, arguing that they are inconsistent with the Constitution. The sections include: 6, 7, 9, 19(2)(a), 21, 22(3), (22(5), 48, 49, 50, 64, among others. Before dealing with this issue, let me briefly consider the principles that guide courts in determining the constitutionality of statutes or statutory provision.
2. First; there is a general, but rebuttable presumption principle that a court should presume a statute enacted by the legislature to be constitutional, unless the law is clearly unconstitutional or a fundamental right is violated. The burden is, however, on the person alleging unconstitutionality to prove the invalidity. This is because it is assumed that the legislature, as the people's representative, understands the problems people face and, therefore, enacts legislations with the intention of solving the problems. (See *Hamdarada Nakhana Union of India Air* (1960) 354).
3. This principle was restated in Ndynabo v Attorney General of Tanzania [2001] EA 495, that an Act of Parliament is presumed constitutional and that the burden is on the person who contends otherwise to prove the contrary.
4. Second; the court should examine the purpose or effect of a statute. The purpose of enacting a legislation, or the effect of implementing such legislation, may lead to nullification of the statute or its provision if found to be inconsistent with the constitution.
5. In R v Big M. Drug Mart Ltd, [1985] 1 SCR 275; 1986 LRC (Const.) 332, the Supreme Court of Canada stated:

[80] Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus, its validity.

1. The Court was clear that the initial test of constitutionality must be whether or not the legislation\'s purpose is valid; the legislation\'s effect would only be considered when the law under review has passed the purpose test. The effect test can never be relied on to save legislation with an invalid purpose.
2. In Olum and another v Attorney General [2002] EA, the court again stated thus:

To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right

guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional.

1. The same point was made in Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR, that in determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned Act, and this can be discerned from the intention expressed in the Act itself.
2. With these principles in mind, the task of the court is to determine whether all or any of the impugned sections are inconsistent with the constitution and, therefore, of no force or effect.
3. The petitioners attack section 6(a), (c) and (g). They argue that the sections establish purposes that are not in line with the Bill of Rights especially Article 43(1), thus contravene Article 19(1) and (2). Further, that the section allows use of national resources in a manner that is inconsistent with Article 201 (c). According to the petitioners, the sections are concerned with maximization of profits to sustain private businesses.
4. Section 6 is on the purpose of privatisation in general. It states:

The purpose of privatisation undertaken under this Act shall be to-

1. *to encourage more participation of the private sector in the economy by shifting production and services from the public to the private sector*
2. …….
3. *reduce the demand for government resources*
4. ……
5. ……
6. ……
7. *improve the efficiency of the economy by making it more responsive to market forces.*
8. Section 6(a) merely states the objects of privatisation as to encourage people or entities outside government to take active role and participate in the economy by changing production and services to the private sector rather that the government-public. That is, turning ownership of public entities from the government to the private sector, including private individuals.
9. Under section 6(c), the object is to reduce the demand for government resources in the entities to be privatised. While under section 6(g), the object is to improve the efficiency of the economy by making it more responsive to market forces.
10. The petitioners' argument that section6(a), (c) and (g) establish purposes that are not in line with the Bill of Rights more so, Article 43(1) is not correct. Article 43(1), on social economic rights, provides that Every person has the right to (a) the highest attainable standard of health, which includes the right to health care services, including reproductive health care; (b) accessible and adequate housing, and to reasonable standards of sanitation; (c) be free from hunger, and to have adequate food of acceptable quality (d) clean and safe water in adequate quantities; (e) social security; and education. In the petitioners' view, the sections thus, contravene Article 19(1), (2).
11. Where a petitioner argues that a provision contravenes the Constitution, he must show, prima facie, that indeed that is the case. In the present case, the petitioners have not shown how section 6(a), (c), and (g) violate Article 43(1), namely: the right to highest attainable standard of health, access to adequate housing, and reasonable sanitation, freedom from hunger and adequate food of acceptable quality, clean and safe water, social security and education.
12. Privatisation means that the government would be shedding off its ownership or part of it in public entities. The objects and purposes of privatisation as stated in section 6 cannot, in my

respectful view, be said to contravene Article 43(1) as read with Article 19 of the Constitution as the petitioners perceive it. In any event, the petitioners have not shown that without the purposes of privatisation in section 6, the rights under Article 43(1) are achievable.

13. The petitioners further argue, that the purposes stated in section 6(a) (c) and (g) allow use of national resources in a manner that is inconsistent with Article 201 (c). According to the petitioners, the sections are concerned with maximization of profits to sustain private businesses.
14. Article 201 is on the principle of public finance generally. Article 201 (c) states that the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations. The petitioners have not demonstrated how the purposes in the impugned sections violate the principle in this Article. The fact that burdens and use of resources be shared equitably would also mean the losses incurred by those entities be shared equitably. At this stage, there no evidence that any would be resources from privatisation would not be used in accordance with Article 201(c). This court is not persuaded by the petitioners' argument.
15. The petitioners again take issue with section 7, arguing that there is a contradiction between section 7 and 9 on the role of the CS Treasury and the Privatisation Authority established under section 8. They assert that the contradiction causes confusion.
16. Section 7 provides for the role of the Cabinet Secretary, namely: to provide policy direction on matters relating to privatisation; co-ordinating adherence to national, regional and international obligations relating to privatisation, developing and formulating privatisation programme and overseeing the administration of the Act.
17. On the other hand, section 9 provides for the functions of the Authority established under section 8. The functions are; to advise the government on all aspects of privatisation of public entities; facilitate implementation of government policies on privatisation; implement privatisation programme; implement specific privatisation proposals in accordance with the privatisation programme; collaborate with other organisations in or outside Kenya as it may consider appropriate in furtherance of the objects of the Act; prepare long-term divesture sequence plan; monitor and evaluate the implementation of the privatisation programme; take such measures as are necessary to ensure that the provisions of the Act are complied with and perform any other functions under the Act or any other legislation as may be conferred on it from time to time.
18. It is not in doubt that the functions in section 7 are different from those in section 9. Whereas the role of the Cabinet Secretary is mainly on policy formulation, the functions and or role of the Authority is on implementation of the Act. In this regard, I am unable to see any real or potential tension between sections 7 and 9 that would render the sections unconstitutional.
19. The petitioners further assail section 19(2) (a), (c) (d) as read with sections 21(1), 22(4) (5), 30,31 and 32, arguing that they contemplate privatisation without parliamentary oversight. According to the petitioners, privatisation proposal only needs to be approved by the Cabinet. Once the Cabinet Secretary comes up with the programme and Cabinet approves it, no other entity's approval is sought. Consultation under section 20 thus, becomes irrelevant.
20. Section 19(2) (a) provides that the Cabinet Secretary is to formulate privatisation programme to be approved by the Cabinet. Section 19 (c) specify the entities identified and approved for privatisation and (d) serves as a basis upon which privatisation is to be undertaken. Section 19 is really on the identification and approval of the public entities to be privatised as the basis upon which privatisation is to proceed/undertaken.
21. Section 21(1) provides that the Cabinet Secretary has to identify and determine the entities to be included in the programme. Under section 22(1), once the Cabinet approves the

programme, the Cabinet Secretary has to submit the programme to the 4th respondent for ratification before implementation. Section 22(2) states that the request for ratification is to be accompanied by an explanatory memorandum with –(a) a brief description of the public entity; (b) a brief explanation of the reasons for privatisation;(c) benefits to be gained, including estimated revenue to be obtained; (d) other relevant information.

22. Section 22(3) provides that the National Assembly shall within sixty days after receipt of the privatisation programme under subsection (1)-
23. *consider the programme guided by principles of good governance, the criteria for identification of entities specified under section 21 and any other relevant consideration;*
24. either-
25. *ratify part or all of the programme for implementation; or*
26. *refuse to ratify part or all the programme and notify the Cabinet Secretary for reconsideration stating the reasons for the refusal; and*
27. *notify the Cabinet Secretary of its decision.*
28. Section 22(4) states that the Cabinet Secretary shall, upon receipt of the refusal, under subsection (3) (b)(ii), consider the decision and may resubmit the same privatisation programme to the National Assembly. Under section 22 (5), where the National Assembly does not make a decision under subsection (3) within ninety days, "*the privatisation programme shall be deemed to have been ratified*."
29. There does not, in my view, seem to be a problem in sections 21(1) in so far as identifying the entities for privatisation is concerned. This is because section 21 (2) contains the factors the Cabinet Secretary has to take into account in coming up with the programme. There is also no problem is section 22 (1), 22(2) 22(3) and 22(4). The real problem, as I understand the petitioners' argument, is in section 22(5) on the ratification of the privatisation programme by the National Assembly.
30. Section 22(1) requires the Cabinet Secretary to submit to the National Assembly the request for ratification of the programme, accompanied by information in section 22(2). Section 22(3) requires the National Assembly to consider and ratify the programme as a whole, in part, or decline to ratify in whole or in part, within sixty days.
31. Section 22(5), however, provides that "*if the National Assembly does not make a decision under subsection (3) within ninety days, the privatisation programme shall be deemed to have been ratified*."
32. The petitioners argue that the scheme of section 19(2) (a)(c)(d) as read with sections 21(1), 22(4), 22 (5), 30,31 and 32 constitutes a conspiracy to defeat the people's will and authority donated to the National Assembly under Article 94(2) of the Constitution, and its oversight role in Article. 95(5) (b). This, they argue, defies the doctrine of separation of powers and undermines the oversight role of the National Assembly.
33. As already pointed out, I do not see any problem with section 19 generally or even sections 21 and 22(1) 22(2),22(3) and 22(4). I do not see how for instance, section 21(2), infringes on the right to dignity, family or human rights and fundamental freedoms generally. The problem is whether section 22(5) is constitutionally invalid.

Section 22(5)

1. Article 94 of the Constitution affirms that the legislative authority is derived from the people and vested in and exercised by Parliament. Parliament thus, represents the will of the people and exercises their sovereign will through its legislative mandate. Under Article 95(5)(b), the 4th respondent oversights State organs, including the executive, on behalf of the people.

2. Section 22 of the Act, requires that the Cabinet Secretary request the 4th respondent to ratify the privatisation programme in exercise of its oversight role. In this regard, when the Cabinet Secretary requests for ratification, the 4th respondent is called upon to exercise its constitutional mandate and statutory discretion of oversight, a fact acknowledged in section 22(3) of the Act.
3. This constitutional mandate notwithstanding, section 22(5) states that if the National Assembly does not make a decision, (ratify or not), within ninety days, the privatisation programme will be deemed to have been ratified. The petitioners argue that the whole scheme is to give the Cabinet Secretary and, by extension the executive, a free hand in the privatisation of public entities in disregard of the 4th respondent and, therefore, the people.
4. The Constitution as the supreme law of the land, assigned to the 4th respondent the role of oversight over State organs, including the executive. The purpose of seeking ratification under the Act, is to give the 4th respondent, as the people's representative, an opportunity to check whether the proposed privatisation is in the public interest. Although the intendment of section 22(3) is to ensure that the 4th respondent makes a prompt decision on the request to ratify the privatisation programme without delay, the effect of section 22(5) to deem ratification to have been given on expiry of ninety days, is to side step role of the National Assembly to check whether the privatisation programme is really in the best interest of the people.
5. During the hearing, counsel for the respondents were at pains to explain why ratification should be deemed to have been given and not declined.
6. It cannot be gainsaid that the 4th respondent exercises a constitutional mandate in oversighting State organs. Further, section 22(3) of the Act affirms this role and assigns to the 4th respondent discretion to ratify the privatisation programme or not. Purporting to deem ratification to have been given is to run away from the 4th respondent's critical constitutional role which is against our constitutional philosophy.
7. It is also inconceivable and unfathomable that the 4th respondent easily acquiesced to ceding one of its core constitutional mandates at the altar of expeditious privatisation. The Constitution does not contemplate a situation where Parliament would not oversight a State organ for whatever reason. It is, therefore, a dereliction for the 4th respondent to purport to leave privatisation of public entities in the hands of the executive branch without any oversight by the very institution the people entrusted that role with.
8. Legislation, or a provision whose purpose may be constitutional will still fail constitutional validity and will not be saved if its effect is offensive to the Constitution. In this regard, I agree with the petitioners that section 22(5) defies the doctrine of separation of powers and undermines one of the key constitutional mandates of the 4th respondent to oversight the executive. Section 22(5) thus, fails the constitutional test of validity.
9. The petitioners again argue that section 29 violates the principle of equality and freedom from discrimination in contravention of Article 27(1)(4). In their view, poor citizens would not be able to purchase shares or participate in the privatisation programme. Section 29 provides for the methods of privatisation which must include—initial public offer of shares; sale of shares by public tender; sale resulting from the exercise of pre-emptive rights; or such other method determined by the Cabinet. These methods are inconclusive.
10. 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.
11. The petitioners again take issue with the fact that the Senate was not involved in the

legislative process despite the fact that most of the entities to be privatised are domiciled in the counties and are concerned with agriculture, a devolved function. According to the petitioners, even though the legislation gives effect to processes that affect functions at both levels of government, the Senate's concurrence was not sought. Article 110 requires that the Senate's concurrence be sought in any legislation that affects counties.

12. It is clear from both the long title to the Act and section 6, that the Act deals with privatisation of public entities belonging to the national government and not county governments. In that regard, it is the national government that would be shedding off its hold in these entities and not the county governments. The fact that some, if not all the entities, are domiciled within counties and while some may have something to do with devolved functions, what is to be privatised is ownership and not the functions. I, therefore, see no reason for faulting the legislative process in excluding the Senate's concurrence.
13. Regarding sections 30 and 31, they deal with privatisation proposals and approvals respectively and, therefore, nothing much turns on their being constitutionally invalid.
14. The petitioners again take issue with section 45, arguing that it limits the options available to a person aggrieved with the identification of the entities to be privatised in that he can only challenge the privatisation programme. In their view, this is a violation of the right to a fair hearing. Section 45 provides that a person aggrieved by the determination of the Authority under this Act or implementation of the privatisation programme, may lodge an objection. An objection under this section is to be lodged and determined in accordance with the procedures set out in the Third Schedule.
15. Section 46 further provides that a person aggrieved by the determination of the Authority under section 45 may appeal to the Privatisation Review Board. Under section 46 (2), an appeal shall be lodged and determined in accordance with the Procedures set out in the Third Schedule. A person aggrieved by the decision of the Review Board in such an appeal, may appeal to the High Court.
16. Section 45 merely provides an opportunity to object to determinations of the privatisation or implementation of the privatisation programme. Section 46 on the other hand, affords a party aggrieved with the decision of the Authority on the objection, to appeal to the Review Board established under section 47. To the extent that section 45 gives an opportunity to lodge an objection before the Privatisation Authority, is not a limitation of rights. I do not, therefore, see any contravention of or inconsistency with, the Constitution.
17. There is a further argument that under Paragraph 8 of the Third Schedule to the Act, the Cabinet Secretary has power to amend procedures of both the Authority and the Review Board for purposes of objections and appeals, including from his own decisions. The petitioners contend, therefore, that this makes the Cabinet Secretary a judge in his own cause.
18. The Third Schedule to the Act provides for the procedures for lodging objections under section 45 (paragraph 3) and appeals under section 46 (paragraph 4), respectively, and determination thereof. Paragraph 8 provides that the Cabinet Secretary may, by notice in the Kenya Gazette, amend the Schedule.
19. The National Assembly may delegate legislative authority and, in this case, delegated this authority to the Cabinet Secretary. While exercising this authority, the Cabinet Secretary must be alive to the principles in Article 10 and the Statutory Instruments Act. I do not think this delegation of authority contravenes the Constitution. In any case, decisions made by the Authority are appealable before the Review Board whose decisions are further reviewable by the High Court.
20. Regarding section 48, the petitioners argue that the section assails the independence of the judiciary. According to the petitioners, sections 48 (1) and 50 empower the Cabinet Secretary

to appoint members and secretary to the Review Board who determine disputes and appeals under the Act.

21. Section 48 provides for the composition and qualifications of members of the Review Board. The Board is to consist of a chairperson and four members, all appointed by the Cabinet secretary. The Board is not a tribunal as contemplated by the Constitution. The Review Board established under the Act (s.48) is not a tribunal contemplated by the Constitution. It does not, therefore, fall within the ambit of Article 159 of the Constitution which vests judicial authority in courts and tribunals and its members are appointed by the Judicial Service Commission. In that respect, I do not see how section 48 infringes on the independence of the judiciary and the mandate of the Judicial Service Commission to appoint members of tribunals within the judiciary.
22. The petitioner again object to section 64 which empowers the Cabinet Secretary to make regulations for the better carrying out the provisions of the Act. The petitioners argue that the section does not incorporate any limitations contemplated in Article 94(6). Section 64 empowers the Cabinet Secretary to make regulations generally for the better carrying out of the provisions of the Act.
23. Article 94(6) provides as follows:

An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.

1. In determining whether a statutory provision is constitutionally valid, the court should as much as is reasonably possible read the provision to be in conformity with the Constitution to avoid a clash. The court should only strike down a provision for being inconsistent with the Constitution if there is irreconcilable tension.
2. In this respect, the Constitutional Court of South African stated in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai motor Distributors (Pty) Ltd and others v Smit No and others CCT 1/00* [2000] ZACC12: 2001(10) BCLR 1079; 2001 (1) SA 545 (CC) (25 August 2000):

{24] [I]t is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them…. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained.

In other words, the court should not be quick to strike down a provision when it can be read to be in conformity with the constitution where this is possible. Only where harmonisation cannot be achieved, should constitutional infirmity be declared.

1. Applying this principle, does section 64 fall afoul Article 94(6)$1 I think not. Section 64 confers on the Cabinet Secretary authority to make "*Regulations generally for the better carrying out of the provisions of this Act.*" That is, the Cabinet Secretary may make regulations generally. The regulations must, however, be for the better carrying out of the provisions of

the Act. This means that the regulations are general in nature; relate only to the Act and are limited to the better implementation or enforcement of the provisions of the Act. The Cabinet Secretary cannot make regulations for any other purpose other than for implementing or better carrying out the provisions of the Act.

2. The court's duty is to, as much as possible, read and interpret the provision to be in harmony with the Constitution. The Court should only invalidate a provision when the tension is irreconcilable. On the other hand, the legislature has a duty to enact laws that are as clear as possible in purpose and scope.
3. Applying the above principle, and giving section 64 a holistic reading, the section is, in my view, in tandem with Article 94(6). There is limitation of its scope in that the regulations be in the Act and for the effective implementation of the provisions therein and nothing more. Furthermore, the Constitution itself is clear that law and policy-making must comply with the principles in Article 10. The making of regulations must also comply with the provisions of the Statutory Instruments Act. In the circumstances, I find no irreconcilable tension between section 64 and Article 94(6) of the Constitution.
4. The petitioners again take issue with the privatisation of the entities for various reasons. I do not think much of the arguments raised and reasons advanced in support of the objection to the proposed privatisation reveal violation of the Constitution. I agree though, that some of the entities are of strategic value to the country. However, whether to privatise or not, is an executive decision. The court would only intervene if it was demonstrated that the privatisation programme violates the Constitution and or the law. In this respect, I only find one entity whose proposed privatisation merits further consideration; that is KICC.

Privatisation of KICC

1. The petitioners have argued that KICC is a gazetted monument and holds both strategic and iconic identity of Kenya and the City of Nairobi, a critical national infrastructure. In the petitioners' view, privatising a national monument violates Article 11(1)(2) of the Constitution as the State has an obligation to promote all forms of national and cultural expressions through cultural heritage. They further argue, that the action violates article 15(1)(a) of ICESCR, which entitles everyone to take part in cultural life. States have an obligation to care for, preserve and restore historical sites and monuments. The respondents have not controverted the petitioners' argument that KICC is a gazetted monument and cannot be privatised.
2. On 24th July 2013, then Cabinet Secretary, Ministry of Sports, Culture and the Arts (Mr. Hassan Wario Arero), declared KICC a monument through Gazette Notice Number 10686, pursuant to section 25(1) of the National Museums and Heritage Act. The Gazette Notice identified the monument thus;

All that building known as the Kenyatta International Conference Centre, including the Kenyatta statue on plot No. 209/11159 which measures approximately 1.694 Hectares, along City Hall Way within the Nairobi Business Central District, Central Division in Nairobi County.

1. Section 2 of the National Museums and Heritage Act defines a "monument" to mean, among others;

"a place or immovable structure of any age which, being of historical, cultural, scientific, architectural, technological or other human interest, has been and remains declared by the Minister under section 25(1)(b) to be a monument".

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1. The long title to the Act states that the purpose of the Act is to consolidate the law relating to national museums and heritage; to among others, provide for "*the establishment, control, management and development of national museums and the identification, protection, conservation and transmission of the cultural and natural heritage of Kenya*."
2. There is no denial that KICC is a monument thus, a cultural heritage that must be conserved and protected as required by the Act. Further, Article 11(2) (a) of the Constitution obligates the State to promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and "*other cultural heritage*".
3. This being the position that KICC is a national monument and forms part of the country's cultural heritage. The government holds KICC in trust for the people and has an obligation to preserve and protect it for their use and enjoyment. The Constitution requires the State to promote national heritage. In this regard, privatising KICC is not the same as promoting this heritage. The Privatisation Act cannot, therefore, override both the Constitution and the National Museums and Heritage Act.

Conclusion

1. Having considered the consolidated petitions, responses and arguments by parties, I come to the following conclusions: First, there was no meaningful, reasonable and effective public participation leading to the enactment of the Privatisation Act,2023. The National Assembly failed to discharge its constitutional obligation to conduct public participation that met both quantitative and qualitative threshold. The six memoranda received coupled with a few handpicked stakeholders could not effectively represent the views of the people as required by Articles 10 and 118 of the Constitution as expounded by courts for purposes of enacting the legislation. The National Assembly was not clear that the notice put out in the newspapers on 12th June 2023, calling for memoranda was only responded to by six stakeholders when some the stakeholders were sourced and invited to submit memoranda; Most of them being government institutions. The purported public participation was not real, meaningful, reasonable and effective. The National Assembly failed in this regard.

Second, section 22(5) of the Act fails the constitutional validity test. Even though the National Assembly exercises oversight role over other State organs, this mandate cannot be avoided simply by deeming ratification of the privatisation programme to have been given if the National Assembly does not make a decision within ninety days. Clearly, the National Assembly failed to protect and defend its constitutional mandate delegated to it by the people but surrendered it to the executive branch of government. Section 22(5) is, therefore, constitutionally infirm.

Third; the Kenyatta National Conference Centre (Kenyatta International Convention Centre) is a national monument and forms part of the cultural heritage of Kenya. The government has an obligation to conserve and protect this heritage through the National Museums of Kenya on behalf of the people. Its purported privatisation, including the statue of the founding President, is a violation of the government's obligation under Article 11(2)(a) of the Constitution read with the Monuments and Heritage Act.

Disposal

1. Flowing from the above conclusions, I make the following declarations and orders:
2. *A declaration is hereby issued that the National Assembly did not conduct reasonable,*

meaningful, adequate and or and effective public participation before passing the Privatisation Act, 2023. The entire Privatisation Act, 2023 is, therefore, unconstitutional, null and void.

3. *A declaration is hereby issued that section 22(5) of the Privatisation Act, 2023 is inconsistent with the Constitution and is unconstitutional, null and void.*
4. *A declaration is hereby issued that the decision to privatise Kenyatta International Conference Centre, (Kenyatta International Convention Centre) a national monument, contravenes Article 11(2) of the Constitution as read with the provisions of the Monuments and Heritage Act and is, therefore, unconstitutional, unlawful null and void.*
5. *This being a public interest litigation, each party will bear own costs*

Dated and Delivered at Nairobi this 24th Day of September 2024

E C MWITA

JUDGE

SIGNED BY: HON. JUSTICE E.C. MWITA

THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT
HIGH COURT CONSTITUTION AND HUMAN RIGHTS
DATE: 2024-09-25 12:18:13