REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI COUNTY

COURT NAME: MILIMANI HIGH COURT

CASE NUMBER: HCCHRPET/E626/2024

KATIBA INSTITUTE VS STATE LAW OFFICE

JUDGMENT

BEFORE HON. LADY JUSTICE NYAUNDI PATRICIA MANDE, SC

1. The Petition dated 8 November 2024 challenges the constitutionality of Kenya's current Public Private Partnership (PPP) legal framework, particularly the Public Private Partnerships Act, 2021 (PPPA) and aspects of the Public Procurement and Asset Disposal Act, 2015 (PPADA). The Petition is supported by the Affidavit of Emily Kinama, Litigation Manager at Katiba Institute, sworn on 7 November 2024, who deposes that recent PPPs, specifically the KETRACO electricity transmission project and the proposed JKIA concession, have been undertaken in a manner that violates constitutional principles of transparency, accountability, competitiveness, public finance oversight, and separation of powers.

2. The Petitioner's factual foundation rests on the 2024 Budget Policy Statement (BPS), which reveals that the State intends to rely heavily on PPPs and Privately Initiated Proposals (PIPs) as a "strategic and sustainable" financing mechanism for major infrastructure. The Affidavit states that Kenya's PPP Directorate has 31 projects in the pipeline, many at the procurement stage, including the KETRACO

project valued at Kshs 95.68 billion and the JKIA concession proposal submitted in March 2024. These projects, according to the Petitioner, were initiated through PIPs, inherently limiting competitiveness and violating Article 227's requirement for fair, equitable, transparent, and competitive procurement.

3. The Petitioner further asserts that both projects have been processed with secrecy and opacity, contrary to Articles 10 and 201 of the Constitution. The Affidavit cites multiple instances of withheld information, including refusal by KETRACO to disclose key contractual terms on 7 October 2024, failure by the Ministry of Energy to publish mandatory tariff details on 15 October 2024, and the hurried processing of the JKIA PIP despite the existence of at least three other proposals.

4. These facts, the Petitioner argues, demonstrate that the Kenyan legal framework is currently incapable of guaranteeing the constitutional imperatives on transparency, accountability and sustainable development (including intergenerational equity).

5. A central legal contention is that the PPPA unconstitutionally excludes Parliament from approving PPP concession agreements; instead it vests final approval authority in the PPP Committee (the 5th Interested Party). The Petition challenges sections 59, 60, 61, 62 and 72(1) as read with section 63, arguing that they violate Articles 94, 95, 96, 206, 220–223, and 228 by removing Parliament from its constitutional role in authorising public expenditure, overseeing public finance, and safeguarding the Consolidated Fund. The Petitioner contends that PPPs constitute longterm public expenditure and contingent liabilities and therefore cannot be executed solely by the Executive without legislative ratification.

6. The Petition also challenges sections 44(5) and (6) of the PPPA, which grant contracting authorities' discretion to decide whether PIPs should undergo competitive tendering. The Petitioner argues

that this discretion violates Article 227's mandatory procurement principles and enables arbitrary, opaque, and potentially biased procurement processes. Additionally, section 4(3) of the PPPA and section 4(2)(e) of the PPADA are said to unconstitutionally oust the applicability of the PPADA to PPPs, thereby undermining the constitutional procurement framework. The Petitioner seeks declarations of unconstitutionality and, where appropriate, retroactive invalidation of the KETRACO and JKIA processes

7. The opposition to the two projects was widely covered in the media, culminating in the cancellation.

SUMMARY OF 1st RESPONDENT'S RESPONSE

8. The 1st Respondent contends that the Petition is baseless because the issues raised are moot, and the cited provisions of the Public Private Partnership Act, sections 44(5), 44(6), 59, 60, 61, 62, 63 and 72(1), are presumed constitutional. They argue that the Petitioner has not demonstrated that the purpose or effect of these provisions is unconstitutional, and further assert that a statute cannot be invalidated simply because it restricts the application of another statute. Accordingly, they ask the Court to dismiss the Petition with costs

SUMMARY OF 3RD RESPONDENT'S RESPONSE

9. The Attorney General's (3rd Respondent) Grounds of Opposition dated 26 March 2025 challenge the Petition on the basis that the impugned provisions of the Public Private Partnerships Act, 2021, specifically sections 59, 60, 61, 62, 63 and 72(1), are constitutionally sound and valid. The Attorney General argues that these provisions properly vest executive functions in the Executive, consistent with the Constitution, and that Article 227's procurement framework is intended to guide policy formulation by both the Executive and Legislature, not to restrict their discretion. The Attorney General

further contends that the Petition improperly seeks to override constitutionally allocated functions of both branches of government, including legislative discretion, by advancing what the Attorney General characterises as the Petitioner's private views.

10. Additionally, the Attorney General asserts that the Petition is speculative, nonjusticiable, and without merit. He maintains that the Petitioner's challenge does not disclose a concrete constitutional controversy but instead attempts to preemptively interfere with lawful governmental processes. The AG therefore urges the Court to dismiss the Petition on the basis that it lacks legal foundation and improperly seeks to fetter constitutional organs in the exercise of their respective mandates

SUMMARY OF THE 5TH RESPONDENT'S RESPONSE

11. The 5th respondent opposes the Petition and relies on the Replying Affidavit sworn by Nicholas Bodo, Acting Managing Director and Chief Executive Officer of the Kenya Airports Authority. At the outset, he avers that prayers (d), (e) and (f) of the Petition are moot insofar as they relate to the Privately Initiated Proposal (PIP) submitted by Adani Airport Holdings Ltd for the JKIA concession, as it was lawfully canceled on 26th February 2025. He relies on the Supreme Court's pronouncement in **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR**, which underscores the public interest in conserving scarce judicial time so that it may be committed only to deserving cases of dispute settlement.

12. On the constitutional challenge to the Public Private Partnerships Act, 2021 (PPPA), the 5th Respondent asserts that the Petition's attack on sections 4(2)(e), 4(3), 44(5) & (6), 59, 60, 61, 62, 63 and 72(1) is speculative, misconceived, and unsupported by specific evidence. He argues that the PPP Act is constitutionally compliant, and that Parliament enacted it pursuant to Article 227(2), which empowers Parliament to legislate procurement frameworks. He

emphasizes that the PPP Committee is not purely an executive body, as it includes representatives from diverse sectors, including the Council of Governors (section 6(1)(e)) and nonpublic officers (section 6(1)(f)). He further notes that section 63 requires parliamentary ratification for PPP agreements involving natural resources, demonstrating that the Act preserves constitutional checks and balances.

13. The 5th Respondent relies on previous court decisions to support the constitutionality of procurement under the PPP Act. He cites **Portside Freight Terminals Limited & 2 Others v Okoiti & 10 Others [2024] KECA 169 (KLR)**, where the Court of Appeal held that procurement outside the PPADA is not automatically unconstitutional and that constitutionality is assessed under Article 227's principles of fairness, equity, transparency, competitiveness, and costeffectiveness. He also cites I**EBC v National Super Alliance (NASA) Kenya & 6 Others [2017] KECA 436 (KLR)**, which held that direct procurement is constitutional if statutory safeguards are met and that public participation is not mandatory unless required by statute. Additional authorities include **Pan African Transformers & Switch Gears Ltd & 2 Others v PPARB & 3 Others [2022] KECA 984 (KLR)**, **William Ole Ntimama & 2 Others v Governor, Narok County & 2 Others [2014] eKLR**, and **Revital Health (EPZ) Ltd v PPOA & 6 Others [2012] eKLR,** all reinforcing that procurement constitutionality depends on adherence to Article 227 values rather than rigid procedural uniformity. It is argued therefore that the PPP Act is a constitutionally valid legislative framework.

14. On allegations of secrecy, opacity, and lack of public participation in the KETRACO and JKIA PPP processes, the 5th Respondent argues that the PPP Act embeds transparency and public participation at multiple stages. He cites section 22(1)(k) (requiring public participation), section 26(3) (mandating publication of an uptodate national PPP project list), section 69 (requiring publication of project execution information), and section 35(2)(h) (requiring stakeholder engagement during project development). He contends that any failures in disclosure or participation would be

implementation issues, not defects in the statutory framework, and therefore cannot justify invalidating the Act.

15. On the Petition's claim that Privately Initiated Proposals (PIPs) undermine competitiveness and violate Article 227, the 5th Respondent argues that the PPP Act operationalises Article 227 through a detailed procurement regime. He highlights section 3(c) (object of giving effect to Article 227), and Part V (sections 37–57), which outlines procurement methods including competitive bidding, direct procurement, and PIPs. He explains that PIPs undergo rigorous vetting, including feasibility studies, due diligence, valueformoney tests, and approval by both the PPP Committee and the Attorney General. He further notes that section 44(5) allows restricted or open tendering where appropriate, and that section 29 requires private proponents to bear project development costs, discouraging frivolous or politically motivated proposals.

16. On allegations of state favoritism toward the Adani Group, the 5th Respondent argues that the PPP Act contains structural safeguards against bias. He cites section 44, which permits direct negotiation only where a proposal is unique or offers public interest benefits; section 28(1), which requires government support measures to comply with public finance management law; and section 62, which empowers contracting authorities to cancel tender processes in the public interest without compensating bidders. He argues that any concerns about favoritism should be addressed through project specific litigation under Articles 22 and 258, not through invalidation of the entire PPP framework.

17. On the Petition's concerns about public finance risks and intergenerational equity, the 5th Respondent argues that the PPP Act contains robust safeguards for fiscal responsibility. He cites section 2 (definition of affordability), section 36 (controls on contingent liabilities), sections 32–33 (mandatory feasibility studies), and section 63 (parliamentary approval for natural resourcerelated projects). He emphasises that PPPs are longterm, complex arrangements requiring specialised regulation distinct from the

PPADA, and that the Act provides mechanisms for suspension, modification, or cancellation of negotiations under sections 57–60. He argues that any harmful PPP can be challenged individually, but isolated concerns cannot justify invalidating the entire statutory framework.

18. The 5th Respondent also provides comparative justification for PPPs by referencing international practice. He explains that PPPs are globally recognised as specialised, long-term infrastructure delivery mechanisms distinct from routine procurement. Jurisdictions such as the United Kingdom, India, South Africa, Brazil, and Australia operate PPP regimes separate from ordinary procurement laws, with dedicated legislation and specialised PPP units, mirroring Kenya's PPP Directorate and PPP Committee. He notes that major airports such as London Heathrow (UK), Delhi International Airport (India), Johannesburg's OR Tambo (South Africa), São Paulo–Guarulhos (Brazil), and Sydney Airport (Australia) have been constructed, expanded, or modernised under PPP or concession arrangements. These examples, he argues, demonstrate that PPPs are a globally accepted model for capitalintensive airport infrastructure, and Kenya's PPP Act aligns with international best practice by providing a tailored framework for complex projects requiring private financing, risk allocation, and longterm operational expertise.

19. Finally, the 5th Respondent rejects the Petition's request for retroactive declarations of unconstitutionality and structural interdicts. He argues that retroactive invalidation violates the doctrine of presumption of constitutionality of statutes and would destabilise ongoing PPP projects undertaken under a valid legal framework. He concludes that the Petition is speculative, academic, and legally untenable, and should be dismissed

SUMMARY OF THE RESPONSE OF THE 4TH RESPONDENT AND 5TH INTERESTED PARTY

20. The Replying Affidavit of the 4th Respondent and the 5th Interested Party is sworn by Dr. Chris Kiptoo, Principal Secretary, National Treasury and Chairperson of the PPP Committee. He states that he is duly authorised to depose to the affidavit and challenges the allegations concerning the constitutionality of the Public Private Partnerships Act, 2021 (PPPA) and the Public Procurement and Asset Disposal Act, 2015 (PPADA), contending that they arise from a misunderstanding of the constitutional, policy and fiscal framework within which the legislation was enacted.

21. The Respondents contend that the PPPA was deliberately enacted to attract private capital, expertise, innovation and efficiency into the delivery of public infrastructure and services, particularly in circumstances where Government's fiscal limitations would otherwise constrain such development. The legislation was enacted to address the identified gaps in the past namely, infrastructure projects suffered from the absence of a clear regulatory framework, prolonged preparation periods, inadequate affordability analysis, and procurement uncertainty. The PPPA was therefore intended to address Kenya's fiscal constraints, facilitate the transfer of significant project risks to the private sector, secure value for money and leverage private capital towards the development of public infrastructure.

22. The Respondents further rely on various Government policy documents, including the 2011 PPP Policy Statement, the 2020 Consultation White Paper, the Medium-Term Plan III, the Budget Policy Statement 2021 and the National Assembly Report on the PPP Bill, to demonstrate that the PPP framework forms part of an established national development policy. They contend that Kenya's limited fiscal space necessitated greater reliance on private-sector investment and that the Government had expressly provided for potential contingent liabilities arising from PPP projects within its fiscal planning framework. The National Assembly also recognised that expenditure arising from the Bill would be provided for through annual estimates approved by Parliament and that adequate public participation had been undertaken.

23. The Respondents maintain that the PPP framework is consistent with the constitutional requirements governing public procurement, public finance and service delivery. They rely on Article 227 of the Constitution, submitting that the PPPA establishes a regulated procurement process that is fair, equitable, transparent and competitive, while Article 201 is given effect through fiscal safeguards intended to ensure sustainable and transparent financial obligations. The establishment of the PPP Committee under section 6 and the PPP Directorate under section 15 provides specialised administrative oversight, while sections 73 and 88 impose reporting obligations to Parliament. In their view, these mechanisms complement rather than replace the oversight functions of the National Assembly and Senate and ensure transparency, accountability and parliamentary supervision.

24. The Respondents further argue that PPPs are necessary in light of Kenya's significant infrastructure financing requirements and limited public resources. The PPP framework therefore enables the Government to mobilise private capital and undertake urgent and high-priority projects without waiting for limited Exchequer allocations. They contend that failure to utilise PPPs in these circumstances would result in essential projects being indefinitely delayed or abandoned, thereby hindering national development and limiting public access to necessary infrastructure and services.

25. The Respondents reject the allegation that the PPPA bypasses Parliament or establishes an unconstitutional procurement regime. They contend that the PPPA and PPADA are complementary statutes operating within a unified constitutional framework aimed at promoting efficiency, integrity and public value in the use of public resources. They further submit that the Petitioner has failed to identify with specificity the provisions alleged to violate the Constitution and has instead advanced broad and unsupported assertions. The Respondents maintain that legislation enjoys a presumption of constitutionality, and that, where possible, the Court should adopt an interpretation that preserves legislation enacted by Parliament in the public interest. They also defend privately initiated proposals as a procurement method expressly provided for under

the PPPA.

26. Finally, the Respondents deny that PPP arrangements create unsustainable intergenerational repayment burdens, maintaining that such arrangements are structured around value for money, affordability, optimal risk allocation and long-term fiscal sustainability. They contend that PPP obligations are subjected to appraisal, approval and affordability thresholds, and that private-sector returns depend upon performance and service delivery rather than guaranteed public indebtedness.

27. They maintain that the PPPA contains safeguards relating to fiscal discipline, public participation, transparency and accountability and remains subject to judicial, statutory and parliamentary oversight. Conversely, suspension of the Act and PPP projects would, in their view, disrupt critical infrastructure development, undermine investor confidence, expose the State to contractual and financial consequences and delay essential public services. They therefore urge the Court to dismiss the Petition and application with costs.

SUMMARY OF 2ND INTERESTED PARTY'S RESPONSE

28. The 2nd Interested Party opposes the Petition, and an affidavit is sworn by Florence Mitei, Company Secretary and General Manager Legal Services, on 27th April 2026. The 2nd Interested Party explains that in consonance with the National Energy and Petroleum Policy of 2014, it embraced the Government's strategic move to broaden financing avenues through Public Private Partnerships (PPPs). The Policy enables the private sector participation in financing, construction, development, operation and maintenance of infrastructure and development projects.

29. Within this statutory and policy framework, it received a privately initiated proposal from Adani Energy Solutions Limited for the development of the 400 kV Gilgil-Thika-Malla-Konza and 220 kV D/C

Rongai-Keringet-Chemosit transmission lines, associated substation works, and the 132/33 kV Thurdibuoro substation across Kenya.

30. That the KETRACO electricity transmission PPP was undertaken pursuant to the Public Private Partnerships Act, 2021, and that all statutory steps were followed. In response to the claim that the Act is unconstitutional because Parliament abrogates its supervisory role, the 2nd interested party avers that Parliament maintains a supervisory role through the annual reports submitted to Parliament and that the Act is deliberately structured to avoid the bureaucratic layers that hampered the now-repealed predecessor Act, the 2013 PPP Act.

31. The 2nd interested party emphasises that PPP projects are not subject to individual parliamentary approval under the Act; however, to the extent that they involve public funds, guarantees or contingent liabilities, they remain subject to parliamentary oversight within the broader public finance framework.

32. Regarding the allegation that Sections 44(5)(6) violate Article 227 of the Constitution, the 2nd Interested Party clarifies that the proposal originates with the private party, without solicitation from the contracting party. Further, Section 40(3)(j) requires the private party to justify why the project is unsuitable for procurement through open and competitive processes, and the contracting authority, with oversight from the PPP Directorate and the PPP Committee, retains discretion to subject such a proposal to competitive bidding where the justification provided is found to be insufficient.

33. The 2nd interested party avers that, contrary to the Petitioner's assertions, Section 4(2) of the PPP Act ousts the PPADA Act's jurisdiction for wholly privately financed PPPs, whereas Section 4(3) of the PPP Act provides for the application of the PPADA Act where there is counterpart funding, including public funds.

34. The 2nd Interested Party therefore contends that the PPP Act is constitutional and rejects the Petitioner's claim that the project was shrouded in secrecy or unlawfully awarded. The 2nd Interested Party maintains that the Petition's allegations are speculative and unsupported by evidence. The right-to-match provisions within the Act ensure transparency and value for money, promote competition, and prevent discrimination.

35. The Petition was canvassed via written submissions, with parties highlighting their respective submissions on 11th June 2026

SUMMARY OF THE PETITIONER'S SUBMISSIONS

36. The Petitioner submits that the Court should adopt a holistic approach to constitutional interpretation, reading the Constitution as an integrated whole and interpreting individual provisions in their historical, contextual and institutional setting. Reliance is placed on **In the Matter of the Kenya National Commission on Human Rights [2014] eKLR ,** where the Supreme Court held that constitutional provisions should be read alongside one another to achieve a rational and coherent interpretation. The Petitioner argues that Articles 1, 2, 10, 95, 96, 201, 206(2), 220, 221 and 223 must therefore be read together to reinforce Parliament's authority over public finance, expenditure and executive accountability.

37. The Petitioner contends that Parliament has exclusive constitutional authority to authorise public expenditure, revenue raising and borrowing. Articles 94, 95(4), 96, 206(2), 220, 221 and 223 establish a constitutional framework under which significant public financial commitments must receive parliamentary approval and oversight. Sections 50(3) and 58 of the Public Finance Management Act are relied upon to reinforce this position. **In Council of Governors & 47 others v Attorney General & 3**

others; Katiba Institute & 2 others (Amicus Curiae) [2020] eKLR, the Supreme Court affirmed that public funds must be supported by lawful appropriations. The Petitioner therefore argues that PPPs involving long-term public expenditure, contingent liabilities or government guarantees cannot constitutionally be approved exclusively by the Executive.

38. The Petitioner challenges sections 59, 60, 61, 62 and 72(1), read with section 63 of the Public Private Partnerships Act, 2021, on the ground that they vest final approval of PPP project agreements, amendments and cancellations in the PPP Committee rather than Parliament. It is argued that section 63 only provides for parliamentary ratification of natural-resource-related PPPs, leaving major projects such as JKIA and KETRACO outside parliamentary scrutiny. The Petitioner relies on **Orange Democratic Movement Party & 4 others v Speaker of National Assembly & 5 others [2024] KEHC 11494 (KLR)** and **In the Matter of the Speaker of the Senate & Another [2013]** to submit that Parliament cannot constitutionally surrender or legislate away its core functions.

39. The Petitioner argues that PPPs are not merely procurement arrangements but mechanisms through which government assumes long-term financial commitments. They may involve annuity or availability payments, user charges, guarantees, indemnities, government support measures and contingent liabilities. The KETRACO project, for instance, involves a 30-year arrangement estimated at Kshs 95.68 billion, while PPPs generally may bind successive governments and future generations. Consequently, such commitments must be subjected to parliamentary pre-authorisation and oversight because they may affect future public budgets and potentially crowd out expenditure on essential constitutional functions and services.

40. The Petitioner challenges sections 40(3)(j), 44(5) and 44(6) of the PPPA for permitting contracting authorities to decide whether a Privately Initiated Proposal should undergo competitive procurement. Article 227 requires public procurement to be fair,

equitable, transparent, competitive and cost-effective. The Petitioner submits that these constitutional standards are mandatory and cannot be displaced by open-ended executive discretion based on concepts such as “market interest” or “public interest.” Reliance is placed on the constitutional values of transparency and accountability under Article 10.

41. The Petitioner further contends that sections 40(3)(j), 44(5) and 44(6) lack objective standards and effective oversight mechanisms governing the decision whether to subject a PIP to open competitive procurement. The absence of a requirement to publish reasons is said to facilitate preferential treatment, inflated project costs and potentially corrupt arrangements between public officials and private proponents. The JKIA project is cited as an illustration, where the Petitioner alleges that although at least three PIPs were received, the proposal associated with Adani Airports Holdings Ltd was processed without transparent comparative evaluation. Similar concerns are raised regarding the KETRACO project.

42. The Petitioner challenges section 4(3) of the PPPA and section 4(2)(e) of the Public Procurement and Asset Disposal Act, 2015, to the extent that they exclude the application of PPADA to certain PPPs, particularly privately funded projects. It is submitted that PPADA is the principal statute giving effect to Article 227 and that excluding its procurement safeguards cannot result in exclusion of the constitutional standards themselves. Article 227 applies uniformly to public procurement irrespective of the funding model. The Petitioner therefore argues that private financing does not constitute a constitutional exception to the requirements of fairness, transparency, competitiveness and value for money.

43. The Petitioner submits that if the impugned provisions are declared unconstitutional, the declaration should operate retrospectively, particularly in relation to the JKIA and KETRACO projects. Article 2(4) provides that laws inconsistent with the Constitution are void to the extent of the inconsistency. The Petitioner relies on **Samuel Kamau Macharia & another v Kenya**

Commercial Bank Ltd & 2 others [2012] eKLR, which recognised that retrospective application may be appropriate where justice, legal certainty or public policy so require, and S**uleiman Said Shahbal v IEBC & 3 others [2014] eKLR**. **It also cites Nation Media Group Ltd v Onesmus Kilonzo [2015] eKLR** for the proposition that, absent limitation by the Court, invalidity operates from the date of enactment.

44. The Petitioner argues that unconstitutional PPP arrangements should not be protected merely because contracts have already been executed. PPPs may create obligations lasting 20–30 years, including future payments, user charges, guarantees, indemnities and concessions over public assets. Reliance is placed on S**ias Moise v Transitional Local Council of Greater Germiston (2001) ZACC 21, Minister of Health v Treatment Action Campaign (No. 2) [2002] ZACC 15, Law Society of Kenya v Attorney General & Another [2013] eKLR** and **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR.** The submission is that contractual expectations cannot override constitutional supremacy and that the public interest in preventing long-term unconstitutional burdens outweighs private expectations arising from an unconstitutional process.

45. Finally, the Petitioner seeks a structural interdict on the basis that declaratory relief alone would be inadequate to address the alleged systemic violations surrounding the JKIA and KETRACO projects. The Petitioner alleges secrecy, lack of parliamentary ratification, inadequate public participation, non-disclosure of critical documents and executive overreach. **In Trusted Society of Human Rights Alliance v AG & 2 others [2012] eKLR** and **Minister of Health v Treatment Action Campaign (No. 2) [2002] ZACC 15**, structural remedies are said to be appropriate where declarations alone cannot cure persistent institutional violations. The Petitioner also relies on **Coalition for Reform and Democracy (CORD) v Attorney-General & another [2015] eKLR** for the proposition that courts may fashion effective remedies suited to complex constitutional violations. The proposed orders include disclosure of the JKIA and KETRACO agreements, review of the PPPA and PPADA, reporting to

the Court, and continued judicial supervision.

SUMMARY OF 3RD RESPONDENT SUBMISSIONS

46. The Attorney-General opposes the Petition principally on the ground that it is moot, since the specific PPP transactions that gave rise to the proceedings have been overtaken by events. It is submitted that the Court's constitutional jurisdiction should be exercised only in the context of a live controversy and not to determine abstract or academic questions. Reliance is placed on **Kenya Railways Corporation & 2 others v Okoiti & 3 others [2023] KESC 38 (KLR)** and W**anjiru Gikonyo & 2 others v National Assembly of Kenya & 4 Others [2016] eKLR.** The Attorney-General further cites **Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] KECA 589 (KLR)**, adopting the definition of a moot case in Black's Law Dictionary, and **Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi [2019] KEHC 2059 (KLR)**, which recognises that a case ceases to be justiciable where supervening events eliminate any practical relief, subject to exceptions such as compelling constitutional questions or matters capable of repetition yet evading review.

47. The Attorney-General also argues that Acts of Parliament enjoy a presumption of constitutionality and that the Petitioner has failed to discharge the requisite legal and evidential burden. The Petition is characterised as an attempt to have the Court substitute its own view of governance for that of Parliament and the Executive, contrary to separation of powers. The Court's role, it is submitted, is supervisory rather than managerial, particularly in matters of public-finance policy and executive implementation. In support, reliance is placed on **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**, where the Court cautioned that a reviewing court is not a "super-legislature" entitled to assess the wisdom or desirability of legislative decisions. The Attorney-General also cites W**ashington Jakoyo Midiwo v Minister, Ministry of Internal Security and 2 Others [2013]**

eKLR in support of judicial restraint concerning matters within the competence of the legislature and the jurisdiction of the Court is limited to determining real and live disputes and not hypothetical and abstract issues.

48. On PPP approval and parliamentary control, the Attorney-General contends that the Petitioner wrongly equates approval of PPP projects and concession agreements with appropriation or withdrawal of public funds. PPPs are characterised as hybrid commercial arrangements rather than budgetary instruments; executive approval does not itself authorise expenditure, since expenditure remains subject to parliamentary appropriation. The Attorney-General relies on Article 1(3), arguing that sovereignty is constitutionally delegated both to Parliament and to the national Executive. Parliament exercised that sovereign authority by enacting the Public Private Partnership Act and prescribing approval thresholds, oversight and reporting mechanisms. It is therefore submitted that there is no constitutional requirement for Parliament to approve every individual executive transaction arising under legislation it has enacted, since such a requirement would undermine separation of powers and effective administration. Executive discretion remains subject to judicial review, parliamentary oversight, Auditor-General scrutiny and the principles of public finance under Article 201.

49. The Attorney-General further submits that PPP obligations do not automatically constitute public debt or require parliamentary approval under Article 211. PPPs are said generally to involve private financing, contingent or performance-based obligations and payments that remain subject to annual appropriations under Article 221. Article 201 establishes principles of openness, accountability and prudence in public finance, while Article 221 regulates the annual budget process; neither provision, it is argued, prohibits the Executive from entering into contracts having future fiscal implications. Article 211 is said to concern public borrowing rather than every contractual obligation with contingent fiscal effects. Where a PPP is financed through user charges, such as tolls, the Attorney-General argues that there is no withdrawal from the

Consolidated Fund and therefore no appropriation under Article 221.

50. Finally, the Attorney-General maintains that the PPP framework preserves Parliament's constitutional control over public resources. PPP-related financial obligations are to be incorporated into annual or supplementary budgets, while the National Treasury evaluates fiscal commitments and contingent liabilities and aggregate exposure limits are prescribed. Parliament retains oversight through committees, Auditor-General reports, budget scrutiny and supplementary appropriations. The Attorney-General therefore rejects the contention that the impugned provisions violate Articles 1, 2, 95, 96, 206, 220, 221 or 223, maintaining that they represent a constitutionally permissible allocation of functions between Parliament and the Executive. Requiring parliamentary ratification of every concession risks paralysing infrastructure delivery, politicising commercial negotiations, and blurring the distinction between legislation and execution. The Petition is consequently urged to be dismissed for want of merit.

SUMMARY OF 5TH RESPONDENT'S SUBMISSIONS

51. The 5th Respondent contends that the prayers seeking nullification of the Adani Privately Initiated Proposal (PIP) for JKIA are moot, the substratum having been extinguished by the formal cancellation of the PIP on 26 February 2025. The Respondent relies on the doctrine of mootness as articulated by the Supreme Court in **Kenya Railways Corporation & 2 others v Okoiti & 3 others [2023] KESC 38 (KLR),** where a moot matter was defined as one in which "a controversy no longer exists; a case that presents only an abstract question." The same principle was affirmed in I**nstitute for Social Accountability v National Assembly [2022] KESC 39 (KLR)** and **Okiya Omtatah Okoiti v AG [2020] KECA 589 (KLR)**. The Respondent submits that no recognised exception applies, and any adjudication would offend judicial economy as emphasised in **IEBC v Cheperenger [2015] KESC 2 (KLR).**

52. The 5th Respondent submits that the Petitioner has not discharged the burden of rebutting the presumption of constitutionality attaching to Acts of Parliament. Reliance is placed on **Mungai v Attorney General [2025] KEHC 8544 (KLR)** and the Indian Supreme Court decision in **Hamdarddawa Khana v Union of India (1960)**, which underscore that courts must assume Parliament legislates reasonably and purposively. The Respondent emphasises that Article 227(2) expressly empowers Parliament to prescribe differentiated procurement frameworks. The Preamble to the PPP Act is invoked as the clearest indicator of legislative intent, consistent with **NSSF Board of Trustees v Kenya Tea Growers Association [2023] KECA 80 (KLR)**

53. The Respondent rejects the allegation that the PPP Act excludes Parliament from oversight. It highlights Section 63, which mandates Parliamentary ratification for PPPs involving natural resources, thereby giving effect to Article 71 of the Constitution. It further notes that the PPP Committee is not a purely executive body, as its composition under Section 6 includes county representation and nonpublic officers. Parliament also retains general oversight through Section 88 annual reporting obligations. The Respondent submits that this framework is consistent with the separation of powers as articulated in **County Government of Nyeri v Cecilia Wangechi Ndungu (2015) KECA 1011 (KLR)**

54. The Respondent argues that the Petitioner's reliance on PPADA procedures is misplaced, as Article 227 establishes principles, not a singular method of procurement. The PPP Act operationalises fairness, equity, transparency, competitiveness, and costeffectiveness through feasibility studies, valueformoney assessments, disclosure obligations, and competitive safeguards. The Respondent relies on **Okoiti v Portside Freight Terminals Limited [2025] KESC 44 (KLR)**, where the Supreme Court affirmed that procurement outside PPADA is not per se unconstitutional, and on **Kenya Railways v Okoiti [2023] KESC 38 (KLR)**, which held that direct procurement may still satisfy Article 227. The Respondent submits that direct negotiation under Section 44 is a constitutionally permissible exception for projects

with “unique elements” or limited market interest.

55. The Respondent asserts full compliance with the PPP Act in the initiation, evaluation, and processing of the Adani PIP. It refers to multilayered evaluation under Sections 41–44, feasibility studies under Sections 32–33, approvals under Sections 59–60, and legal vetting by the Attorney General. The Respondent notes that the project was driven by urgent national infrastructure needs at JKIA and aligned with government policy. It further submits that direct negotiation was justified under Section 44(1)(b) due to unique technological elements and full private financing. The Respondent maintains that the process exemplified Article 227 principles in practice.

56. Finally, the 5th Respondent opposes the prayers seeking retroactive invalidation of the PPP Act and existing PPP projects, submitting that such orders would undermine legal certainty and violate the principle against retroactivity as articulated in **Macharia v KCB [2012] KESC 8 (KLR)**. It further argues that a structural interdict is unwarranted, as no systemic constitutional breach has been demonstrated and the impugned PIP has already been cancelled. The Respondent urges that, should any provision be found unconstitutional, the Court should suspend the declaration of invalidity to avoid administrative disruption, consistent with C**abinet Secretary for National Treasury v Okoiti [2024] KESC 63 (KLR)**

SUMMARY OF 2ND INTERESTED PARTY’S SUBMISSIONS

57. The 2nd Interested Party stresses the presumption of constitutionality of statutes, citing **Mwau & 2 Others v IEBC & 2 Others; Aukot & Another (Interested Parties) (Election Petition Nos. 2 & 4 of 2017) [2017] KESC 54 (KLR)**, where the Supreme Court held that “any legislative action by Parliament is presumed Constitutional.” The Petitioner, it is argued, has not demonstrated any violation of rights under the Bill of Rights. Their

complaints are structural and policybased objections to the PPP Act, insufficient to rebut the presumption of constitutionality or justify suspending the Act.

58. On constitutionality, the Party argues that the PPP Act aligns with Articles 10, 201, 227, and the separation of powers. Parliamentary oversight is preserved through mechanisms such as Section 88 (annual reporting) and Section 63 (mandatory parliamentary ratification for natural resource PPPs). The submissions rely on **National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others [2023] KECA 80 (KLR)** to emphasise purposive interpretation. They also cite **Okoiti v Portside Freight Terminals Limited & 12 Others [2025] KESC 44 (KLR)** and **Kenya Railways Corporation & 2 Others v Okoiti & 3 Others [2023] KESC 38 (KLR)** to show that procurement outside PPADA is not per se unconstitutional if Article 227 principles are upheld.

59. Finally, the 2nd Interested Party rejects the Petitioner's request for retroactive invalidation of the PPP Act. Citing **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, Joseph Maburu alias Ayub v Republic [2019] KEHC 1172 (KLR)**, and **Bloomingdale Roses (K) Ltd v Gladys Kathure Nteere [2018] KEELRC 538 (KLR)**, the submissions emphasise the general rule against retrospective application. They argue that retroactive invalidation would divest vested rights, impair contracts, and cause administrative chaos. Instead, if any provision is unconstitutional, the proper remedy is a prospective and possibly suspended declaration, consistent with the Supreme Court's guidance in **Cabinet Secretary for the National Treasury and Planning & 4 Others v Okoiti & 52 Others; Bhatia (Amicus Curiae) [2024] KESC 63 (KLR).**

ANALYSIS AND DETERMINATION

60. Having considered the pleadings herein and the submissions on record alongside the relevant law, I frame the following as the issues for determination

a. Whether the Petition is moot

b. If the answer to (a) is in the negative, whether the impugned provisions of the Public Private Partnership Act are unconstitutional

c. Arising from (b) above what are the consequential orders.

Whether the Petition is Moot?

61. In **Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) & 3 others v County Government of Nairobi [2019] KEHC 2059 (KLR), the** Court stated

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.

62. Further in **Kenya Railways Corporation & 2 others v Okoiti & 3 others [2023] KESC 38 (KLR)**, the Supreme Court adopted the Blacks Law Dictionary (9th Edition) definition of a moot case stating as follows-

[69]…. a "moot case" as "a matter in which a controversy no longer

exists; a case that presents only an abstract question that does not arise from existing facts or rights", and as a verb, as meaning "to render a question as of no practical significance". Mootness of a matter therefore arises where a live controversy no longer exists between parties to a suit and the decision of the court, in such instance, would have no practical effect. The doctrine of mootness enquires whether events subsequent to the filing of a suit would have eliminated the controversy between the parties.

63. The Petition herein challenges the Privately Initiated Proposal by the 4th Interested Party, Adani Group in relation to two projects; referred to as the JKIA and KETRACO projects. By the time the Petition came up for hearing the two projects had been cancelled. It is on this basis that the respondents and the 2nd Interested party argue that the Petition is moot.

64. The circumstances herein are almost identical to those in **Kenya Railways Corporation & 2 others v Okoiti & 3 others (Supra)** where the Petitioners had sought declaratory, injunctive and directives and an order of certiorari to quash the award of the Contract to CRBC to construct the SGR. By the Petition was being heard, the SGR project was complete and had been commissioned.

65. Whilst observing that some of the reliefs sought were no longer available their remained some live issues for consideration and determination, the court then proceeded to lay out exceptions to the doctrine of mootness, observing that the issues pending raised matters of public importance and that the operative law surrounding the litigation was unsettled. The Court proceeded to cite with approval the decision of the Supreme Court of Canada In **Re Opposition by Quebec to a Resolution to amend Constitution, [1982] 2 SCR 793**, where the Court held that in certain circumstances, the Court may entertain an appeal which has become moot as follows-

While this court retains its discretion to entertain or not to

entertain an appeal as of right where the issue has become moot, it may, in the exercise of its discretion, take into consideration the importance of the constitutional issue determined by a court of appeal judgment which would remain unreviewed by this court. In the circumstances of this case, it appears desirable that the constitutional question be answered in order to dispel any doubt over it and it accordingly will be answered.

66. By parity of reasoning, I am unable to accept the proposition that the termination of the projects initiated by the 4th Interested Party renders the present dispute moot. Termination may have halted the physical progression of the projects, but it did not extinguish the constitutional and statutory questions that continue to animate the Petition. The reliefs sought at Paragraph 171 reveal that the Petitioner challenges not merely the operational status of the projects, but the legality of the processes, decisions, and governance structures that underpinned them. Those questions, touching on procurement regularity, administrative accountability, fiscal prudence, and the proper exercise of statutory power, remain live and justiciable. I am therefore satisfied that the Petition raises issues of public interest meriting adjudication.

Whether the impugned provisions of the Public Private Partnership Act are unconstitutional?

67. The respondents rely on the presumption of constitutionality, a principle articulated in **Ndyanabo v AttorneyGeneral [2002] AHRLR 243 (TzCA 2002)**, where the Court held inter alia as follows-

[19.] We propose, before commencing to examine the correctness or otherwise of counsel's arguments, to allude to general principles governing constitutional interpretation which, in our opinion, are relevant to the determination of the issues raised by counsel in this appeal. These principles may, in the interests of brevity, be stated as follows. First, the Constitution of the United Republic of

Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in time with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and rule of law…

[20.] Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, that our young democracy not only functions but also grows, and that the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed. <u>Thirdly, until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative. Fourthly, since, as stated a short while ago, there is a presumption of constitutionality of a legislation, save where a clawback or exclusion clause is relied upon as a basis for constitutionality of the legislation, the onus is upon those who challenge the constitutionality of the legislation; they have to rebut the presumption.</u> Fifthly, where those supporting a restriction on a fundamental right rely on a clawback or exclusion clause in doing so, the onus is on them; they have to justify the restriction. (Emphasis Supplied)

68. The burden of rebutting this presumption lies with the challenger. In **Matindi v National Assembly & 2 others (Petition E714 of 2025) [2026] KEHC 2484 (KLR) (Constitutional and Human Rights) (19 February 2026) (Judgment)** the Court expressed itself thus-

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

69. The Public Private Partnerships Act, 2021 repealed and replaced the Public Private Partnerships Act, 2013, thereby restructuring Kenya's PPP governance framework. The 2021 Act introduces a new institutional architecture (the PPP Committee and PPP Directorate), a streamlined procurement regime to replace that under the 2013 Act which was regarded as lengthy inflexible, expensive and inefficient. The Act also aims to integrate the fiscal oversight with the Public Finance Management Act.

70. The Petitioner argues that Articles 1, 2, 10, 95, 96, 201, 206(2), 220, 221 and 223 of the Constitution must therefore be read together to reinforce Parliament's authority over public finance, expenditure and executive accountability. It is submitted that sections 59, 60,61,62 and 72(1) as read with Section 63 of the Public Private Partnerships Act, 2021 violate the Constitution as they oust parliamentary oversight over the PPP concessions and instead contrary to the express provisions of the Constitution place this responsibility on the PPP Committee. The Petitioners argue that Parliament has legislated away its constitutionally mandated authority over public finances.

71. The respondents and Interested Party argue that Section 88 of the Act aptly provides for parliamentary oversight as Section 88(3) requires that the Cabinet Secretary submit a copy of the annual report to Parliament.

72. Article 95(4)(c) of the Constitution provides that the National Assembly "exercises oversight over national revenue and its expenditure." The provision is framed in mandatory terms, leaving no discretion as to whether Parliament may or may not perform this function. When the Constitution speaks in imperative language, courts must give effect to that command without dilution. Oversight of national revenue is not a ceremonial role; it is constitutionally entrenched and indispensable, it is a substantive constitutional safeguard designed to ensure transparency, accountability, and fidelity to the principles of public finance under Article 201.

73. In **Orange Democratic Movement Party & 4 others v Speaker of National Assembly & 5 others [2024] KEHC 11494 (KLR),** the Court was emphatic that Parliament could not legislate its constitutional mandate 'even at the altar of expeditious privatisation'. While PPPs enable private sector participation, the Act does not require parliamentary ratification for all PPPs, except those involving natural resources under section 63 of the Act and Article 71 of the Constitution. The constitutional question is not whether a transaction is labelled as a PPP, but whether it creates expenditure, borrowing, guarantees, or public liability.

74. The Act contemplates three PPP categories: privately financed projects with no government financial commitment; PPPs involving government expenditure or appropriation, including availability payments, annuity payments, viability gap funding and termination payments; and Government Support measures and contingent liabilities under sections 28 and 36, including guarantees, letters of support, political risk insurance and other instruments. The second and third categories reveal that even privately financed PPPs may expose the State to substantial fiscal obligations, thereby activating

Articles 201, 220 and 221 of the Constitution. Parliament need not approve the project, but it must approve the expenditure.

75. Articles 95, 201, 206, 220 and 221 of the Constitution establish a structured constitutional process governing public finance. Article 206(2) of the Constitution prohibits withdrawal from the Consolidated Fund without parliamentary appropriation. The Executive may administer public finances, but it cannot autonomously bind the Consolidated Fund. Section 88's reporting obligation does not satisfy the constitutional requirement of oversight. As affirmed in **In the Matter of Council of Governors & 47 others [2020] KESC 65 (KLR),** appropriation and expenditure of public resources are constitutional processes, not matters left to executive discretion, even where the State elects to use PPPs.

76. Where PPPs require direct payments, availability payments, annuity payments, viabilitygap funding, capital contributions or termination payments; such obligations constitute national expenditure. Embedding these obligations in longterm PPP contracts cannot convert expenditure requiring appropriation into expenditure insulated from parliamentary control. The longterm nature of PPPs heightens the relevance of Article 201, which demands prudent and responsible financial management across generations. An interpretation enabling the Executive to impose longterm fiscal obligations without parliamentary processes cannot therefore survive scrutiny.

77. Article 220(1)(c) of the Constitution requires budget proposals on "borrowing and other forms of public liability that will increase public debt." PPPs often generate contingent liabilities; termination payments, guarantees, revenue shortfalls, captured in sections 36 and 58 of the PPP Act. Section 58 of the Public Finance Management Act requires parliamentary approval for national government guarantees, even where the primary borrower is private. The statutory framework thus confirms that PPPrelated liabilities fall within parliamentary financial oversight.

78. The Executive cannot avoid parliamentary scrutiny by structuring public financial commitments as PPPs or by relying on private capital. The decisive inquiry is whether the State assumes obligations involving expenditure, borrowing, guarantees or public liability. Where such obligations arise, parliamentary authorisation is constitutionally mandatory. Accordingly, the Court finds that sections 59, 60 and 72(1) of the PPP Act are unconstitutional to the extent that they exclude Parliament from approving expenditure where a PPP creates expenditure, borrowing, guarantees, public debt or other forms of public liability for the national government

79. In addition, tThe Petitioners challenge sections 40(3)(j), 44(5) and 44(6) of the PPP Act on grounds that they allow contracting authorities discretion to decide whether a privately initiated proposal (PIP) should undergo open competitive procurement, allegedly violating Article 227(1) of the Constitituion. Article 227(1) Constitution requires procurement systems to be “fair, equitable, transparent, competitive and cost-effective,” while Article 227(2) permits Parliament to design different procurement procedures provided, they retain these constitutional qualities. Parliament may therefore tailor procurement methods for complex PPP projects, but it cannot make Article 227 optional or create procedures that dilute constitutional standards.

80. Part V of the PPPA establishes procurement methods, direct procurement, PIPs, competitive bidding and restricted bidding, and section 37(2) expressly requires transparency, cost-effectiveness and equal opportunity. Section 40 must be read within this constitutional framework: it allows PIPs only where they meet stringent criteria including alignment with national priorities, value for money, affordability, fair market pricing and risk transfer. Section 40(3)(j) requires the proponent to justify why open competitive procurement is unsuitable, a justification that forms the factual foundation for any departure from competition. The Act embeds PIPs in a multilayered process involving due diligence, evaluation, assessment by the Directorate and determination by the Committee, ensuring institutional scrutiny rather than unfettered

discretion.

81. The question is therefore whether the statutory discretion can be exercised consistently with Article 227. The Supreme Court's guidance in **Kenya Railways Corporation & 2 others v Okoiti & 3 others [2023] KESC 38 (KLR)** is decisive: procurement must conform to Article 227 even when undertaken through GovernmenttoGovernment arrangements or other special procedures. In **Okoiti v Portside Freight Terminals Limited & 12 others [2025] KESC 44 (KLR**), the Court held that Article 227(2) does not create exceptions permitting abandonment of constitutional procurement standards; whatever method is adopted, the constitutional minimum remains applicable.

82. Article 227 does not constitutionalise one procurement method; it constitutionalises procurement standards. Competition is a constitutional value, but its form may vary where justified. A PIP may legitimately follow a different pathway because the idea originates with a private party possessing unique information or innovation. But this does not confer a right to exclusive negotiation. The contracting authority must determine whether bypassing open competition is objectively justified and whether the chosen method remains fair, transparent, competitive and cost-effective. Section 40(3)(j) cannot be read as permission to bypass competition based on administrative convenience, preference or the mere attractiveness of a proposal.

83. Sections 44(5) and 44(6) must be exercised within the same constitutional discipline. They cannot be used to select a preferred private party first and devise the procurement method afterwards, nor do they give the proponent a proprietary claim to the project. The discretion must be exercised for proper purposes, on relevant material, with rational reasons, and consistently with Article 227. Exclusion of the PPADA under section 4(2) does not exclude Article 227, which is constitutional and therefore supreme. As held in **Kenya Railways Corporation & 2 others v Okoiti & 3 others [2023] KESC 38 (KLR),** exemption from statutory procurement

does not remove procurement from constitutional scrutiny.

84. The Petitioners have therefore not demonstrated that sections 4(2) 40(3)(j), 44(5) and 44(6) are unconstitutional. Properly construed, these provisions do not create an exception to Article 227; they confer a discretion that must be exercised within constitutional boundaries. Their validity does not immunize their application from constitutional review: if a contracting authority departs from competition without objective justification, acts opaquely, excludes similarly situated providers arbitrarily, or fails to secure value for money, the resulting decision may be unconstitutional notwithstanding formal compliance with the PPPA. The Constitution remains the final measure of legality.

85. Ultimately, the Petition succeeds to the extent that I find that 59, 60 and 72(1) of the PPP Act are unconstitutional to the extent that they exclude Parliament from approving expenditure where a PPP creates expenditure, borrowing, guarantees, public debt or other forms of public liability for the national government.

86. In considering the appropriate orders, I am guided by the decision of the Supreme Court in C**abinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae) [2024] KESC 63 (KLR),** where the Court recognised that suspension of a declaration of invalidity may be preferable where immediate invalidity would cause greater harm. The Petitioner indicates that there are 31 PPP projects in the pipeline in different stages. In conclusion, the following the Orders are appropriate in the circumstances;

a. Sections 59, 60 and 72(1) are hereby declared unconstitutional to the extent that they fail to provide for parliamentary approval of PPP projects that create public expenditure, guarantees, public debt or other forms of public liability for the national government

b. The invalidity is suspended for a period of 6 months to allow Parliament to make the necessary amendments

c. The matter will be mentioned on 11th May 2027 to confirm compliance and take further directions.

d. This being a public interest litigation each party will bear their own costs

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI this 17th DAY OF SEPTEMBER 2026

SIGNED BY:
HON. LADY JUSTICE NYAUNDI PATRICIA MANDE, SC

THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT
HIGH COURT CONSTITUTION AND HUMAN RIGHTS
DATE: 2026-09-17 13:39:09+03