

LEGAL ALERT

THE HIGH COURT REQUIRES PARLIAMENTARY APPROVAL FOR PPP FISCAL COMMITMENTS

In [Katiba Institute v National Assembly & 9 others \[2026\] KEHC 13501 \(KLR\)](#), the High Court has held that Article 95(4)(c) of the Constitution requires Parliament to approve PPP projects that create borrowing, public expenditure, guarantees, public debt or other public financial liabilities for the national government.

The Court held that this constitutional role under Article 95(4)(c) cannot be substituted by a statutory reporting requirement. On that basis, the Court declared sections 59, 60 and 72(1) of the Public Private Partnerships Act, 2021 unconstitutional to the extent that they do not require parliamentary approval of PPP projects that create such public financial obligations. However, the declaration of invalidity was suspended for six months to allow Parliament to amend the Act while taking into account the court's holding.

The Court further rejected the argument that termination of the challenged projects (JKIA and KETRACO) rendered the dispute moot. It held that the *doctrine of mootness* is subject to an exception where a case raises a constitutional question of continuing public importance whose determination would otherwise evade judicial scrutiny. The termination of the projects therefore did not extinguish the live constitutional questions concerning the legality of the statutory framework, public-finance accountability, and the exercise of statutory power.

The decision underscores the mandatory nature of parliamentary oversight under Article 95(4)(c) and the public-finance provisions in Articles 201, 206(2), 220 and 221 of the Constitution. The Court emphasized that parliamentary oversight of national revenue and expenditure is substantive, not ceremonial, and cannot be replaced by a reporting obligation such as the Cabinet Secretary's duty to submit an annual report under section 88 of the PPP Act.

The Court held that the decisive inquiry is whether the PPP exposes the national government to expenditure, borrowing, guarantees, debt, contingent liability or any other public financial obligation. This is so even where the project is described as "privately financed" or structured to rely on private capital including private initiated proposals.

The Court identified as particularly significant PPP structures involving Availability, annuity or viability-gap payments, capital contributions, termination payment; government guarantees, letters of support or political-risk insurance; and revenue-shortfall support and other contingent liabilities.

Where such commitments exist, the Court held that the constitutional appropriation and oversight processes are engaged pursuant to Article 95(4)(c) which empowers parliament to exercise oversight over national revenue and expenditure. The Court rejected that this role can be satisfied through the reporting mechanism under section 88 of the PPP Act. The Court held that reporting after a liability has been assumed is not equivalent to parliamentary approval or oversight of the expenditure or liability. The Court

accordingly, declared sections 59, 60 and 72(1) unconstitutional to the extent that they fail to provide for parliamentary approval of PPP projects creating such public financial obligations. The declaration was suspended for six months to enable Parliament to cure the constitutional defect.

Procurement and privately initiated proposals; Article 227

The Court declined the invitation to invalidate sections 4(2), 40(3)(j), 44(5) and 44(6) of the PPP Act concerning privately initiated proposals and departures from open competition. It held that these provisions are not unconstitutional on their face because they must be construed and applied consistently with Article 227 of the Constitution.

Article 227 does not constitutionalise a single procurement method; it constitutionalises procurement standards. All procurement methods, including PPP-specific procedures and privately initiated proposals, must remain fair, equitable, transparent, competitive and cost-effective. A privately initiated proposal does not confer an automatic right to exclusive negotiation or a proprietary entitlement to the resulting project. A departure from open competitive procurement must be objectively justified on the facts and supported by rational reasons. Exclusion of the Public Procurement and Asset Disposal Act under section 4(2) of the PPP Act does not exclude the operation of Article 227.

Practical implications

The decision requires national-government contracting authorities to examine the substance of PPP arrangements and identify any direct or contingent financial exposure before commitments are undertaken. Particular scrutiny should be given to government payment obligations, viability-gap funding, guarantees, revenue-support arrangements, termination compensation and other forms of government support. Where a PPP creates public financial liability, the contracting authority must address the applicable parliamentary approval and appropriation requirements.

For project sponsors, lenders and investors, the decision makes parliamentary approval an important consideration in assessing the bankability and enforceability of government-support arrangements. Due diligence should establish whether a government commitment requires parliamentary approval, whether the requisite appropriation has been made or can lawfully be made, and how the agreement allocates the consequences of approval or appropriation being delayed or withheld.

The decision also provides an important safeguard against the misuse of PIPs. A contracting authority cannot treat a PIP as conferring exclusivity or use the PPP framework to avoid competitive procurement. Any departure from open competition must have an objectively defensible basis and remain consistent with Article 227.

Conclusion

The decision does not invalidate Kenya's PPP framework or require Parliament to approve every PPP project. Its effect is more precise, but potentially far-reaching: where a PPP exposes the national government to expenditure, borrowing, guarantees, public

debt or another form of public liability, parliamentary approval is constitutionally mandatory.

The ruling also confirms that PPP procurement remains subject to Article 227 at all times. Special statutory PPP procedures and privately initiated proposals may be used, but they cannot become vehicles for avoiding constitutional requirements of fairness, transparency, competition and cost-effectiveness.

For expert legal support on public-private partnerships, public procurement and public-finance matters, contact us on info@gkmuturi.ke or gmuturi@gkmuturi.ke.

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