



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI LAW COURTS

CASE NUMBER: HCCHRPET/E146/2025

CITATION: WAMALWA AND ECHESA COMPANY ADVOCATES VS STATE LAW OFFICE AND
CABINET SECRETARY MINISTRY OF AGRICULTURE, LIVESTOCK AND FISHERIES

RULING

Introduction

1. The Petition dated 20/3/2025 is supported by sworn affidavit of Athanas Wafula Wamunyinyi of even date.
2. The Petitioner assails the 3rd Respondent's action of posting in its website an invitation to tender on 28/2/2025 namely, the 'International Tender Notice, No. MOALD/SDA/IT/001/2024-2025' requesting prospective tenderers to bid for the leasing of the public sector owned/controlled sugar companies that was set to expire on the 21/3/2025.
3. The Petitioner alleges that the said act violates Articles 10, 201 and 227 of the Constitution for reasons that there was no involvement of the public through public participation prior to taking the said action in regard to Nzoia Sugar Company; that the said tendering process will not yield value for money or lead to sustainable and profitable operation of the sugar mills to benefit the economy and stakeholders involved and further, it is exposing public assets to the risk of mismanagement and loss.
4. This matter was initially placed before the Presiding Judge of this Division, Justice E.C. Mwita on 24/3/2025 who directed service and reallocated the matter to this Court fixing a mention date of 26/3/2025 for further directions.
5. I directed reservice by physical means upon the Respondents when the matter came up on the aforementioned mention date. On 23/4/2025; the Mr. Kaumba from the Office of Attorney General appeared on behalf of all the Respondents. He notified this Court he had filed a notice of Preliminary Objection dated 15/4/2025. The Court directed that the Preliminary Objection would take precedence as it was challenge on the Court's jurisdiction and ordered the filing of submissions on the same.
6. In the meantime, three applications seeking for joinder were filed vide Notice of Motion by the 1st



Interested Party dated 28/4/2025, Notice of Motion by the 2nd Interested Party dated 6/5/2025 and the Notice of Motion dated 8/5/2025 by the 3rd & 4th Interested Party. Both the Petitioner and the Respondent, dropped their initial stance to oppose joinder to expedite focus on the Petition itself hence the Court granted leave to the Interested Parties to join the proceedings on 12/5/2025.

7. Upon admission into the proceedings, the 1st Interested Party, the 3rd & 4th Interested Parties, separately filed their respective Preliminary Objections to the Petition.

8. This ruling thus pertains to three Preliminary Objections; namely: the Respondents P.O. dated 15/4/2015, the 1st Interested Party P.O dated 13/5/2025 and the joint P.O. by the 3rd & 4th Interested Party dated 14/5/2025. The content of the said Preliminary Objections is as follows:

Respondents' Notice Preliminary Objection dated 15/4/2025

The Preliminary Objection was filed by Kaumba S.O, Deputy Chief State Counsel on behalf of all the Respondents. It is based on grounds that:

i) It is appropriate, under the doctrine of Exhaustion of Remedies and the scheme of the Constitution under Article 159, for this Honourable Court to exercise jurisdiction over the subject matter in light of alternative redress mechanisms available under Sections 9 (1) (h) and 28 (1) of the Public Procurement and Asset Disposal Act, Cap 412C Laws of Kenya, Section 75 (1) and (4) of the Public Private Partnerships Act Cap 430 Laws of Kenya

ii) The allegation of want of public participation is without basis and is premature on account of open tendering (which in itself is an invitation to the public to participate) in light of Section 91 of the Public Procurement and Asset Disposal Act as clarified by the Court of Appeal in Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR.

iii) The Petition/Application cannot be considered by this Honourable Court unless and until the Court dispenses with jurisdictional question in line with the legal principle established by the Court of Appeal in Owners of Motor Vessel 'Lilian S vs. Caltex Oil (Kenya) Limited (1989) KLR and affirmed by the Supreme Court In the Matter of the Interim Independent Electoral Commission [2011] eKLR.

9. 1st Interested Party Notice of Preliminary Objection dated 13th May, 2023.

The Preliminary objection filed by Munga Kibanga & Co. Advocates was based on the following grounds:

i) The Petition is res judicata, the issue of whether or not there was public participation having been raised and determined in Nairobi PET/065 of 2024, Martin Nyongesa Barasa vs. The Cabinet Secretary, Ministry of Treasury & Economic Planning & Others

ii) The Petition is bad in law and an abuse of the Court process.

10. 3rd & 4th Interested Parties Notice of Preliminary Objection dated 14th May, 2025

The Preliminary Objection filed by Wekesa & Simiyu Advocates was premised on the following grounds:

i) That given that the entire Petition herein challenges the procurement process leading to leasing of Nzoia Sugar Company Limited which is a public sector owned/controlled sugar company which procurement process was undertaken under the Public Procurement and Asset Disposal Act, 2015



and Regulations thereat, this Court does not have jurisdiction under the Public Procurement and Asset Disposal Act, 2015 to hear and determine this Petition in the first instance.

ii) That the subject matter of this Petition being Tender No. MOALD/SDA/IT/001/2024-2025 AS amended for leasing of Nzoia Sugar Company Limited, a Public Sector owned/controlled sugar company, having previously litigated in Petition No. E065 of 2024 save for the period now being 2024-2025 instead of 2023 to 2024 and Petition E262 of 2020 in this Court and judgments delivered, the Petition herein is res judicata and this Court does not have jurisdiction to relitigate the same issue over and over again.

iii) That this Court having determined the issue the subject matter of this Petition being Tender No. MOALD/SDA/IT/001/2024-2025 as amended for Leasing of Nzoia Sugar Company Limited, a public owned/controlled sugar company in the two previous petitions being E065 of 2024 and E262 of 2020 and rendered judgments, the Court lacks jurisdiction to sit on its own appeal and rehear the same issue.

iv) That the Petition and the Notice of Motion herein are res-subjudice as there exists a Notice of Motion dated 10/2/2025 filed in Petition No. E065 of 2024 Martin Nyongesa Barasa before this Court over the same subject matter in which the Petitioner is agitating seeking the same reliefs, claims as those in this Petition; and

v) That it is meet and in furtherance of the overriding objectives of Article 159 (2) of the Constitution and Rules made thereunder for timely disposal of proceedings that this Court peremptorily strike out the Petition and the Notice of Motion as an abuse of the process of the Court with costs.

11. Grounds of Opposition dated 27/4/2025 in response to the Respondents' Notice of Preliminary Objection dated 15/4/2025 were filed by the Petitioner responding as follows:

(i) THAT the said Preliminary Objection is misplaced, premature and an attempt to summarily defeat the Petitioner/Applicant's Application without affording a hearing on the constitutional issues raised.

(ii) THAT for clarity, the Petition and Application do not seek to challenge the procurement process in isolation or on technical grounds under the Public Procurement and Asset Disposal Act. Rather, the Petition and Application challenge the Constitutionality, legality, and propriety of the entire process, starting from the inception of the decision to lease Nzoia Sugar Company, the absence of public participation, and the lack of a lawful and transparent framework guiding that decision.

(iii) THAT the doctrine of exhaustion is not absolute and does not bar the Honourable Court from exercising its jurisdiction under Article 165(3) of the Constitution of Kenya 2010 where constitutional rights are alleged to have been violated.

(iv) THAT the Petitioner/Applicant's Application raises fundamental constitutional issues including violation of the right to public participation (Article 10 of the Constitution of Kenya 2010), fair administrative action (Article 47 of the Constitution of Kenya 2010), and legitimate expectation.

(v) THAT there exists no adequate or suitable alternative remedy under the Public Procurement and Asset Disposal Act or the Public Private Partnerships Act to address the constitutional grievances raised by the Petitioner/Applicant.

(vi) THAT the High Court has unfettered jurisdiction under Article 165(3) (d) of the Constitution of



Kenya 2010 to determine whether a right or freedom in the Bill of Rights has been violated.

(vii) THAT the issue of public participation cannot be addressed by mere publication of a tender, public participation must be meaningful and not superficial.

(viii) THAT the Preliminary Objection raises matters requiring evidence and interpretation of constitutional provisions and is therefore not a pure point of law.

(ix) THAT the Preliminary Objection is without merit and designed to delay the just hearing and determination of the Petitioner/Applicant's Application.

(x) THAT it is in the public interest and the interest of justice that this Honourable Court dismisses the Preliminary Objection dated 15th April 2025 filed by the Respondents.

12. The Petitioner equally filed Grounds of Opposition dated 16/5/2025 responding to the 1st Interested Party's Preliminary Objection dated 13th May, 2025 and in answer thereto stated thus:

(i) THAT the said Preliminary Objection is misplaced, premature, and an attempt to summarily defeat the Petitioner/Applicant's Application without affording a hearing on the constitutional issues raised.

(ii) THAT the doctrine of res judicata is inapplicable in this matter as the Petition challenges a fresh procurement process, being International Tender Notice No. MOALD/SDA/IT/001/2024/2025, whose legality and procedural integrity have never been adjudicated upon in any previous litigation.

(iii) THAT for clarity, the Petition and Application do not seek to challenge the procurement process in isolation or on technical grounds under the Public Procurement and Asset Disposal Act. Rather, the Petition and Application challenge the Constitutionality, legality, and propriety of the entire process, starting from the inception of the decision to lease Nzoia Sugar Company, the absence of public participation, and the lack of a lawful and transparent framework guiding that decision.

(iv) THAT there is no similarity of parties, cause of action, or issues between the current Petition and any previously determined case, a prerequisite for the doctrine of res judicata to apply under Section 7 of the Civil Procedure Act.

(iv) THAT the Petitioner/Applicant's Application raises fundamental constitutional issues, including violation of the right to public participation (Article 10 of the Constitution of Kenya 2010), fair administrative action (Article 47 of the Constitution of Kenya 2010), and legitimate expectation.

(v) THAT the 1st Interested Party's Preliminary Objection is a thinly veiled attempt to shield the Respondents from judicial scrutiny and frustrate constitutional litigation, contrary to the principles in Articles 22, 23, 48, and 258 of the Constitution of Kenya 2010.

(vi) THAT the 1st Interested Party lacks legal standing to raise the objection on res judicata, as it is a matter of law and fact properly left to the primary Respondents.

(vii) THAT the issue of public participation cannot be addressed by mere publication of a tender, public participation must be meaningful and not superficial.

(viii) THAT the Preliminary Objection raises matters requiring evidence and interpretation of



constitutional provisions and is therefore not a pure point of law. (x) THAT the Preliminary Objection raises factual disputes requiring evidentiary interrogation, which disqualifies it from being determined as a pure point of law.

(xi) THAT the Preliminary Objection is without merit and designed to delay the just hearing and determination of the Petitioner/Applicant's Application.

(xii) THAT it is in the Public interest and the interest of justice that this Honourable Court dismisses the Preliminary Objection dated 13/5/ 2025.

Case Submissions

Respondents' Submissions in support of notice of preliminary objection dated 15/4/2025

13. Deputy Chief State Counsel, Mr. Kaumba S.O, filed written submissions dated 24/4/2025 on behalf of all the Respondents.

14. Mr. Kaumba submitted that the that the cause of action challenges the tendering process for the international tender Notice No. MOALD/SDA/IT/001/2024/2025.

15. He argued that Article 227 of the Constitution demands for a value-based system of public procurement premised on a system that is fair, equitable, transparent, competitive and cost effective and sub-article (2) thereof contemplates a procurement framework based on an Act of Parliament.

16. He submitted that in the light of this, Parliament enacted the Public Procurement and Asset Disposal Act, (PPADA) Cap 412C Laws of Kenya, and the Public Private Partnerships Act Cap 430 (PPPA) Laws of Kenya, that regulate public procurement depending on the subject matter.

17. He argued that under Section 9(1)(h) of the Public Procurement and Asset Disposal Act, the Public Procurement Regulatory Authority which is established under section 8 has the mandate to investigate and act on complaints received on procurement and asset disposal proceedings emanating from procuring entities, tenderers, contractors or the general public that are not subject of administrative review. It was thus Mr. Kaumba's contention that Petitioners were obliged to lodge the whatever complaint they may have had with the Public Procurement Regulatory Authority which under section 9(1) (c), the Public Procurement Regulatory Authority has power to enforce the standards stipulated in the Act.

18. Further, that under section 28(1) of the Act, the Public Procurement Administrative Review Board, established under section 27, has the mandate that covers the following:

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.

19. Mr. Kaumba further contended that because the tendering process anticipated a public-private partnership the leasing of the sugar factory; it is subject to the provisions of Public Private Partnerships in which section 75(1) provides for establishment of a Petition Committee that is for and is tasked with the hearing and determining petitions on any decision by the Committee, Directorate or a Contracting authority under the Act. That pursuant to Section 9 (4), any person who is aggrieved by a decision of the Directorate, Committee or a contracting authority regarding a tender process or project agreement may lodge a petition for the review of the decision by the Petition Committee.



20. He submitted that this Petition has been filed invoking the jurisdiction of the Court without prior exhaustion the available statutory remedies. He relied on the Supreme Court case of Waity v Independent Electoral & Boundaries Commission & 3 others (Petition 33 of 2018) [2019] KESC 54 (KLR) (8 February 2019) (Judgment).

21. In regard to the allegation that there was no meaningful public participation, Mr. Kaumba countered that the allegation is premature and made without any basis at all. He relied on the Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR where the Court of Appeal held as follows:

“168. Public participation in procurement process is achieved largely through invitation of members of the public to bid and submit tenders for procurement of goods, works or services. The invitation is ordinarily done through competitive and open advertisement to the public. Section 91 (1) of Public Procurement and Asset Disposal Act, 2015 echoes this by stipulating that open tendering shall be the preferred procurement method for goods, works and services. Section 91 (2) of the Public Procurement and Asset Disposal Act, 2015 permits a procuring entity to use alternative procurement procedure if allowed by law and stipulated conditions are satisfied. A common theme when alternative procurement procedure is adopted is that the scope of public participation through competitive bidding is reduced and progressively eliminated as we approach the direct procurement method.”

22. Mr. Kaumba questioned the Petitioner’s claim that there was no public participation on the instant tender when this Petition was filed at a time when the open international competitive tender was still under progress following its advertisement in the media with wide circulation and was available on various portals.

23. Further, that other tendering processes had not even commenced including tender opening, technical evaluation and financial evaluation.

24. The Respondents maintained that in the absence of an allegation that some members public were locked out or rigged out from the process, the allegation of lack of public participation cannot be sustained. He relied on John Harun Mwau & 3 others v Attorney General & 2 others [2012] eKLR where the High Court observed thus:

“118. We also agree with the submissions of Prof. Ghai that this court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the Constitution conferred under article 165(3)(d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy...”

25. Mr. Kaumba submitted that the Petitioners were mechanically tossing out allegations of lack of public participation without any specificity and thus does not meet the threshold set by the Court of Appeal in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where the Court emphasized the importance of defining claims precisely to prevent the issues being enlarged by narrowing the parties to definite issues in order to alleviate the expense and delay, especially, as regards the amount of testimony required from either side at the hearing.

26. It was also contended on behalf of the Respondents that the issue of public participation in the tendering process as pertains to Nzoia Sugar Factory was conclusively determined by Justice Mwita in *HCCHRPET/E065/2024 -Martin Nyongesa Barasa Vs State Law and Ministry of Agriculture, Livestock and Fisheries* where he found that there was prior public engagement that led to the



recommendations that sugar companies would be put on leasing. The Judge held thus:

“The replying affidavit by Prof. Ndung’u filed in response to the petition and the annexures thereto show that although initially approval had been given for privatization of the sugar companies, that position was shelved when the National Assembly approved long term leasing following recommendations from the Joint Committees. Indeed, the report signed on 14th September 2023 by the Joint Committees on Finance and National Planning and that on Agriculture and Livestock, attached to the affidavit as “LK11” and submitted to the National Assembly, recommended, among others, approval of the leasing of five (5) sugar companies under the provisions of the Public Privat Partnership Act; that the House vacates the privatization model that had been earlier approved by the National Assembly in 2015 and approval of the decision of the Cabinet to write off tax arrears owed by the five (5) sugar companies (Nzoia; Chemelil; Muhoroni; Miwani and South Nyanza Sugar Companies). The report was prepared after stakeholders’ engagement with the joint committees and contains the views received from the people who appeared before the joint committees. The report was tabled before the National Assembly; the National Assembly vacated the privatization model approved in 2015; approved the leasing model as well as the Cabinet decision to write off debts owed by the sugar companies as recommended in the joint committees’ report. Following adoption of the recommendations, the Ministry of Agriculture and Livestock issued the impugned international tender notice inviting bids for the leasing of the sugar companies. This is in annex “LK1” in the replying affidavit which showed that the tender notice invited bids for leasing of the sugar companies and not privatisation.”

27. The Respondents thus urged that this Petition be dismissed.

1st Interested Party Submissions in Support of Preliminary Objection Dated 13/5/2025

28. The 1st interested Party filed submissions dated 13/5/2025 through the firm of Munga Kibanga & Co. Advocates.

29. The 1st interested Party lunged at the Petitioners claim that there was no public participation prior to the process leading to issuance of the international tender notice. He pointed out that the issue raised and dealt with in a previous trial on the same subject matter hence is res judicata having been conclusively determined by the High Court in the case of Barasa v Cabinet Secretary, Ministry of Treasury & Economic Planning & 3 others (Petition 065 of 2024) (2025) KEHC 1455 (KLR) (Constitutional and Human Rights) (28 February 2025).

30. Counsel, citing Section 7 of the Civil Procedure Act hammered home the importance of res-judicata principle which he supported through the Court of Appeal in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & Others [2015] KECA 472 KLR where it was held that the principle of res judicata is not a mere technicality but a principle that goes to the root of the suit and upholds the public interest that there should be an end to litigation and also, it serves the aim of ensuring that a party is protected from repetitive litigation on the same subject matter.

31. It was submitted that res judicata is available in two principal ways: cause of action res judicata and issue-based res judicata.

32. Counsel highlighted the prayers that were sought in previous matter, Petition E065 of 2024 and maintained that these prayers are principally similar to what the instant Petition is also seeking. He submitted that in the previous case, its prayers were pegged allegation encapsulated in paragraph 4 of the Court decision in PET 065 of 2024 that stated thus:



'the privatisation of the sugar companies through long term leases was being done without public participation in violation of the Constitution'

33. Counsel argued that the Court addressed the issue at paragraph 37 of the Judgment in Petition E065 of 2024 and arriving at the conclusion contained in paragraph 44 where the Court held:

"In this respect, the Respondent demonstrated through documentary evidence that there was stakeholders' engagement and the National Assembly approved leasing of the sugar companies"

34. Counsel contended on behalf of the 1st Interested Party that even the prayers in the instant Petition, particularly prayers 1, 2, 3, 4 and 5 are analogous to prayers a, b, c, f & g in the former suit, Petition E065 of 2024 with only some minor differences in the tender number but the subject matter is the same.

35. That even the parties, other than the Petitioner are also the same hence is an attempt to revive an already concluded matter disguised as public interest litigation yet the matter was concluded on merits vide Petition E065 of 2024 and the interest of the Petitioner as a member of public is deemed to have been represented in that suit which was also initiated in public interest.

3rd and 4th Interested Parties Submissions in support of their Preliminary Objection dated 14/5/2025

36. Wekesa and Simiyu Advocates filed written submissions dated 14/5/2025 in support of the 3rd and 4th Interested Parties' preliminary objection dated 14th May, 2025.

37. The 3rd and 4th Interested Party submitted that the main ground upon which the Petitioner seeks to nullify the tender for leasing Nzoia Sugar Company is the allegation there was no public participation and/or meaningful public participation but this issue is res-judicata having been the subject of three previous Constitutional Petitions and Judicial Review where these issues were determined with finality by the High Court and no appeal was lodged to the Court of Appeal. These cases are: Nzuki Musyoki vs. Agriculture and Food Authority and Attorney General Petition No. E262 of 2020 Nairobi [2002] KEHC 525 (KLR); Martin Nyongesa Barasa vs. The Cabinet Secretary Ministry of Treasury and Economic Planning and Others, Petition No. E065 of 2024 Nairobi [2025] eKLR and Republic v Cabinet Secretary, Ministry of Agriculture Livestock & Fisheries; Otieno (Exparte Applicant); Agriculture & Food Authority (Interested Party) (Judicial Review Miscellaneous Application 11 of 2020) [2023] KEHC 2359 (KLR) (16 March 2023) (Judgment).

38. The 3rd and 4th Interested Parties argued that Petition No. E065 of 2024 at Milimani, (supra) dealt with the issue of the alleged lack of public participation in the leasing process of Nzoia Sugar Company Limited (which is also at the core of this petition) and Justice Mwita found that "the Respondents demonstrated through documentary evidence that there was stakeholders' engagement and the National Assembly approved leasing of the sugar companies, " and dismissed the Petition.

39. As such, it was argued that under the issue-based estoppel, the Petitioner herein is precluded from raising the same issues that had been litigated and determined by this Court in three other cases which issues are now res judicata.

40. He relied on a three-judge bench decision of Matindi & 3 others v The National Assembly of Kenya & 4 others; [2023] KEHC 19534 (KLR) the Judges held:

"We do not think that a court ought to re litigate the same issues over and over, each time a new party files a petition relating to the same subject matter. To do so would lead to an absurd outcome and embarrass the court with contradicting decisions."



41. It was thus submitted that the issue of public participation in the leasing of Nzoia Sugar Company Limited having been previously litigated and determined in three previous petitions/application E262 of 2020, E065 of 2024 and JR No 11 of 2020, cannot be re-litigated in the present petition hence the same should be struck out.

42. Further, the contention that because the Petition raises Constitutional issues, they are incapable of being addressed by Public Administrative Review Board was matter that was raised and deflated by the Judgement of Justice Ongudi in Petition No. 262 of 2020 of 3rd May 2022.

43. On exhaustion of local remedies, Counsel submitted that the subject matter of the petition is the Tender No. MOALD/SDA/IT/001/2024-2025 as amended which deals with leasing of Nzoia Sugar Company Limited, a procurement process initiated under the Public Procurement and Asset Disposal Act, 2015 (the PPADA 2015) of which the Public Procurement Administrative Review Board has the power to review, hear and determine tendering and asset disposal disputes.

44. Counsel further cited the Supreme Court case of the Communications Commission of Kenya and others vs. Royal Media Services LTD & Others [2014] eKLR where it was held that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question, in this case, the Public Procurement and Assets Disposal Act.

45. It was the 3rd and 4th Interested Party's submission that the Petitioner, if aggrieved with the present International Tender for Leasing Nzoia Sugar Company Limited the subject of this Petition, should have approached the Public Procurement Administrative Review Board under the Public Procurement and Asset Disposal Act, 2015 and not this Court as enunciated as was held by the Supreme Court in Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others [2019] eKLR as also done by this Court in similar suits filed over the same subject matter of leasing of Nzoia Sugar Company Limited in Nzuki Musyoki vs. Agriculture and Food Authority and Attorney General [supra] and Republic v Cabinet Secretary, Ministry of Agriculture Livestock & Fisheries; Otieno (Exparte Applicant); Agriculture & Food Authority (Interested Party) (supra) on the basis that the Court did not have jurisdiction as the Applicant ought to have approached the Public Procurement Administrative Review Board and, that further, public participation had been carried out.

Petitioner's written Submissions in Opposition to the 3rd and 4th interested parties' preliminary objection dated 14th May 2025

46. In opposition to the 3rd and 4th Interested Parties' Preliminary Objection dated 14th May 2025, the Petitioner filed written dated 16/5/2025 through Wamalwa & Echesa Company Advocates.

47. It was argued on behalf of the Petitioner that the Petition challenges the constitutionality of the Respondents' decision to lease Nzoia Sugar Company through a public tender process without adequate public participation.

48. The Petitioner began by restating the brief facts upon which the Petition is founded.

49. He explained that on or about 28th February, 2025, the 3rd Respondent's Ministry posted an invitation to tender on their website, to wit, 'International Tender Notice, No. MOALD/SDA/IT/001/2024-2025' for prospective tenderers to bid for the leasing of the public sector owned/controlled sugar company.

50. According to the Petitioner this was done abruptly without any consultation with the members of



the public or any meaningful and adequate public participation be carried out hence was a contravention of Articles 10, 201, and 227 of the Constitution of Kenya for lack of transparency, accountability, and public participation considering that leasing out of public sector-owned/controlled sugar companies is a matter of great public concern of which the public ought to have been considered and involved in the decision-making process before the invitation to tender was issued.

51. In response to the issues raised in the preliminary objection; the Petitioner identified three issues which he made submissions on; namely:

- a) Whether the doctrine of res judicata applies to the current Petition.
- b) Whether the doctrine of exhaustion of remedies applies to oust the jurisdiction of this Honourable Court in the present matter.
- c) Whether the Petition raises constitutional questions that justify the invocation of the High Court's jurisdiction under Article 165 of the Constitution of Kenya 2010 .
- d) Whether the Preliminary Objection as raised satisfies the threshold in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 E.

52. On whether the doctrine of res judicata applies to the current Petition, Counsel for the Petitioner while making reference to res Section 7 of the Civil Procedure Act argued that the elements of res judicata had not been satisfied. He emphasized that for the doctrine of res judicata to apply, the parties, the subject matter or the cause of action have to be the same as in the former Suit and the present suit.

53. The Petitioner relied on *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] KECA 477 (KLR), where the Court of Appeal outlined the elements required for res judicata to apply as follows:

"For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied...

- (a) The suit or issue was directly and substantially in issue in the former suit;
- (b) That former suit was between the same parties...
- (c) Those parties were litigating under the same title;
- (d) The issue was heard and finally determined in the former suit;
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit..."

54. It was also contended on behalf of the Petitioner that the present Petition not only does merely challenge the procurement process under the Public Procurement and Asset Disposal Act, rather, it impugns the legality and constitutionality of the entire leasing process of Nzoia Sugar Company from the initial policy decision to the execution of the impugned tender notice on the grounds of lack of public participation. The Petitioner submitted that Articles 10(2)(a) and 232(1)(d) of the Constitution of Kenya 2010 impose a mandatory obligation on State organs to ensure public participation in decisions involving public resources. Furthermore, it was argued on behalf of the



Petitioner that public participation is not a one-off event but is a continuing duty.

55. The Petitioner placed relied on the Court of Appeal decision of IEBC v NASA Kenya & 6 others [2017] eKLR, that affirmed the justifiability and enforceability of Article 10 of the Constitution, particularly the obligation to undertake public participation in public decision-making processes.

56. Further, it was the Petitioner's contention that the subject matter of the present Petition is a new procurement process which has not been previously adjudicated thus is not affected by res-judicata bar.

57. On the issue of whether the doctrine of exhaustion of remedies applies to oust the jurisdiction of this Court in the present matter; The Petitioner argued that the petition does not merely contest the procurement process under the Public Procurement and Asset Disposal Act but also impugns the legality and Constitutionality of the entire leasing process of Nzoia Sugar Company from the initial policy decision to the execution of the impugned tender notice on the grounds of lack of public participation, breach of legitimate expectation, and disregard of national values under Article 10 of the Constitution of Kenya and as such, there exists no adequate or suitable alternative remedy under the Public Procurement and Asset Disposal Act or the Public Private Partnerships Act to address the constitutional grievances raised by the Petitioner.

58. The Petitioner was emphatic that the doctrine of exhaustion is not absolute and does not oust this Court's jurisdiction where constitutional questions are at play or where the available statutory mechanisms are inadequate or ill-suited to address the grievances raised. He relied on Geoffrey Muthinja & Another V Samuel Muguna Henry & 1756 Others [2015] eKLR the Court of Appeal held:

"We say so quite cognizant of the fact that so long as there is a sufficiency of information, as to the constitutional right violated with particulars supplied, then a court of competent jurisdiction ought, in the spirit of a rights-centric constitutional dispensation such as ours, to take the matter up, investigate and provide redress or relief if merited, careful not to defeat substance at the altar of procedure."

59. The Petitioner contended that the Petition raises fundamental constitutional questions which cannot be resolved by the Public Procurement Administrative Review Board or under the framework in the Public Private Partnerships Act.

60. On the issue of whether the Petition raises constitutional questions that justify the invocation of the High Court's jurisdiction under Article 165 of the Constitution, the Petitioner contended that under Article 165(3) (d) (ii) of the Constitution, this Court is vested with the power to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed. He cited the Supreme Court decision in Mitu-Bell Welfare Society V Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] Kesc 34 (Klr) that emphasized the High Court's authority under Article 23(3) of the Constitution to grant appropriate reliefs for violations of fundamental rights. It was submitted that the statutory mechanisms under the Public Procurement and Asset Disposal Act and the Public Private Partnerships Act do not contemplate or provide adequate relief for constitutional violations relating to lack of public participation and violation of fair administrative action.

61. Finally, Counsel argued the issue as to whether the Preliminary Objection as raised satisfies the threshold in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 69.

62. He submitted that the Preliminary Objection does not raise any point of law relying on the High



Court at Homa Bay in *Evans Otieno Oloo Gor v County Public Service Board of Homa Bay & 7 others* [2022] KEHC 27060 (KLR) cited *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, where the Court held that: “A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

63. He maintained that the preliminary objection raised herein is intertwined with factual and constitutional disputes including the scope and quality of public participation and the legality of the administrative decisions taken which can only be determined upon a full hearing of the Petitioner/Applicant’s Petition and Application.

64. He thus urged the Court to dismiss the Preliminary Objection by the 3rd and 4th Interested Parties for want of merit and for the failure to meet threshold established in the *Mukisa Biscuit* case (*supra*).

2nd Interested Partys' submissions in opposition to the preliminary objection by the 1st interested party.

65. The 2nd Interested Party filed submissions dated 16th day of May 2025 Mokaya Omwoyo & Associates Advocates.

66. It was contended on behalf of the 2nd Interested Party that *res judicata* principles under Section 7 of the Civil Procedure Act had not been met hence the plea of *res judicata* was inapplicable in relation to the present petition.

67. Rehearsing the provisions of Section 7 of the Civil Procedure Act, the 2nd Interested Party pointed out that the Petitioner in PET/E065/2024 was Martin Nyongesa Barasa but the Petitioner in the current Petition PET E146/ 2025 the Petitioner is ATHANAS WAFULA WAMUNYINYI hence the parties are different.

68. Further, that Petition E046/2024 was brought under the Constitution and the Privatization Act while the current Petition is premised on the violation of the provisions of the constitution, Public Administrative Action Act, 2015 and The Public Procurement and Asset Disposal Act, 2015.

69. Moreover, the matter in contention in PET/E046/2024 was International Tender No. MOALD/SDA/IT/001/2023-2024 whereas the current dispute is International Tender Notice No. MOALD/SDA/IT/001/2024-2025, hence they are not similar.

70. It was argued that the judgment in the PET/E046/2024 was based on the Privatization Act yet the current Petition has nothing to do with Privatization Act.

71. In regard to public participation, the 2nd Interested Party argued Hon Judge Mwita, in paragraph 38 & 40 of the judgment addressed the subject as follows:

“... Public participation is one of the founding values in our Constitution as a principle of good governance under Article 10 of the Constitution. The principle of good governance, (including public participation), bind all State Organs, State Officers, Public Officers and all persons whenever they, among others, make or implements public policy decisions.

40. The decision to lease the sugar companies was made by the National Assembly following recommendations by the committee on Finance and National Planning and that on Agriculture and



Livestock. This was a shift from the earlier decision to privatise the sugar companies under the Privatization Act which had been made in 2025...whether the process of leasing the sugar companies required further public participation after the Nation Assembly adopted the recommendations of the Joint Committee was not raised as an issue in this petition and parties did not make submissions on it."

72. It was thus argued that the previous case PET 065 of 2024 had to do privatisation under the Privatisation Act unlike the present Petition, further that, the Judge concluded that the issue of whether or not there should have been public participation in respect to the leasing of publicly owned sugar companies was not raised in that petition for the resolution by the Court.

73. Counsel in his written submissions writes:

"... The challenge with the PET E065/2024 was that the process being undertaken was privatization under the Privatization Act and in violation of a subsisting court order as captured in this judgment in paragraph 45. The judge went further to state that the challenge was not directed at a process under the PPP Act. There was no suggestion that the provisions of the PPP Act were not complied with and if so how. The judgment concludes by observing whether there should be public participation under the public Private Partnership Act was not raised in this petition for consideration..."

74. It was thus the 2nd Interested Party's submission that the Judgment being relied on by the Respondents and the 1st Interested Party confirms that there was no Public Participation for privatisation of sugar companies under the Public Private Partnership Act yet Section 22 (k) of the Act requires there be Public Participation on a Project.

75. It was thus contended that there is nothing res judicata about PET E046/2024 and the Petition at hand since the parties are different, the Tender in dispute is different, the law applicable is different and the circumstances have changed.

76. Further, that in any event the said tenders are dubbed as International but end up being too local for any international bidding due to restrictive deliberate conditions to suit certain local bidders for vested interests.

77. The 2nd Interested Party cited the holding by in Justice Waithaka in *Chemweno V Kiprop* (Suing as a Legal Representative of the Estate of Luka Kiprop Kiptai) (Environment and Land Appeal E006 of 2023) 2024 where in paragraph 23 she quoted with approval the case of *George Kamau Kimani & 4 others Vs County Government of Trans Nzoia & Another* (2014) eKLR, held that one cannot raise a ground of res judicata by way of Preliminary Objection. Also, the case of *Henry Wanyama Khaemba Vs Standard Chartered Bank Ltd and another supra*, further relied upon by the Judge in finding that issues of res judicata, duplicity of suits and suits having been spent, will require probing of evidence hence not capable of being handled as Preliminary Objection because of the limited scope of the jurisdiction of Preliminary Objection.

Analysis and Determination

78. Having regard to the submissions made in support of and in opposition to the three Preliminary Objections under consideration; this Court has identified the following to be the issues for determination:

a) Whether the legal objections raised meet the threshold of proper Preliminary Objection.

b) Whether the Petition offends the principle of res judicata.



c) Whether the Petition offends the doctrine of exhaustion of remedies.

Whether the legal objections raised meet the threshold of proper Preliminary Objection

79. The Petitioner and the 2nd Interested Party challenged the validity of the three Preliminary Objections raised on the account that they do not meet the threshold of pure preliminary objections.

80. The Petitioner asserted that the preliminary objections touch on factual and constitutional disputes as regards the scope and quality of public participation and the legality of the administrative decisions taken which can only be determined upon a full hearing of the petition and the applicant's application.

81. The 2nd Interested Party insisted that the issues of res judicata will require probing of evidence on the content of the previous pleadings hence is incapable of being dealt with as a Preliminary Objection because of the limited scope of the jurisdiction of Preliminary Objection.

82. The threshold of a preliminary objection was laid out in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 69. The principles in that case were reaffirmed by the Supreme Court in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* (2014) eKLR as follows:

"[31] To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd -vs. - West End Distributors* (1969) EA 696:

"a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

83. Commenting on rationale behind the raising of preliminary objections, the Supreme Court in *Independent Electoral & Boundaries Commission v Cheperenger & 2 others* (Civil Application 36 of 2014) [2015] KESC 2 (KLR) (15 December 2015) (Ruling) explained:

"21. The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement..."

84. To summarize a proper preliminary objection is one that comprises the following essential characteristics:

a) Argued successfully, a preliminary objection should be able to disposing of the suit without a trial on merits.

b) It is argued on the assumption that all the facts pleaded by the other side are correct.

c) It cannot be raised if any fact has to be ascertained by evidence.

d) It cannot be if what is sought is the exercise of judicial discretion.

85. In my view, in a plea of res judicata, what the Court is primarily concerned with is the previous



Court judgment for the Court to ascertain the cause of action, the issues dealt with therein or the parties therein to compare with the present suit so as to and establish if the matters are similar or not. Such an examination is sufficient to inform the Court whether it can proceed and hear the matter or not. A judgment of a Court delivered in this Country needs no proof as that is a matter that this Court can take judicial notice of. Once res judicata principles are fulfilled, it acts as a jurisdictional bar by precluding the Court from hearing the matter. Res judicata is thus a jurisdictional issue for which a preliminary objection can be raised.

86. In the Matter of the Interim Independent Electoral Commission [2011] KESC 1 (KLR) the Supreme Court held that:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent.”

87. The nature of the preliminary objection herein is that it raises a jurisdictional question based on the jurisprudentially settled principles of the doctrine of exhaustion and res judicata, which is even statutorily reinforced by Section 7 of the Civil Procedure Act. I find that it satisfies the requisite threshold of preliminary objection in that if successful, the two legal issues are capable of disposing the matter without the need to go for the full trial. There is also no context as to facts and also, they do not depend on other contradictory facts or evidence.

Whether the Petition offends the principle of res judicata

88. Res judicata doctrine has been given statutory back-up by Section 7 of the Civil Procedure Act, CAP 21 which provides as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

89. The Supreme Court in Kenya Commercial Bank Limited vs. Muiri Coffee Estate Limited & another (2016) eKLR emphasized the inescapability of the doctrine of res judicata in all cases including constitutional petitions by stating thus:

“[52] Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights...”

90. Further, in John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2024] KEHC 6648 (KLR) the Supreme Court stated:

“54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

55. It emerges that, contrary to the respondent’s argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article 159 of the Constitution, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.

56. The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the



principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):

The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

91. It must be appreciated that res judicata does not only focus on the issue of duplicate causes of action or suit that it prevents from being re-litigated by the same parties or their representatives; but it also includes issue-based estoppel. This means any issue determined in the former suit may not be raised again by a party or the representative of that party in the later suit even if that suit is different. The party or its representative are barred from resuscitating the issue.

92. In *Mumira v Attorney General* [2022] KEHC 271 (KLR); the Court elaborated on the difference between issue-based estoppel and cause of action estoppel by stating thus:

“18. In the United Kingdom, res judicata is known as cause of action estoppel or issue estoppel... (A distinction is made between “cause of action estoppel” and “issue estoppel”. In the first case— “the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter.” (Arnold v National Westminster Bank [1991] 2 AC 93 (HL) at 104.) In the second case— “a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue.” (Arnold at 105.)

93. In *Okiya Omutatah Vs Communication Authority of Kenya* (2015) eKLR the Court had recourse to the principle of issue-based estoppel when it held thus:

“In my view, he sued the officials of the 1st Respondent so as to disguise the proper parties who were in the first Petition and that attempt cannot affect my conclusions above and help him evade the doctrine of res judicata on the main issue of digital migration which is the common thread running through all the Petitions as can be seen above. I shall repeat for emphasis that the said issue cannot be re-opened merely by re-introducing the rights of viewers to migrate and re-packaging it differently as a violation of the provisions of the Constitution and that of the Bill of Rights so as to prevaricate the principle of res judicata.”

94. Where a decision has been made about the constitutionality of a particular process concerning a subject matter that is of public or national interest, such a decision is in rem as the issue transcends the interest of the parties in that dispute.

95. In the present case, the Petitioner’s chief complaint relates to the 3rd Respondent’s posting on its website, an invitation to tender on 28/2/2025 dubbed the ‘International Tender Notice, No. MOALD/SDA/IT/001/2024-2025’ requesting prospective tenderers to bid for the leasing of the public sector owned/controlled sugar companies. The notice was set to expire on the 21/3/2025. The Petitioner alleged that the said action violates Articles 10, 201 and 227 of the Constitution for reasons that there was no involvement of the public by means of public participation prior to taking the said action in regard to Nzoia Sugar Company; that the tendering process will not yield value for money or lead to sustainable and profitable operation of the sugar mills to benefit the economy and stakeholders involved and further, it is exposing public assets to the risk of mismanagement and loss.

96. The Respondents as well as the 1st, 3rd and 4th Interested Parties raised Preliminary Objections contending that the matter is res judicata as this very issue was raised and substantively considered on merits in a previous Petition, to wit, Petition E065 of 2024 in a Judgment delivered by Justice Mwita on 28th February, 2025.



97. This position was vehemently opposed by the Petitioner and the 2nd Interested Party who referring to the conditions necessary to raise a plea of res judicata as specified in Section 7 of the Civil Procedure Act, Cap 21 maintained that the threshold had not been met.

98. The 2nd Interested Party in particular argued that the Petitioner in PET/E065/2024 was Martin Nyongesa Barasa as the Petitioner while instant PET E146/ 2025 it is ATHANAS WAFULA WAMUNYINYI hence the parties are different.

99. Further, that the previous petition PET E065 /2024 was mainly about the violation of the Constitution and the Privatization Act but the instant Petition is premised on the violation of the provisions of the constitution, 'Public Administrative Action Act, 2015' (sic) and The Public Procurement and Asset Disposal Act, 2015.

100. Counsel for the 2nd Interested Party wrote in his submissions:

"... Petitioner in the current Petition PET E146/ 2025 is ATHANAS WAFULA WAMUNYINYI. The parties are not the same. The Petition E046/2024 was brought under the Constitution and the Privatization Act. In the current Petition, the provisions of the constitution, Public Administrative Action Act, 2015 and The Public Procurement and Asset Disposal Act, 2015 have been violated. The matter in contention in PET/E046/2024 was International Tender No. MOALD/SDA/IT/001/2023-2024. In the current dispute is International Tender Notice No. MOALD/SDA/IT/001/2024-2025, they are not similar..."

101. Moreover, what was in contention in in the previous suit was International Tender No. MOALD/SDA/IT/001/2023-2024 whereas the current dispute is International Tender Notice No. MOALD/SDA/IT/001/2024-2025, hence they are dissimilar. It was argued that the judgment in the PET/E065 of 2024 was based on the Privatization Act yet the current Petition has nothing to do with Privatization Act.

102. I have carefully read the submissions on this issue and also the previous judgment Petition E065 of 2024 by my brother, Justice E.C. Mwita.

103. In the introductory paragraph, that is, paragraph 1 of the judgment PET E065 of 2024, the Judge brings out the genesis forming the substratum of the Petition as follows:

"On 16th January 2024, the Ministry of Agriculture and Livestock Development advertised an International tender No. MOALD/SDA/IT/11/001/2023-2024, (the Tender) inviting international bids for leasing of Nzoia Sugar Company Limited, Chemilil Sugar Company Limited and South Nyanza Sugar Company Limited (the sugar companies). The time line for submitting bids was to expire on 15th February 2024."

104. It is apparent that the factual situation that precipitated the Petition was the 'invitation of international bids for leasing of Nzoia Sugar Company Limited, Chemilil Sugar Company Limited and South Nyanza Sugar Company Limited (the sugar companies)'

105. In the instant Petition, it was sparked by:
'An invitation to tender for International Tender Notice, No. MOALD/SDA/IT/001/2024-2025' requesting prospective tenderers to bid for the leasing of the public sector owned/controlled sugar companies'

106. There is a conspicuous constant in the factual situation that is clearly noticeable, the subject



matter forming the substratum of the Petition is invitation to tender for the international tender in respect of publicly owned or controlled sugar companies. All the details in the two advertisements are a constant feature except the financial year to which the tender relates, which changes from 2023-2024 to 2024-2025.

107. At paragraph 7 and 8 of the Judgment PET E065 of 2024, the Judge captures the Petitioner's main grievance in the pleadings as follows:

Para. '7. The Petitioner argued that the respondents violated Article 10 of the Constitution by making the decisions to privatise the sugar companies through long term leases without public participation'

Para '8. The petitioner asserted that the respondents made the decision without prior notice of the intention to make the decision, a violation of Article 47 of the Constitution...'

108. In the instant Petition, the Petitioner pleads his grievance as follows at paragraph 22 of the instant Petition.

Para 22 "That the tendering process is being conducted in a manner that contravenes Articles 10, 201 and 227 of the Constitution of Kenya as it lacks transparency, accountability, and public participation.

109. In paragraph 12 of PET E065 of 2024, the Court summarized the reliefs that the Petitioner was seeking as follows:

"Para 12- Citing Articles 22 (1), 2 (c) and 23 (3) of the Constitution, and the definition of public interest in Black's Law Dictionary 10th Edition, (page 1425), the Petitioner urged the Court to allow the petition and grant the following reliefs:

a) Prayer a, as captured by the Judge in the Judgment reads:

'A declaration that the action and/or inaction of the respondents of not allowing the public to participate in making the decision whether or not to lease the public-sector owned/controlled sugar companies is in contravention of national values under Article 10, and principles of public service under Article 232 (1) of the Constitution of Kenya, 2010.'

Compare this with prayer no. I of the instant Petition No. E146 of 2025 dated 20/3/2025 which reads:

'1. A declaration that actions and/or inactions of the Respondents of not allowing the public to participate in making the decision whether or not to lease the public sector owned/controlled sugar companies is in contravention with national values in Article 10, and principles of public service under Article 232(1) of the Constitution of Kenya 2010.'

b) Prayer no. b in the Petition E065 of 2024 as captured in the said judgment reads:

'A declaration that the invitation to tender dubbed International Tender Notice No. MOALD/SDA/IT/001/2023-2024 by the Respondents is unconstitutional to the extent that it contravenes constitutional principles of good governance, transparency, accountability and public participation'



Compare this prayer with the prayer No. 2 in the instant Petition No. E146 of 2025 which reads:

'2. A declaration that the invitation to Tender dubbed International Tender Notice No. MOALD/SDA/IT/001/2024-2025 by the Respondents is unconstitutional to the extent that it contravenes constitutional principles of good governance, transparency, accountability, and public participation.'

c) Prayer c in Petition E065 of 2024 as captured in the judgment reads:

'A declaration that the Petitioner's fundamental rights and freedoms as enshrined in Article 29 (d) and 47 of the Constitution have been contravened and infringed by the respondents'

d) A judicial review order of certiorari quashing the international tender notice no. MOALD/SDA/IT/001/2023-2024'

e) Prayer e of the Petition as captured in the Judgment E065 of 2024 reads:

'A Permanent injunction stopping and/halting the tendering process of the International tender Notice, No. MOALD/SDA/IT/001/2023-2024 advertised by the 3rd Respondent intending to lease public sector owned/controlled sugar companies without public participation'

Compare this with Prayer number 3 of the present Petition No. E146 of 2025 which reads:

'A permanent injunction stopping and/or halting the further tendering and awarding process of the International tender notice no. MOALD/SDA/IT/001/2024-2025 advertised by the 3rd Respondent intending to lease public sector owned /controlled sugar companies without public participation.'

f) Prayer f in Petition E065 of 2024 as captured in the Judgment read:

'An order awarding costs of the Petition to the Petitioner'

Compare this with prayer no. 4 of the current Petition No. E146 of 2025 which reads:

'4. An order awarding costs to the Petitioner'

g) Prayer g in Petition E065 of 2024 as captured by the Judge read:

' Any other or further orders, writs, and directions this Court considers appropriate and just to grant for the purpose of enforcement of petitioner members' fundamental rights and freedoms, the enforcement and defence of the Constitution pursuant to Article 23(3) of the Constitution.'

Compare this with prayer No. 5 of the instant Petition number E146 of 2025:

'5. Any other or further orders, writs, and directions this Court considers appropriate and just to grant for the purpose of enforcement of the Petitioner's fundamental right and freedoms; the enforcement and defence of the Constitution pursuant to Article 23 (3) of the Constitution.'

110. It is clear beyond peradventure that the prayers in the two Petitions are analogous and/or repetitious word for word.

111. I now turn to the submissions. The 2nd Interested party advanced submissions that the dispute in PET E065 of 2024 is premised on the Constitution and the Privatisation Act but the present



Petition is different because it is premised on the Constitution and Public Procurement and Asset Disposal Act and what he referred to as the 'Public Administrative Action Act, 2015.' Firstly, I am unaware of any Statute in this country known as 'Public Administrative Action Act 2015'.

112. Secondly, the submission itself is a mis-contextualization of the judgment in PET E065 of 2024 by claiming that it was premised upon the Constitution and the Privatisation Act.

113. Justice Mwita was quite explicit when he explained that the case did not involve the Privatisation Act and that is why he did not fault process of advertisement as having violated the Court order which was in place as urged by the Petitioner who had argued that the process was conducted at a time when Section 21 of the Privatisation Act had been suspended pursuant to a conservatory order issued by the Court. The Judge instead found that the advertisement of the tender was instead done under the provisions of the Private Public Partnership Act, and not the Privatisation Act hence it did not violate the conservatory order. The Judge stated:

"... The court had indeed suspended Section 21 of the Privatisation Act in late 2023 through Petition No. 491 of 2023 which was challenging privatisation of 11 eleven public entities. Those orders were still in force when the tender notice was published in January 2024. However, from the facts on record, the respondents in this petition were not acting under the Privatisation Act whose section 21 had been suspended. The process being undertaken was a public private partnership under the PPP Act. In that premise, the petitioner's argument that the decision to lease the sugar companies and the action of inviting international bids through the international tender notice published in January 2024 violated the court order was not correct.

36. Even though the action was taken during the subsistence of a court order, there could not have been violation of the court order suspending section 21 of the Privatisation Act since the process was not being undertaken under that legal regime but through the Privatisation Act. The order had no effect on the process being taken under the Public Private Partnership Act..."

114. On the fundamental question of whether public participation prior to the advertisement of the invitation to tender for the international tender for leasing of the publicly owned/controlled sugar companies was done, the Judge in PET E065 Of 2024 found that the Respondents had by affidavit evidence demonstrated that this was in actual fact undertaken in accordance with the Constitution. This can be gleaned from paragraph 37,42, 43 and 44 of the Judgment E065 of 2024 reproduced hereunder:

"37. The next issue is whether there was public participation. The petitioner argued that the process of leasing the sugar companies under the Privatization Act was being undertaken without public participation in violation of the Constitution. The respondents maintained that there was public participation at every stage of the process and that the petition was filed prematurely since there are remedies provided for under the PPP Act....

42. The replying affidavit by Prof. Ndung'u filed in response to the petition and the annextures thereto show that although initially approval had been given for privatization of the sugar companies, that position was shelved when the National Assembly approved long term leasing following recommendations from the Joint Committees. Indeed, the report signed on 14th September 2023 by the Joint Committees on Finance and National Planning and that on Agriculture and Livestock, attached to the affidavit as "LK11" and submitted to the National Assembly, recommended, among others, approval of the leasing of five (5) sugar companies under the provisions of the Public Private Partnership Act; that the House vacates the privatization model that had been earlier approved by the National Assembly in 2015 and approval of the decision of the



Cabinet to write off tax arrears owed by the five (5) sugar companies (Nzoia; Chemelil; Muhoroni; Miwani and South Nyanza Sugar Companies).

43. The report was prepared after stakeholders' engagement with the joint committees and contains the views received from the people who appeared before the joint committees. The report was tabled before the National Assembly; the National Assembly vacated the privatization model approved in 2015; approved the leasing model as well as the Cabinet decision to write off debts owed by the sugar companies as recommended in the joint committees' report. Following adoption of the recommendations, the Ministry of Agriculture and Livestock issued the impugned international tender notice inviting bids for the leasing of the sugar companies. This is in annex "LK1" in the replying affidavit which showed that the tender notice invited bids for leasing of the sugar companies and not privatisation.

44. When an action is challenged for being unconstitutional, the burden is on the State organ or agency responsible to prove otherwise. In this case, the duty fell on the respondents to prove that their action complied with the Constitution and the law. In this respect, the respondents demonstrated through documentary evidence that there was stakeholders' engagement and the National Assembly approved leasing of the sugar companies..."

115. In the light of the above, the contention that no public participation was not conducted for purposes commencing the tendering process of leasing out publicly owned or controlled sugar companies of which Nzoia Sugar Company formed part is utterly misleading as the Judge in PET E065 of 2024 who dealt with issue initially in PET E065 of 2024 made a concrete finding that the Respondents had demonstrated that they had fulfilled the constitutional requirement relating to public participation hence the conclusion paragraph 44 of the Judgment thus:

"44. When an action is challenged for being unconstitutional, the burden is on the State organ or agency responsible to prove otherwise. In this case, the duty fell on the respondents to prove that their action complied with the Constitution and the law. In this respect, the respondents demonstrated through documentary evidence that there was stakeholders' engagement and the National Assembly approved leasing of the sugar companies..."

116. The issue of public participation as regards the leasing of the sugar companies is thus a done and dusted deal as the Court's finding PET E065 of 2024 confirms. The issue of inadequate participation cannot thus be reintroduced in a subsequent matter on the same subject matter of leasing of publicly owned or controlled sugar companies, the matter having been conclusively settled after a trial on merits.

117. An argument was made that because the Petitioner in PET E065/2024 and the Petitioner in the instant Petition are different, then the plea of res-judicata does not apply. The argument disregards the fact that the previous suit, just like the present one, was filed in public interest and the decision made therein is a decision in rem. In any case, explanation number 6 of the Civil Procedure Act at Section 7 deals with such a situation by elaborating thus:

"Where persons litigate Bonafide in respect of a public right or a private right claimed in common for themselves and others, all persons interested in such right shall, for purposes of this section, be deemed to claim under the persons so litigating"

118. The fact that the Petitioner is a different person does not permit him to relitigate the matter camouflaging it as a different Petition. It is my finding that the instant Petition offends the doctrine



of res judicata.

119. This finding is sufficient to dispose of this Petition without any further consideration of any other issue. At this juncture I cannot proceed any further, I must down my tools.

120. The upshot is that the preliminary objection is upheld and the instant Petition is struck out. I make no orders as to costs.

Dated, signed and delivered virtually at Nairobi this 19th day of June, 2025.

.....

L N MUGAMBI

JUDGE

SIGNED BY: HON. MR. JUSTICE LAWRENCE N. MUGAMBI



THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT
HIGH COURT CONSTITUTION AND HUMAN RIGHTS
DATE: 2025-06-19 14:08:04+03

