



CM ADVOCATES LLP



KENYA'S PPP ACT RULING: PARLIAMENTARY APPROVAL, ATTORNEY-GENERAL CLEARANCE AND THE FUTURE OF PRIVATELY INITIATED PROPOSALS

High Court Upholds Privately Initiated Proposals but Strengthens Constitutional Oversight of Public Financial Commitments

19th October 2026

Implications for PPP Investors, Infrastructure Developers, Government Contracting Authorities, Contractors, Project Financiers and Development Partners

EXECUTIVE SUMMARY

In a landmark judgment delivered on 17th September 2026, the High Court of Kenya in *Katiba Institute v State Law Office & Others*, Constitutional Petition No. E626 of 2024, declared sections 59, 60 and 72(1) of the Public Private Partnerships Act, 2021 ("PPP Act") unconstitutional to the extent that they exclude parliamentary approval of public expenditure, Government guarantees, public debt and other financial liabilities arising from public-private partnership ("PPP") projects.

The Court suspended the declaration of invalidity for six months to allow Parliament to introduce the necessary legislative amendments.

Significantly, the Court upheld the constitutionality of Privately Initiated Proposals (PIPs), recognizing their legitimate role in promoting private sector innovation, investment and infrastructure development.

However, the Court clarified that a PIP does not entitle its proponent to exclusive negotiations or an automatic contract award. Contracting

authorities must objectively justify any departure from open competitive procurement and demonstrate compliance with Article 227 of the Constitution.

The judgment has four principal consequences:

- a) PPP financing and parliamentary oversight:** Projects creating national Government financial obligations must comply with constitutional requirements for parliamentary authorization and public financial accountability.
- b) PIP procurement:** Privately initiated projects remain permissible, but the procurement route must be independently justified, transparent, competitive in the constitutionally relevant sense and demonstrably cost-effective.
- c) Attorney-General clearance:** Under section 60(2) of the PPP Act, the final draft project agreement must be submitted to the Attorney-General for legal clearance before execution.
- d) Parliamentary ratification:** PPP agreements involving the exploitation of natural resources must be submitted to Parliament for approval under section 63 of the PPP Act, Article 71 of the Constitution and applicable legislation.

For investors and contracting authorities, the decision reinforces the need to structure PPP transactions around commercial bankability, lawful procurement, Attorney-General clearance, parliamentary oversight and constitutional compliance.

1. THE HIGH COURT'S DECISION, WHAT HAS CHANGED?

The petition arose from constitutional concerns surrounding proposed infrastructure projects involving Jomo Kenyatta International Airport (JKIA) and the Kenya Electricity Transmission Company (KETRACO).

Although the projects had been cancelled, the Court determined that the constitutional questions remained relevant to Kenya's broader PPP framework.

The Court made three significant findings.

1.1. Parliamentary approval of public financial commitments

Sections 59, 60 and 72(1) of the PPP Act were declared unconstitutional to the extent that they exclude parliamentary approval where PPP arrangements create public expenditure, guarantees, public debt or other national Government financial liabilities. The Court distinguished approval of a PPP project from approval of the public expenditure arising from that project.

Accordingly, not every privately financed PPP necessarily requires parliamentary approval. The decisive consideration is whether the transaction creates financial obligations falling within Parliament's constitutional oversight responsibilities. The Court's decision must also be read alongside section 63 of the PPP Act, which expressly requires parliamentary approval of qualifying PPP agreements concerning the exploitation of natural resources.

These constitute distinct but potentially overlapping approval requirements.

1.2. Privately Initiated Proposals remain lawful

The Court upheld sections 40(3)(j), 44(5) and 44(6) of the PPP Act, confirming that PIPs and alternative procurement methods are not inherently unconstitutional. Nevertheless, these provisions must be implemented consistently with Article 227 of the Constitution.

The Court further recognized that the PPP Act provides a specialised procurement framework and that exclusion from particular procedures under the Public Procurement and Asset Disposal Act, 2015, does not exempt PPP procurement from constitutional scrutiny.

1.3. Six-month suspension of invalidity

The Court suspended its declaration of invalidity for six months from 17th September 2026 to allow legislative amendments. The matter is scheduled for mention on 11th May 2027 to confirm compliance and issue further directions.

The suspension preserves an opportunity for an orderly legislative transition without eliminating existing constitutional obligations. Contracting authorities and investors should therefore monitor the legislative response and review the implications for projects under procurement, negotiation or financial close.

2. THE COURT'S GUIDANCE ON PRIVATELY INITIATED PROPOSALS.

The most commercially significant aspect of the judgment is its clarification of how PIPs should be assessed and procured. The Court recognized that private proponents may originate infrastructure projects involving distinctive innovation, technical expertise, proprietary information or financing solutions. It nevertheless rejected the proposition that private origination alone justifies exclusive negotiations.

The Court stated:

“Article 227 does not constitutionalize one procurement method; it constitutionalizes procurement standards.”

It further emphasized that a PIP does not confer a right to exclusive negotiation and that a contracting authority must independently determine whether bypassing open competition is objectively justified. The central principle is that a PIP may justify a differentiated procurement process, but it does not justify preferential treatment.

Accordingly, a contracting authority cannot select its preferred private partner first and subsequently devise a procurement process to legitimize that selection.

This approach is consistent with the Supreme Court's decisions in *Kenya Railways Corporation & 2 Others v Okiiti & 3 Others [2023] KESC 38 (KLR)* and *Okiiti v Portside Freight Terminals Limited & 12 Others [2025] KESC 44 (KLR)*, which reinforce the application of Article 227 to specialized procurement arrangements.

3. HOW PRIVATELY INITIATED PROPOSALS SHOULD BE APPROACHED

Following the judgment, PIPs should be approached through a structured, evidence-based process that separates project origination, project evaluation, procurement-method selection, statutory approvals, Attorney-General clearance and parliamentary approval or ratification where applicable.

3.1. STAGE ONE - ESTABLISH PROJECT ELIGIBILITY AND STRATEGIC ALIGNMENT

Before submitting a PIP, the private proponent should establish that the proposed project:

- Addresses an identifiable public infrastructure or service delivery requirement;
- Aligns with relevant national or sectoral development priorities;
- Falls within the mandate of the proposed contracting authority;
- Is suitable for implementation through a PPP structure; and
- Offers identifiable public benefits beyond the commercial interests of the proponent.

The proposal should clearly demonstrate why the project merits consideration as a PPP rather than conventional public procurement or direct public investment.

Recommended approach: Prepare a preliminary project concept and strategic justification identifying the public need, proposed solution, anticipated investment, implementation structure and expected public benefits.

The proponent should also identify, at the outset, whether the project may involve public financial commitments or natural-resource rights requiring parliamentary involvement.

3.2. Stage Two - Demonstrate Innovation, Uniqueness and Value for Money

A PIP should establish the specific commercial, technological or operational advantages of the proposed project.

Relevant considerations include:

- Proprietary technology or distinctive technical solutions;
- Innovative project design or delivery methodologies;
- Demonstrable improvements in efficiency, cost or service quality;
- Access to specialized expertise or financing arrangements;
- Appropriate allocation of construction, operational, financial and performance risks; and
- Measurable value for money over the project's lifecycle.

However, innovation or private financing does not automatically establish that open competitive procurement is unsuitable.

The proponent should substantiate its claims through credible technical, financial and commercial evidence.

Recommended approach: Prepare a detailed value-for-money assessment supported by appropriate benchmarks, preliminary financial modelling and evidence of the proposal's distinctive advantages.

The assessment should also identify the proposed sources of revenue, any Government support requirements and potential contingent liabilities.

3.3. Stage Three - Justify Any Departure from Open Competitive Procurement.

This is the most important procedural safeguard arising from the judgment.

Section 40(3)(j) of the PPP Act requires the private proponent to justify why the project is unsuitable for procurement through an open and competitive process.

The Court identified this justification as the factual foundation for any departure from competition.

The proponent should therefore address:

1. Whether other qualified investors or contractors could deliver substantially

equivalent solutions.

2. Whether the proposed technology, expertise or project structure is genuinely distinctive.
3. Whether an open tender could achieve comparable or better value for money.
4. Whether any proposed exclusivity is objectively necessary and proportionate.
5. Whether alternative competitive procedures could preserve the proponent's legitimate interests while protecting public value.

A general assertion that the proponent originated the idea, possesses financing or can implement the project quickly is insufficient.

The recommended approach is to include a dedicated Procurement Route Justification Memorandum addressing section 40(3)(j), Article 227 and the objective basis for any proposed departure from open competition. Where direct negotiations are contemplated, the memorandum should explain why that approach is legally permissible and preferable to an available competitive alternative.

3.4. Stage Four - Independent Assessment by the Contracting Authority

The contracting authority must undertake its own assessment rather than merely adopt the proponent's justification.

The assessment should address:

- Technical feasibility and implementation capacity;
- Financial viability and affordability;
- Project risks and their proposed allocation;
- Fair market pricing and value for money;
- Availability of comparable market solutions;
- Public interest considerations;
- Environmental, social and regulatory requirements; and
- The appropriate procurement method.

The Court emphasized that discretion under sections 44(5) and 44(6) must be exercised for proper purposes, on relevant material and with rational justification.

It is important to maintain a comprehensive evaluation record demonstrating independent assessment, objective decision-making and compliance with applicable PPP approval procedures.

3.5. Stage Five - Determine the Appropriate Procurement Route

Following evaluation, the contracting authority should determine whether the project should proceed through open competition, another permissible competitive procedure or direct negotiations where legally justified.

The decision should be informed by the project's characteristics, the availability of alternative providers, the statutory requirements and the need to secure public value.

Procurement Approach	Recommended Application
Open competitive tendering	Where several capable market participants can deliver comparable solutions and meaningful competition is practicable
Restricted or other authorised competitive procedures	Where the statutory criteria justify a tailored competitive process
Direct negotiations	Where the applicable legal conditions are satisfied and objective evidence justifies proceeding without open competition

Direct negotiations should not be treated as the default route merely because a project originated as a PIP. The parties should adopt a reasoned procurement-method determination before commencing substantive negotiations or granting preferential treatment to any proponent.

3.6. Stage Six - Undertake Due Diligence and Secure Statutory Approvals

Before entering into binding contractual commitments, the contracting authority should ensure completion of the applicable statutory processes.

These may include:

- Feasibility studies and project appraisal;
- Technical, legal, financial and commercial due diligence;
- Assessment by the PPP Directorate;
- Applicable PPP Committee approvals;
- Legal review and clearance by the Attorney-General;
- Public participation and stakeholder

engagement;

- Environmental and sector-specific regulatory approvals;
- Assessment of Government financial commitments;
- Parliamentary approval of expenditure, guarantees, debt or other public liabilities where constitutionally required; and
- Parliamentary ratification of natural-resource agreements where required under section 63 of the PPP Act.

Where the project involves Government guarantees, availability payments, viability gap funding, termination compensation or other public financial liabilities, the approval framework must address the constitutional requirements identified by the Court.

There should be the establishment of a project-specific approvals matrix identifying the responsible institution, applicable statutory provisions, required documentation, sequencing of approvals and conditions precedent to execution. Particular care should be taken to distinguish the PPP Committee's approval of the project and financial risk assessment from the Attorney-General's clearance of the final agreement and Parliament's separate constitutional or statutory functions.

3.7. Stage Seven - Protect Bankability and Contractual Enforceability

Following procurement and approval, the transaction should be structured to address both commercial and constitutional risks.

Particular attention should be given to:

- Conditions precedent to contractual effectiveness and financial close;
- Government support obligations;
- Financing and security arrangements;
- Construction and operational risk allocation;
- Performance standards and payment mechanisms;
- Change-in-law provisions;
- Termination rights and compensation;
- Dispute resolution and enforcement;
- Attorney-General clearance under section 60(2);
- Parliamentary approval or ratification where applicable; and
- Compliance with public finance and statutory approval requirements.

The recommended approach is to ensure that material statutory and constitutional approvals are appropriately addressed before the parties assume binding financial commitments or proceed to financial close. The final transaction documentation should accurately reflect the scope of the approvals obtained, and any material amendments should be assessed against the applicable statutory requirements, including section 72 of the PPP Act.

3.8. Stage Eight - Obtain the Attorney-General's Clearance Before Execution

Section 60(2) of the PPP Act expressly requires the contracting authority, following notification of the PPP Committee's approval, to prepare the final draft project agreement and submit it to the Attorney-General for clearance.

Only upon obtaining that clearance should the agreement be presented to the successful bidder for execution in accordance with the statutory framework.

The Attorney-General's role is therefore an integral legal safeguard in the PPP approval process.

For complex projects, the legal review should address, as appropriate:

- The contracting authority's statutory mandate and capacity;
- Compliance with the prescribed PPP procurement procedure;
- The legality of the selected procurement method;
- Compliance with constitutional procurement principles;
- The authority to grant the proposed contractual rights;
- The enforceability of Government obligations and support instruments;
- Public finance and parliamentary approval requirements;
- Risk allocation, indemnities and termination compensation;
- Dispute resolution provisions; and
- Consistency with applicable sectoral legislation.

The Attorney-General's clearance should not be treated as a substitute for parliamentary approval, PPP Committee approval or any other statutory authorization. Equally, the Attorney-General's clearance does not displace the contracting authority's responsibility to comply with Article 227.

Seek legal advice from the Attorney-General's Office at an appropriately early stage where

material constitutional, procurement or public finance questions arise, and obtain the formal statutory clearance of the final draft agreement under section 60(2) before execution. This reduces the risk of negotiating a commercially advanced transaction whose final terms cannot lawfully be approved.

3.9. Stage Nine -Obtain Parliamentary Approval or Ratification Where Required

Parliamentary involvement must be assessed independently of the procurement method adopted. A PIP does not become exempt from parliamentary oversight merely because it is privately initiated or privately financed.

Two principal approval categories should be considered.

A. Parliamentary authorization of public financial commitments

Following the High Court's judgment, parliamentary involvement is constitutionally required where PPP arrangements create expenditure, borrowing, Government guarantees, public debt or other forms of public liability for the national Government.

The appropriate parliamentary process should be identified by reference to the Constitution, public finance legislation, the terms of the transaction and any legislative amendments implementing the judgment.

B. Parliamentary ratification of natural-resource transactions

Section 63 of the PPP Act requires the Cabinet Secretary responsible for a contracting authority entering into a PPP project agreement concerning the exploitation of natural resources to submit the project to Parliament for approval in accordance with Article 71 of the Constitution and relevant written law.

This obligation is distinct from the parliamentary oversight of public expenditure considered in the judgment.

A project may therefore require parliamentary involvement because it creates public financial liabilities, concerns the exploitation of natural resources, or both.

Recommended approach: Prepare a Parliamentary Approval and Ratification Assessment identifying the applicable constitutional and statutory triggers, responsible institutions, required submissions and appropriate sequencing.

Where parliamentary approval or ratification is mandatory, transaction implementation and financial close should be structured to ensure that the necessary authorization is obtained at the legally required stage.

4. WHAT THE JUDGMENT MEANS FOR PIP PROPONENTS

The judgment creates a clearer framework for investors seeking to originate infrastructure projects in Kenya. A successful PIP should not merely present an attractive investment opportunity. It should demonstrate that the project meets an identifiable public need, offers value for money and can be procured through a constitutionally defensible process.

For private proponents, the following considerations are particularly important to:

- i. First, protect the commercial value of innovation without assuming exclusivity. Proprietary technology, intellectual property and confidential commercial information should be appropriately identified and protected through lawful arrangements.
- ii. Second, prepare for potential competition. A proponent should not assume that submission or preliminary acceptance of a PIP guarantees direct negotiations or contract award.
- iii. Third, establish financial credibility. Financing proposals should be supported by evidence of funding capacity, realistic financial models and a clear allocation of project risks.
- iv. Fourth, demonstrate public value. The proposal should explain why the project is

affordable, commercially sustainable and beneficial to the public.

- v. Fifth, maintain regulatory discipline. All engagements with Government institutions should follow transparent and properly documented procedures.
- vi. Sixth, anticipate Attorney-General clearance. Proposed contractual arrangements should be structured with sufficient legal certainty to facilitate clearance under section 60(2) of the PPP Act.
- vii. Seventh, identify parliamentary approval requirements early. Projects involving Government financial commitments or natural-resource rights should incorporate the relevant approval or ratification processes into their implementation timetable.

A well-prepared PIP should therefore be investment-ready, procurement-ready, approval-ready and legally defensible.

5. IMPLICATIONS FOR GOVERNMENT CONTRACTING AUTHORITIES

Government entities receiving PIPs should establish clear internal procedures for evaluating proposals and determining the appropriate procurement route.

Particular attention should be given to:

- Consistent preliminary screening criteria;
- Independent technical and financial evaluations;
- Proper documentation of procurement decisions;
- Management of conflicts of interest;
- Fair treatment of competing or comparable proposals;
- Transparent stakeholder engagement;
- Compliance with PPP institutional approval requirements;
- Early identification of public financial commitments;
- Timely submission of the final project agreement for Attorney-General clearance; and
- Identification of parliamentary approval or ratification requirements.

The judgment makes clear that statutory discretion is not unfettered. Even where the PPP Act authorizes a particular procurement method, its application may be challenged if the contracting authority acts without objective justification, excludes competing providers arbitrarily or fails to demonstrate value for money. The appropriate institutional response is to make constitutional compliance an integral part of the project development process rather than a final-stage legal formality.

6. PARLIAMENTARY OVERSIGHT AND PPP FINANCING

The Court identified three broad categories of PPP arrangements:

1. Privately financed projects without Government financial commitments;
2. Projects involving Government expenditure, including availability payments, annuity payments, viability gap funding and termination payments; and
3. Projects involving Government support measures and contingent liabilities, including guarantees and other financial support instruments.

A project financed principally by private capital may nevertheless create public financial liabilities through Government guarantees, revenue support, compensation undertakings or termination provisions. Accordingly, project sponsors and lenders should undertake a comprehensive assessment of Government financial exposure before concluding transaction documents.

The judgment reinforces the importance of Articles 95, 201, 206, 220 and 221 of the Constitution, together with the applicable provisions of the Public Finance Management Act. The key distinction is that parliamentary approval of public expenditure and liabilities is not necessarily equivalent to parliamentary approval of every commercial aspect of a PPP project.

6.1. Parliamentary Ratification Under Section 63 of the PPP Act

Section 63 establishes an express parliamentary approval requirement for PPP project agreements

concerning the exploitation of natural resources.

This provision must be read with Article 71 of the Constitution and the applicable legislation governing natural-resource transactions. Contracting authorities and investors should determine whether the proposed concession, licence, development right or other contractual arrangement falls within the classes of transactions requiring parliamentary ratification.

Where applicable, parliamentary ratification should be addressed expressly in the approvals timetable and transaction documentation.

6.2. Attorney-General Clearance Under Section 60(2)

Section 60(2) provides a separate legal clearance requirement for the final draft PPP project agreement.

The statutory sequence contemplates approval by the PPP Committee, notification to the contracting authority, preparation of the final draft agreement, submission to the Attorney-General for clearance and execution following clearance.

Accordingly, PPP Committee approval alone should not be treated as sufficient authority to execute the project agreement. The Attorney-General's clearance is also distinct from the approvals required for Government guarantees, parliamentary appropriations and natural-resource transactions.

6.3. Amendments, Variations and Continuing Compliance

The High Court's declaration also concerns section 72(1) of the PPP Act.

Material amendments and variations to existing PPP agreements should therefore be reviewed to determine whether they create new or additional public financial liabilities or otherwise trigger statutory approvals.

Contracting authorities should not assume that approvals obtained for an original project necessarily cover subsequent changes in project

scope, financing, payment obligations or Government support.

7. IMPLICATIONS FOR EXISTING AND PROPOSED PPP PROJECTS

The judgment has significant implications across Kenya's infrastructure and public service sectors, including transport, energy, ports, aviation, housing, healthcare, water and digital infrastructure.

7.1. Existing PPP Projects

Project sponsors and contracting authorities should review existing arrangements to identify potential approval deficiencies, particularly where Government guarantees or long-term financial obligations are involved. The judgment does not automatically invalidate existing PPP contracts. Any assessment of an existing transaction should consider the applicable statutory framework, the Court's suspended declaration, the specific contractual obligations and any subsequent legislative or judicial developments.

7.2. Projects Under Procurement

Contracting authorities should review ongoing procurement processes to ensure that the selected procurement method is objectively justified and properly documented. For PIPs, particular attention should be given to the reasons supporting any departure from open competition. Where the project is expected to involve Government financial support, the parliamentary approval implications should be assessed before negotiations become commercially advanced.

7.3. Projects Approaching Financial Close

Lenders and investors should review conditions precedent, Government support documentation and approval requirements to establish whether the transaction remains legally enforceable and financeable. Particular attention should be given to evidence of Attorney-General clearance, applicable parliamentary authorization, Government guarantee approvals and any natural-resource ratification requirements.

7.4. Future PPP Projects

New projects should integrate procurement compliance, public finance approvals, Attorney-General clearance, parliamentary ratification where applicable, stakeholder engagement and constitutional risk assessment from the earliest stages of development.

8. KEY RECOMMENDATIONS

In light of the judgment, CM Advocates LLP recommends that PPP stakeholders:

1. Undertake a constitutional compliance review of proposed and existing PPP financing and approval structures.
2. Prepare comprehensive PIP submissions demonstrating strategic alignment, innovation, affordability, value for money and appropriate risk allocation.
3. Provide a reasoned justification for the proposed procurement method, particularly where direct negotiations are contemplated.
4. Maintain independent and transparent evaluation processes supported by appropriate technical, commercial and financial evidence.
5. Identify Government financial commitments early and determine the applicable parliamentary and public finance approval requirements.
6. Review project and financing documentation to address approval risks, enforceability, termination and change-in-law protections.
7. Monitor legislative amendments during the six-month suspension of invalidity and any subsequent judicial developments.
8. Obtain Attorney-General clearance of the final draft PPP project agreement under section 60(2) before execution.
9. Secure parliamentary ratification where applicable, particularly for natural-resource PPP transactions under section 63 and Article 71.
10. Maintain an integrated approvals matrix covering PPP Committee approvals, Attorney-General clearance, parliamentary processes, sectoral authorisations and financial close requirements.

9. STRATEGIC OUTLOOK.

The High Court's decision provides important guidance on the place of PIPs in Kenya's infrastructure investment framework. It preserves their role in fostering private sector innovation while reaffirming the constitutional safeguards governing public procurement and public finance.

For investors, the decision underscores the need for commercially viable proposals supported by objective procurement justification. For contracting authorities, it reinforces the importance of independent evaluation, transparency and the requisite legal and parliamentary approvals. For financiers, it highlights the need for a sound legal basis for Government support and long-term financial commitments.

Ultimately, the decision confirms that PIPs do not guarantee exclusivity. Their success depends on demonstrable innovation, value for money, a justified procurement route and compliance with the applicable approval requirements, each serving its distinct legal purpose.

10. HOW WE CAN ASSIST

CM Advocates LLP advises Government entities, infrastructure developers, project sponsors, investors, contractors, commercial banks, development finance institutions and multinational corporations on PPP transactions, Government contracting and regulatory compliance.

Our Public Procurement & Strategic Partnerships (P2P) and Government Advisory, Public Law & Regulatory Litigation (GAVEL) practices provide integrated legal support across the PPP project lifecycle, including:

- Structuring and preparing Privately Initiated Proposals;
- Developing procurement-route justification memoranda;
- PPP project development, procurement and transaction advisory;
- Feasibility, value-for-money and regulatory compliance reviews;
- Government approvals, parliamentary

- oversight and public finance advisory;
- Parliamentary ratification and natural-resource transaction advisory;
- Preparation and review of documentation for Attorney-General clearance;
- Negotiation and drafting of PPP agreements, concessions and Government support instruments;
- Infrastructure financing and financial close;
- Constitutional and administrative law advisory;

- Procurement challenges, judicial review and constitutional litigation; and
- PPP disputes, arbitration and enforcement.

Our multidisciplinary approach combines transactional expertise with public law and dispute resolution capabilities to assist clients in navigating complex infrastructure and Government investment projects.

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Disclaimer: This Regulatory Alert is provided for general information and does not constitute legal advice. Its analysis is based on the High Court judgment delivered on 17th September 2026 and the statutory framework reviewed as at 19th October 2026. The legal implications of the decision depend on the circumstances of each project, the applicable statutory framework and subsequent legislative or judicial developments. Specific professional advice should be obtained before taking action.