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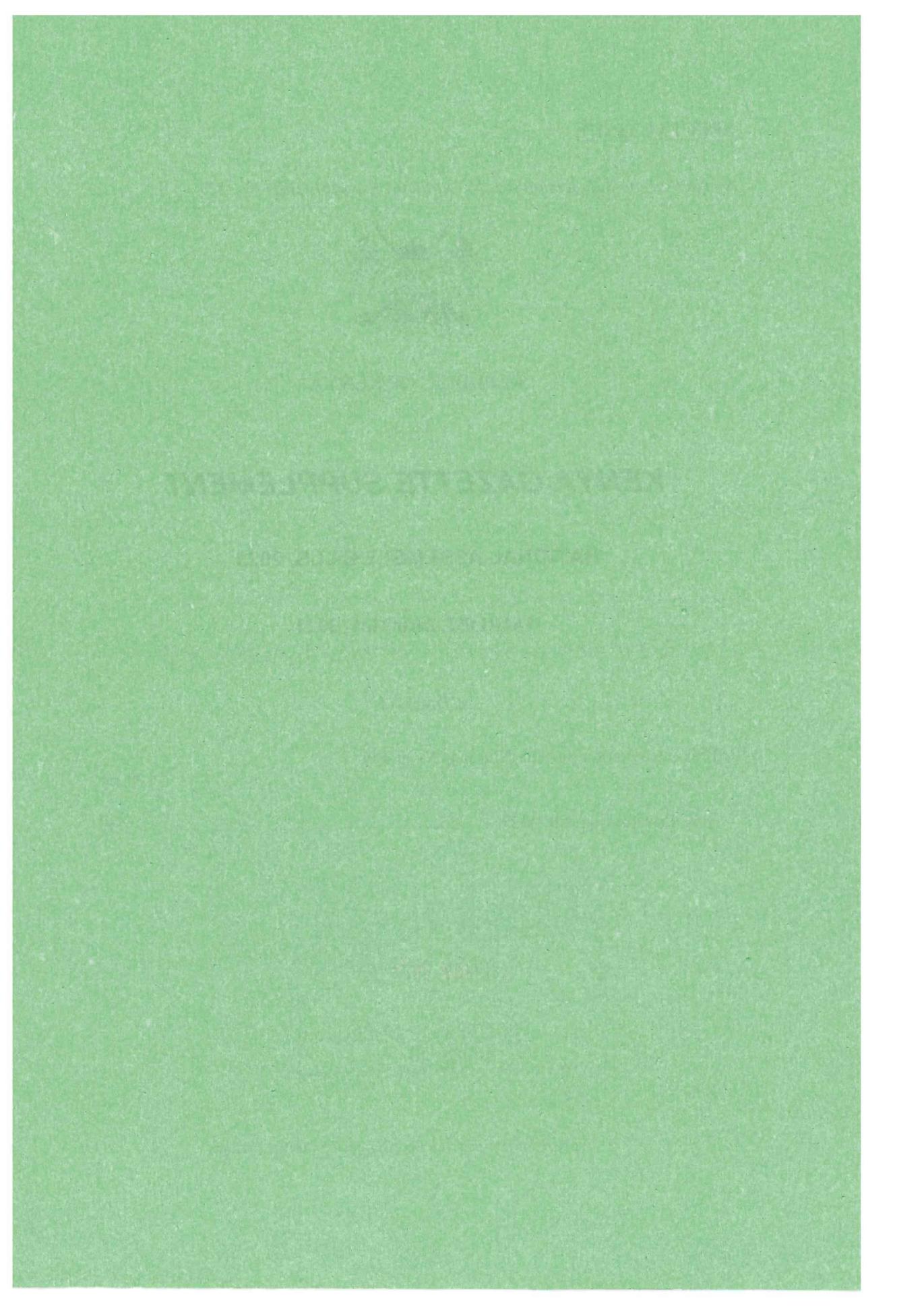
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PRIVATISATION ACT**

THE PRIVATISATION BILL, 2023

A Bill for

AN ACT of Parliament to provide a regulatory framework for the privatisation of public entities; to establish the Privatisation Authority; and for connected purposes.

ENACTED by the Parliament of Kenya, as follows—

PART I—PRELIMINARY

1. This Act may be cited as the Privatisation Act, 2023. Short title.

2.(1) In this Act, unless the context otherwise requires— Interpretation.

“Authority” means the Privatisation Authority established under section 8;

“Board” means the Board of the Authority constituted under section 10;

“Cabinet Secretary” means the Cabinet Secretary to the National Treasury;

“Corporation Secretary” means the Corporation Secretary appointed in accordance with section 16;

“Managing Director” means the Managing Director of the Authority appointed under section 15;

“national government-linked corporation” means a corporation in which the National Government or a national government entity is a shareholder with less than fifty per centum of the share capital of the corporation;

“privatisation” means a transaction that results in a transfer, other than to a public entity, of the national government shareholding in a public entity;

“privatisation programme” means the privatisation programme provided for under section 18;

“privatisation proposal” means a proposal provided for under section 29;

“public entity” includes —

- (a) a national government-linked corporation;
- (b) a subsidiary of a national government corporation;
or
- (c) a state corporation within the meaning of the State Corporations Act;

Cap. 446.

“Review Board” means the Privatisation Review Board established under section 47; and

“secondary market” means a financial market in which previously issued financial instruments such as shares and other marketable securities are traded.

3. The objects and purpose of this Act are to—

Objects and
purpose of the
Act.

- (a) provide for the establishment of the Privatisation Authority; and
- (b) streamline the regulatory and institutional framework for the implementation of a privatisation.

4. (1) This Act shall not apply to—

Limitation of
application.

- (a) sale of shares in the secondary market;
- (b) sale of shares by a social security fund, compensation fund, superannuation fund, insurance fund or endowment fund under public control for the benefit of its contributors;
- (c) sale of new shares to existing shareholders through a rights issue;
- (d) any balance sheet reorganisation which may lead to dilution of the percentage of shares held by a public entity; or
- (e) sale or transfer of shares by a county government.

(2) Without prejudice to subsection (1)(e), the National Treasury may, on its own or through the Authority, provide technical support and assistance to county governments with regard to privatisation by county governments.

5. The implementation of this Act shall be guided by the following principles—

- (a) the national values and principles of governance set out under Article 10 of the Constitution;
- (b) the principles of public finance provided under Article 201 of the Constitution;
- (c) the promotion of participation by Kenyans in the sustainable development and protection of the economy;
- (d) transparency and accountability;
- (e) efficiency and sustainability; and
- (f) cost effectiveness and value for public resources.

6. The purpose of a privatisation undertaken under this Act shall be to—

- (a) encourage more participation of the private sector in the economy by shifting the production and delivery of products and services from the public sector to the private sector;
- (b) improve the infrastructure and the delivery of public services through the involvement of private capital and expertise;
- (c) reduce the demand for government resources;
- (d) generate additional revenue for the government through compensation for privatisations;
- (e) improve the regulation of the economy by reducing conflicts between the public sector's regulatory functions and commercial functions;
- (f) broaden the base of ownership in the Kenyan economy by encouraging private ownership of entities;
- (g) improve the efficiency of the Kenyan economy by making it more responsive to market forces; and
- (h) enhance and develop the capital markets in Kenya.

Guiding principles of the Act.

Purpose of privatisation.

PART II — CO-ORDINATION AND OVERSIGHT OF PRIVATISATION MATTERS

7. The Cabinet Secretary shall have the following functions under this Act—

Role of Cabinet
Secretary.

- (a) providing policy direction on matters related to privatisation;
- (b) co-ordinating the adherence to national, regional and international obligations relating to privatisation;
- (c) developing and formulating the privatisation programme; and
- (d) overseeing the administration of this Act.

8. (1) There is established an authority to be known as the Privatisation Authority.

Privatisation
Authority.

(2) The Authority shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of—

- (a) suing and being sued;
- (b) taking, purchasing, charging and disposing of movable and immovable property;
- (c) entering into contracts; and
- (d) doing or performing all other things necessary for the proper discharge of its functions under this Act which may be lawfully done or performed by a body corporate.

9. The Authority shall—

Functions of the
Authority.

- (a) advise the government on all aspects of privatisation of public entities;
- (b) facilitate the implementation of government policies on privatisation;
- (c) implement the privatisation programme;
- (d) implement specific privatisation proposals in accordance with the privatisation programme;

- (e) collaborate with other organisations, within or outside Kenya, as it may consider appropriate in furtherance of the objects of this Act;
- (f) take such measures as are necessary to ensure that the provisions of this Act are complied with; and
- (g) perform any other functions under this Act or any other legislation as may be conferred, from time to time, on the Authority.

10. (1) The Authority shall be managed by a Board which shall consist of—

Board of the Authority.

- (a) a chairperson appointed by the President;
- (b) the Principal Secretary to the National Treasury or a representative designated in writing;
- (c) the Principal Secretary in the Ministry responsible for matters relating to investment promotion or a representative designated in writing;
- (d) the Attorney General or a representative designated in writing;
- (e) four other persons, not being public officers, competitively recruited and appointed by the Cabinet Secretary possessing relevant skills and competencies that may be required to achieve the objects of the Act; and
- (f) the Managing Director of the Authority, who shall be an *ex-officio* member of the Board with no voting rights.

(2) The chairperson and members of the Board appointed under subsection (1)(e) shall hold office for a term of three years and may be eligible for reappointment for one further term of three years.

(3) In the appointment of the Board, the appointing authority shall ensure that the membership reflects gender and regional balance and an appropriate mix of skills and competencies required to achieve the functions of the Board.

11. (1) The Board shall—

Functions of the Board.

- (a) ensure the proper and effective performance of the functions of the Authority;
- (b) determine the mission, vision, purpose and core values of the Authority;
- (c) set and oversee the overall strategy and approve policies of the Authority; and
- (d) ensure availability of adequate resources for the achievement of the Authority's objectives.

(2) In the performance of its functions under subsection (1), the Board shall have power to—

- (a) subject to the approval of the Cabinet Secretary, invest any of the Authority's funds that are not immediately required for the purposes of this Act;
- (b) monitor and evaluate the performance of the Authority;
- (c) open and operate bank accounts for the funds of the Authority in accordance with the Public Finance Management Act, 2012;
- (d) receive any grants, gifts, donations or endowments on behalf of the Authority; and
- (e) in consultation with the relevant agencies, determine and specify the terms and conditions for the appointment and emoluments of the staff of the Authority.

No. 18 of 2012.

12. (1) The office of the chairperson or a member of the Board shall become vacant if the holder—

Vacancy in the Board.

- (a) dies;
- (b) resigns from office by notice in writing addressed to the appointing authority;
- (c) is removed from office on any of the following grounds—
 - (i) has been absent from three consecutive meetings of the Board without a reasonable explanation;

- (ii) incapacitation due to prolonged physical or mental illness and is unable to discharge the duties of his or her office;
- (iii) failure to comply with the provisions of this Act relating to disclosure of interest;
- (iv) being adjudged bankrupt or entering into a composition scheme or arrangement with his or her creditors;
- (v) being convicted of a criminal offence and sentenced to imprisonment for a term exceeding six months; or
- (vi) being otherwise unable or unfit to discharge the functions of his office.

(2) Where a vacancy occurs in the membership of the Board, the appointing authority shall appoint a new member in accordance with the provisions of this Act.

13. The conduct of the business and affairs of the Board shall be as set out in the First Schedule.

Conduct of business and affairs of the Board.

Remuneration of the members.

14. The chairperson and members of the Board, other than the Managing Director, shall be paid out of the funds of the Authority such allowances or other remuneration as the Cabinet Secretary, on the advice of the Salaries and Remuneration Commission, determines.

15. (1) There shall be a Managing Director of the Authority who shall be competitively recruited and appointed by the Board on such terms as may be specified in the instrument of appointment.

Managing Director.

(2) The Managing Director shall, under the direction of the Board, be responsible for—

- (a) the day-to-day management of the affairs of the Authority;
- (b) the exercise and performance of the objectives, functions and duties of the Authority, and the general administration of the Authority; and
- (c) performing such other duties as may be determined by the Board.

(3) A person is qualified to be appointed as the Managing Director if that person possesses experience and expertise in either financial management, banking, economics, public policy or any other relevant skills and competencies that may be required to achieve the objects of the Authority.

(4) The Managing Director shall be appointed for a term of four years and may be eligible for reappointment for one further term not exceeding four years.

16. (1) There shall be a Corporation Secretary who shall be competitively recruited and appointed by the Board on such terms as the Board, on the advice of the Salaries and Remuneration Commission, determines.

Corporation
Secretary.

(2) The Corporation Secretary shall —

- (a) provide secretariat services to the Board;
- (b) record and keep minutes and other records of the Board;
- (c) ensure that members of the Board are aware of all relevant laws affecting the Authority; and
- (d) carry out such other functions as may be assigned from time to time by the Board or the Managing Director.

(3) The Corporation Secretary shall be responsible to the Managing Director.

17. The Authority shall have such staff as it may require for the proper discharge of its functions under this Act, on such terms and conditions of service as the Board may determine.

Staff of the
Authority.

PART III – PRIVATISATION PROGRAMME

18. (1) There shall be a programme to be known as the privatisation programme.

Privatisation
programme.

(2) The privatisation programme shall —

- (a) be formulated by the Cabinet Secretary in accordance with this Act and approved by the Cabinet;
- (b) specify the public entities identified and approved for privatisation; and

- (c) serve as the basis upon which a privatisation shall be undertaken.

19. (1) During the formulation of the privatisation programme, the Cabinet Secretary shall make appropriate consultations with persons who are likely to be affected by the privatisation of a public entity.

Consultation in formulation of the programme.

(2) The persons envisaged under subsection (1) include—

- (a) persons with expertise in fields relevant to the entities to be included in the privatisation programme;
- (b) organisations representing persons who are likely to be affected by the proposed privatisation; and
- (c) members of the public.

20. (1) The Cabinet Secretary shall identify and determine the entities to be included in the privatisation programme.

Identification of entities for the programme.

(2) Without prejudice to the generality of subsection (1), the Cabinet Secretary shall, in the identification and determination of entities for privatisation, take into consideration—

- (a) the relevant government policies in respect of privatisation;
- (b) the strategic priorities and policy goals to be achieved by the privatisation;
- (c) the strategic nature of the public entity to be privatised;
- (d) the need to avoid a privatisation that may result in an unregulated monopoly;
- (e) the need to avoid a privatisation that may accord the new owners' special protection or access to credit on concessionary terms as a result of the National Government's sovereign status;
- (f) the extent of regulatory adjustments required;

- (g) the need to reduce budget drain on government resources;
- (h) the expected benefits to be gained from a proposed privatisation; and
- (i) any other relevant consideration.

21. (1) Upon approval of the privatisation programme by Cabinet, the Cabinet Secretary shall submit the approved privatisation programme to Parliament for ratification before implementation of the programme.

Ratification by
Parliament.

(2) The request for ratification under subsection (1) shall be accompanied by an explanatory memorandum indicating—

- (a) a brief description of the public entity to undergo privatisation;
- (b) a brief explanation of the reasons for undertaking the privatisation;
- (c) the benefits to be gained from the proposed privatisation including the estimated revenue to be obtained; and
- (d) any other relevant information.

(3) Parliament shall, within sixty days after receipt of privatisation programme under subsection (1), —

- (a) consider the programme guided by principles of good governance, the criteria for identification of entities specified under section 20 and any other relevant consideration;
- (b) Either—
 - (i) ratify part or all of the programme for implementation; or
 - (ii) refuse to ratify part or all the programme and notify the Cabinet Secretary for reconsideration stating the reasons for the refusal; and
- (c) notify the Cabinet Secretary of its decision.

(4) The Cabinet Secretary shall, upon receipt of the refusal under subsection (3)(b)(ii), consider the decision

and may resubmit the same privatisation programme to Parliament for ratification.

(5) Where Parliament does not make a decision under subsection (3) within ninety days, the privatisation programme shall be deemed to have been ratified.

22. The privatisation programme ratified under section 21 shall be published in the Kenya *Gazette*.

Publication of programme.

23. (1) A privatisation programme shall be valid for a period not exceeding five years from the date of *gazettlement*.

Validity of the programme.

(2) Notwithstanding subsection (1), the Cabinet Secretary may extend the validity of the privatisation programme for a period not exceeding twelve months.

(3) If, on expiry of the programme under subsection (1) or at the expiration of the extended period under subsection (2), the implementation of the programme has not been completed, the Cabinet Secretary may include the affected entities in another privatisation programme formulated and approved in accordance with this Act.

24. The Cabinet Secretary may amend the privatisation programme and the provisions of this Part relating to formulation and approvals shall apply with respect to any such amendments.

Amendment of the programme.

PART IV — IMPLEMENTATION OF THE PRIVATISATION PROGRAMME

Preliminaries

25. The privatisation programme shall be implemented by the Authority in accordance with this Act.

Implementation of the programme.

26. (1) Any person, whether Kenyan or non-Kenyan, is eligible to participate in a privatisation:

Eligibility in a privatisation.

Provided that this section shall not affect the application of any other law imposing restrictions on participation by non-Kenyans.

(2) Notwithstanding subsection (1), the Cabinet Secretary may direct the Authority to—

- (a) limit participation in any privatisation to Kenyans; or
- (b) ensure that there is a specified minimum level of participation by Kenyans in any privatisation.

(3) A national government-owned entity is not eligible to participate in a privatisation.

(4) Subsection (3) shall not prevent a social security fund, compensation fund, superannuation fund, insurance fund or endowment fund under government control from purchasing shares for the benefit of its contributors.

27. (1) In the implementation of a privatisation, the Managing Director may constitute a technical advisory committee.

Technical
advisory
committees.

(2) A committee constituted under subsection (1) shall consist of representatives from the following institutions—

- (a) the National Treasury;
- (b) the Authority;
- (c) the Ministry responsible for the entity being privatised;
- (d) the entity to be privatised;
- (e) the Attorney General; and
- (f) a representative of any other relevant institution as may be determined by the Managing Director.

(3) A technical advisory committee shall operate on an *ad hoc* basis depending on the needs and technicalities of the proposed privatisation.

28. The methods of privatisation shall include—

Methods of
privatisation.

- (a) initial public offer of shares;
- (b) sale of shares by public tender;
- (c) sale resulting from the exercise of pre-emptive rights; or
- (d) such other method as the Board shall, with the approval of the Cabinet Secretary, determine.

Privatisation proposal

29. (1) Where an entity has been identified for privatisation under this Act, the Authority shall prepare a privatisation proposal on the entity.

Privatisation
proposal.

(2) The privatisation proposal shall specify—

- (a) the purpose for the establishment or existence of the entity to be privatised and the extent to which that purpose or operation has been met including any inadequacies in meeting that purpose;
- (b) any rights or other entitlements and resources that have been provided to meet the purpose for the establishment or existence of the entity to be privatised;
- (c) any recommendations for continuing to meet the purpose for establishment or existence of the entity to be privatised;
- (d) the financial position of the entity to be privatised;
- (e) the recommended method of privatisation;
- (f) the estimated costs of implementing the proposed privatisation;
- (g) any recommendations for dealing with the employees directly affected by the proposed privatisation including any benefits they are entitled to;
- (h) where applicable, a recommendation on how to undertake socio-economic investments to the host community;
- (i) the benefits to be gained from the proposed privatisation;
- (j) a work plan for the proposed privatisation;
- (k) any information relating to the repeal, amendment or enactment of any law for the proposed privatisation to be carried out;

- (l) an evaluation of the entity to be privatised;
- (m) any proposals on how Kenyans can participate in the transaction; and
- (n) any other relevant information.

30. (1) During the preparation of a privatisation proposal, the Authority shall undertake consultations on the privatisations to be implemented under the privatisation programme.

Stakeholder engagement during proposal preparation.

(2) The consultations under subsection (1) shall include engagements with—

- (a) experts on technical matters related to the proposed privatisation;
- (b) any employees or officers directly affected by the proposed privatisation;
- (c) the host community in the area where the entity to be privatised is located; and
- (d) any other relevant stakeholder.

31. Upon preparation of a privatisation proposal under section 30, the proposal shall be approved by the Board and submitted to the Cabinet Secretary for approval.

Approval of privatisation proposal.

32. Upon approval of a privatisation proposal under section 31, the determined and approved method of privatisation shall be effected in the manner specified in the Second Schedule.

Implementation of a finalised privatisation.

Valuation

33. (1) The Authority shall undertake a valuation for each privatisation, to assist in the implementation of the privatisation proposal.

Valuation required for each privatisation.

(2) The valuation shall be performed by a qualified person appointed by the Authority.

Restrictions and obligations on entities scheduled for privatisation

34. The restrictions set out under this Part shall begin to apply upon publication of privatisation programme under section 22.

Application of restrictions.

35. A state corporation to which this section applies shall not—

General restrictions.

- (a) allow the assets of the public entity to be dissipated;
- (b) incur any liabilities, other than in the ordinary course of business, without the prior written approval of the Cabinet Secretary; or
- (c) disclose information, other than publicly, if there is a reasonable risk that the disclosure would give an advantage to a person who might compete in the privatisation.

36. A state corporation undergoing privatisation shall not undertake any new capital investment or disposal unless approved by the Cabinet Secretary.

Control of investments.

37. The National Government or the public entity undergoing privatisation shall not extend credit or provide financing for the purchase of the shares.

No credit on sale of shares.

38. A public entity undergoing privatisation shall—

Obligation for record keeping.

- (a) keep up-to-date business records and books of accounts;
- (b) maintain an up-to-date register of all fixed assets; and
- (c) document all legal and other obligations of the entity.

PART V — PRIVATISATION AGREEMENT

39. Upon approval and implementation of a privatisation under Part IV, an agreement to give effect to a privatisation shall not be binding unless executed by the registered owner of the shares and countersigned by the Cabinet Secretary.

Privatisation agreement.

40. (1) An agreement to give effect to a privatisation shall not be signed until the period for filing an objection has lapsed.

Limits on when agreement may be signed.

(2) Where an objection or appeal has been lodged in accordance with section 45 or 46, the agreement to give effect to the privatisation shall not be executed until—

- (a) a determination with respect to the objection or appeal has been made; and
- (b) the time for filing a notice of appeal has expired without such a notice being filed.

41. Where a proposed privatisation may result in an unregulated monopoly, the Authority shall, subject to the Competition Act —

Regulation of monopolies.

No. 12 of 2010.

- (a) ensure that the agreement to give effect to the privatisation provides for the regulation of the monopoly; and
- (b) seek the approval of the Cabinet Secretary on the agreement.

42. (1) After an agreement to give effect to a privatisation becomes binding on the public entity, the Authority shall promptly publish a notice of the privatisation in the Kenya *Gazette*.

Publication of finalised privatisation.

(2) The notice under subsection (1) shall specify—

- (a) a description of the entity being privatised;
- (b) a summarised description of the transaction used to give effect to the privatisation;
- (c) the names and addresses of the persons to whom the shareholding is being transferred:

Provided that this paragraph shall not apply to a privatisation undertaken through initial public offer of shares; and

- (d) such other information as the Authority considers appropriate.

PART VI — PROCEEDS OF PRIVATISATION

43. Any proceeds from the sale of a direct National Government shareholding shall be paid into the Consolidated Fund.

Proceeds from sale of direct government shareholding.

44. (1) Any proceeds from the sale of a state corporation's shareholding shall be deposited in a special interest-bearing account established for that state

Proceeds from the sale of a state corporation's shareholding.

corporation in order to protect the erosion of the balance sheet of the state corporation.

(2) Subject to the approval of the Cabinet Secretary, the proceeds under subsection (1) may be —

- (a) used to liquidate the debts of the state corporation;
- (b) used to pay the costs of financial and organisational restructuring of the state corporation;
- (c) used to pay for capital investments by the state corporation;
- (d) used to defray the cost incurred by the Authority in the privatisation, which payment shall not exceed five per centum of the proceeds of the privatisation or the actual cost incurred, whichever is lower; or
- (e) paid into the Consolidated Fund.

PART VII — OBJECTIONS AND APPEALS

45. (1) Any person aggrieved by the determination of the Authority under this Act or implementation of the privatisation programme may lodge an objection.

Objections.

(2) An objection under this section shall be lodged and determined in accordance with the Procedures set out in the Third Schedule.

46. (1) Any person aggrieved by the determination of the Authority under section 46 may appeal to the Privatisation Review Board.

Appeals.

(2) An appeal under this section shall be lodged and determined in accordance with the Procedures set out in the Third Schedule.

(3) A person aggrieved by the decision of the Review Board in an appeal under this section may appeal to the High Court.

47. There is established a board to be known as the Privatisation Review Board to determine disputes and appeals under this Act or any other written law.

Establishment of
the Privatisation
Review Board.

48. (1) The Review Board shall consist of the following members appointed by the Cabinet Secretary —

Members of the
Review Board.

- (a) a chairperson who shall be an accredited arbitrator registered with the Chartered institute of Arbitrators (Kenyan Chapter) and with at least ten years' experience in commercial dispute resolution; and
- (b) four other persons, not being public officers or employees of the Authority, possessing relevant knowledge and experience in privatisation related matters.

(2) A member of the review Board shall hold office for a term of—

- (a) five years in the case of the chairperson; and
- (b) three years in the case of any other member, and may be eligible for re-appointment for one further term.

(3) A person shall be qualified for appointment under subsection (1) if that person—

- (a) is a citizen of Kenya;
- (b) holds a degree in a relevant field from a university recognised in Kenya;
- (c) is a member in good standing of the relevant professional association; and
- (d) meets the requirements of leadership and integrity set out in Chapter Six of the Constitution.

49. The office of the chairperson or a member of the Review Board shall become vacant—

Vacancy in the
Review Board.

- (a) at the expiration of the term of office of the chairperson or member;
- (b) where the chairperson or a member dies or resigns from office;
- (c) if the chairperson or member is otherwise unable or unfit to discharge the functions of his office; or
- (d) if the chairperson or member accepts any office the holding of which would make him or her ineligible for appointment to the office of member of the Review Board.

- 50.** The Cabinet Secretary shall designate a public officer to be the secretary to the Review Board.
- 51.** Unless otherwise provided, the Review Board shall regulate its own procedures.
- 52.** The chairperson and members of the Review Board shall be paid such remuneration or allowances as the Cabinet Secretary may, in consultation with the Salaries and Remuneration Commission, determine.
- 53.** Where the chairperson or a member of the Review Board has a direct or indirect interest in a matter before the Review Board, the chairperson or member shall declare the interest and shall not participate in any proceedings of the Review Board on the matter.
- PART VIII — FINANCIAL PROVISIONS**
- 54.** The funds of the Authority shall consist of—
- (a) monies allocated by Parliament for the purposes of the Authority;
 - (b) monies accruing to or vesting in the Authority in the course of the exercise of its powers or the performance of its functions;
 - (c) grants, donations, bequests or other gifts made to the Authority; and
 - (d) monies from any other source provided for, donated or loaned to the Authority.
- 55.** The financial year of the Authority shall be the period of twelve months ending on the thirtieth June in each year.
- 56.** (1) At least three months before the commencement of each financial year and in accordance with the Public Finance Management Act, 2012, the Board shall cause to be prepared the estimates of revenue and expenditure of the Authority for the financial year.
- (2) The annual estimates shall provide for all the estimated expenditure of the Authority for the financial year, and in particular, shall provide for—
- Secretary to the Review Board.
- Conduct of proceedings of the Review Board.
- Remuneration of the Review Board.
- Conflict of interest.
- Funds of the Authority.
- Financial year.
- Annual estimates.
- No. 18 of 2012.

- (a) the payment of salaries, allowances and other charges in respect of the staff of the Authority;
- (b) the payment of pensions, gratuities and other charges in respect of the staff of the Authority;
- (c) the maintenance of buildings, other equipment and other property of the Authority; and
- (d) the acquisition, maintenance, repair and replacement of the equipment and other movable or immovable property of the Authority.

57. (1) The Board shall cause to be kept proper books of accounts of the income, expenditure, assets and liabilities undertakings, activities, transactions and other business of the Authority.

Accounts and audit.

(2) The accounts of the Authority shall be audited in accordance with the Public Audit Act, 2015.

No. 34 of 2015.

PART IX — MISCELLANEOUS PROVISIONS

58. (1) Within three months after the end of each financial year, the Authority shall prepare and submit to the Cabinet Secretary an annual report of the Authority for the immediately preceding financial year.

Annual report.

(2) The report under subsection (1) shall include information on—

- (a) the operations of the Authority for the immediately preceding financial year;
- (b) activities undertaken under the privatisation programme in each financial year; and
- (c) any other relevant information.

(3) The annual report submitted under subsection (1) shall form part of the annual report on privatisation which shall be tabled in Parliament by the Cabinet Secretary.

59. The Authority shall maintain updated records of each privatisation undertaken under this Act.

Records.

60. No matter or action done by a member of the Board or by any officer, employee, or agent of the Authority shall, if the matter or action is done in good faith

Protection from personal liability.

in the execution of the functions, powers or duties of the Authority under this Act, render the member, officer, employee or agent personally liable to any action, claim or demand.

(2) The provisions of subsection (1) shall not relieve the Authority of any liability to pay compensation or damages for any injury or damage caused by the exercise of any power under this Act or any other written law or by the failure, wholly or partially, of any works.

61. (1) In the implementation of this Act, a public entity to which this Act applies shall provide the Authority with such information as may be necessary to effectively implement the privatisation.

Information to the Authority.

(2) The information given, furnished or maintained or required to be given, furnished or maintained under this Act shall be true, complete and accurate.

(3) Any information required under subsection (1) shall be submitted to the Authority within fourteen days of receipt of a request for information.

62. (1) Any information issued to or sought by the Authority under this Act is confidential and shall not be disclosed unless with the written approval of the Authority.

Confidential information.

(2) No person carrying out duties or responsibilities under this Act shall disclose any information or other data of a confidential nature obtained by virtue of their said authority, duties and responsibilities to any other person without the approval of the Authority.

63. A person who—

Offences.

- (a) falsifies or omits material information from the privatisation proposal;
- (b) provides false or misleading information that results in a wrong or erroneous valuation of an entity to be privatised;
- (c) provides false or misleading information to a person carrying out a duty or function under this Act;

- (d) discloses insider information, otherwise than in the performance of their duties and under this Act or with the written consent of the Authority, that may give an advantage to a person who might compete in the privatisation;

commits an offence and is liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding two years and payment of an equivalent amount of the gain made or loss incurred.

64. The Cabinet Secretary may make Regulations generally for the better carrying out of the provisions of this Act.

Regulations.

PART X – REPEALS, SAVINGS AND TRANSITIONAL PROVISIONS

65. (1) In this Part—

Interpretation of Part.

“Commission” means the Privatisation Commission established under the repealed Act;

“Tribunal” means the Privatisation Appeals Tribunal established under the repealed Act; and

“repealed Act” mean the Privatisation Act, 2005.

No. 2 of 2005.

(2) The Authority shall be the successor to the Commission existing immediately before the commencement of this Act.

66. The Privatisation Act, 2005 is repealed.

Repeal of No. 2 of 2005.

67. (1) Any rights and obligations of the Commission existing at the commencement of this Act shall, by virtue of this subsection, vest in the Authority.

Transitional provisions.

(2) Any reference in any written law, document or instrument to the Commission shall be deemed to be a reference to the Authority.

(3) Any rights and obligations vested in or enforceable by or against the Commission shall, by virtue of this subsection, be vested in, or become enforceable by or against the Authority.

(4) Any asset and liabilities held or imposed on the Commission shall, by virtue of this subsection vest in the Authority.

68. (1) Upon commencement of this Act, the privatisation of entities published under Gazette Notice No. 8739 of 14th August 2009 shall lapse.

Ongoing
privatisations.

(2) Notwithstanding subsection (1) any ongoing privatisation under the repealed Act that may be completed within twelve months from the date of commencement of this Act, shall be determined and finalised in accordance with this Act.

69. Any person who was a member of the Commission immediately before the commencement of this Act shall be deemed to be a member of the Board of the Authority for the unexpired period of that person's tenure.

Members of the
Commission.

70. Any person who immediately before the commencement of this Act was an officer or employee of the Commission shall be deemed to be a member of staff of the Authority based on the terms and conditions of engagement.

Staff of the
Commission.

71. Any person who was a member of the Tribunal immediately before the commencement of this Act shall be deemed to be a member of the Review Board for the unexpired period of that person's tenure.

Members of the
Tribunal.

FIRST SCHEDULE

(s. 13)

CONDUCT OF BUSINESS AND AFFAIRS OF THE BOARD**1. Meetings**

(1) The Board shall hold at least four meetings in every financial year.

(2) The notice for a meeting of the Board shall be in writing, and shall be for a period of at least seven days from the expected day of the meeting.

(3) The chairperson shall preside over all meetings and in the absence of the chairperson, a person elected by the Board at the meeting for that purpose shall preside.

(4) The chairperson may, on the written request made by at least half of the members of the Board and within seven days of the request, convene an extraordinary meeting at such time and place as the chairperson may appoint.

(5) The Board may invite any person to attend any of its meetings and to participate in its deliberations, but such person shall not have a vote in any decision of the Board.

2. Conflict of interest and disclosure

(1) If a person is present at a meeting of the Board or any committee at which any matter is the subject of consideration and in which matter that person is directly or indirectly interested in a private capacity, that person shall as soon as is practicable after becoming aware of the conflict and in any case at the commencement of the meeting, declare such interest.

(2) The person making the disclosure of interest under subsection (1) shall not, unless the Board or committee otherwise directs, take part in any consideration or, discussion of, or vote on any question touching on the matter.

(3) A disclosure of interest made under subparagraph (1) shall be recorded in the minutes of the meeting at which it is made.

(4) No member of the Board or officer, employee or agent of the Authority shall enter into a service contract or trade with the Authority.

3. Quorum

The quorum for the conduct of business at a meeting of the Board shall be two-thirds of all the total members of the Board.

4. Resolution of the Board

A decision of the Board shall be by a majority of the members present and voting and, in the case of an equality of votes, the person presiding at the meeting shall have a casting vote.

5. Rules of procedure

Subject to this Act, the Board shall determine the procedure for the conduct of its business and cause to be kept records of minutes of its proceedings and decisions.

SECOND SCHEDULE

(s. 32)

METHODS OF PRIVATISATION**1. Initial public offering of shares**

Where the selected method of privatisation is through initial public offer of shares, the offering of shares shall be undertaken in accordance with the Capital Markets Act, Cap 485A.

2. Sale of shares by public tendering

Where the selected method of privatisation is through sale of shares by public tendering, the following procedure shall apply—

Invitation of expression of interest

(1) The Authority shall prepare a notice inviting interested persons to submit expressions of interests.

(2) The notice inviting expressions of interests shall specify—

a brief description of the entity to be privatized;

the eligibility and qualifications necessary to be invited to submit a proposal;

an explanation of where and when the expressions of interests shall be submitted;

information on the timelines for closure of bids; and

any other relevant information

(3) The Authority shall advertise the notice inviting the expressions of interests in the Government tenders' portal, or on the Authority's website and in at least two newspapers of nationwide circulation.

Evaluation of EOIs

(4) The Managing Director shall constitute a committee, of not less than three persons and not more than five persons to evaluate successfully submitted bids.

(5) Upon closure of the period for submission of bids, the committee constituted under paragraph (4) shall evaluate the successfully submitted bids in accordance with the procedures and criteria set out in the expressions of interests.

(6) Upon completion of the evaluation, the Managing Director shall submit to the Board a detailed report of all shortlisted persons for its approval.

Request for Proposal to qualified persons

(7) Upon approval of the evaluation report by the Board, the Managing Director shall issue all shortlisted persons with a request for proposal and concurrently notify persons not shortlisted of the outcome of the evaluation indicating the reasons thereof.

Evaluation of proposals

(8) The Managing Director shall constitute a committee of not less than three persons and not more than five persons to evaluate successfully submitted request for proposals.

(9) Upon closure of the period for submission of request for proposals, the committee constituted under paragraph (8) shall evaluate the successfully submitted request for proposals in accordance with the procedures and criteria set out in the request for proposals.

(10) The successful proposal shall be the responsive proposal with the highest ranked bidder, subject to the reserve price.

(11) Upon completion of the evaluation, the Managing Director shall submit to the Board a detailed report containing a summary of the evaluation and comparison of tenders for approval.

(12) The recommendations of the Board under paragraph (12), together with a draft agreement, shall be submitted to the Cabinet Secretary for approval.

Notification to tenderers

(13) Upon approval by the Cabinet Secretary, the Managing Director shall notify the successful tenderer and concurrently notify the unsuccessful tenderers of the outcome of the tender indicating the reasons thereof.

3. Sale resulting from the exercise of pre-emptive rights

(1) Where the selected method of privatisation is through sale resulting from the exercise of pre-emptive rights, the sale shall be undertaken in accordance procedure specified in the respective entity's constituting instruments.

(2) Where the constituting instruments of the entity do not provide a procedure for exercising and sale of a pre-emptive right, the provisions of the relevant laws shall apply.

THIRD SCHEDULE

(S. 45)

**THE ADMINISTRATIVE PROCEDURES FOR THE
ADMINISTRATION OF OBJECTIONS AND APPEALS UNDER
THE PRIVATISATION ACT****1. Citation**

These procedures may be cited as the Administrative Procedures for the Administration of Objections and Appeals under the Act.

2. Definitions

In these Procedures, unless the context otherwise requires—

“Act” means the Privatisation Act, 2023;

“Authority” means the Privatisation Authority;

‘Review Board’ means the Privatisation Review Board;

“working day” means a day other than a Saturday, Sunday or public holiday.

3. Objections

(1) Pursuant to section 45 of the Act, any person aggrieved by the determination of the Authority or the implementation of the privatisation programme may lodge an objection.

(2) An objection under paragraph (1) shall be made in writing to the Authority—

- (a) within fifteen days of the determination by the Authority;
- (b) indicating the details of the person lodging the objection;
- (c) stating precisely grounds and reasons for the objection; and
- (d) provide such other relevant information as may be necessary to support the application.

(3) Where an objection meets the criteria under paragraph 3(2), the Authority shall make a determination within fifteen days of receipt of complete application.

(4) Upon making a determination under paragraph 3(3), the Authority shall notify the objector of its decision indicating the reasons for the decision.

4. Appeals

(1) Pursuant to section 46 of the Act, any person aggrieved by the determination of the Authority in an objection may appeal to the Privatisation Review Board.

(2) An appeal shall be lodged with the Review Board by notice of appeal within fifteen days of receipt or notification of the determination by the Authority.

(3) The notice of appeal shall —

- (a) be signed by the appellant;
- (b) state the appellant's initial objection;
- (c) be accompanied by a copy of the decision of the Authority in the objection; and
- (d) concisely set out the grounds for the appeal.

(4) The notice of appeal shall be filed with the Review Board within fifteen days of receipt or notification of the determination and a copy served on the Authority.

(5) The Authority shall file a response to the notice of appeal with the Review Board within fifteen days after being served with the notice of appeal.

(6) The Review Board shall hear and determine the appeal within thirty days of receipt of response to the notice of appeal from the Authority and notify the applicant and the Authority of its decision stating the reasons thereof.

(7) On determination of a matter on appeal, the Review Board may —

- (a) annul anything done in the privatisation process, including annul the privatisation process in its entirety;
- (b) issue directions with respect to anything to be done or repeated in the privatisation process; or
- (c) order the payment of costs between the parties to the appeal.

5. Further appeal

(1) Pursuant to section 46 of the Act, a person aggrieved by the decision of the Review Board in an appeal under this section may appeal to the High Court.

(2) An appeal to the High Court shall be made within fifteen days of receipt or notification of the determination by the Review Board.

6. Conduct of procedures

Unless otherwise provided, the Review Board shall determine its own procedure.

7. Powers of the Review Board

The Review Board shall have the power to issue directions to secure the attendance of persons, require the production of documents and require a party to provide security for costs as a condition of participating in an appeal.

8. Amendment of the Schedule

The Cabinet Secretary may, by notice in the Kenya *Gazette*, amend this Schedule.

MEMORANDUM OF OBJECTS AND REASONS

The principal object of this Bill is to provide a revised regulatory framework for the privatisation of public entities with a view to improving the efficiency and competitiveness of Kenya's productive resources.

The Bill provides as follows:

Part I (Clauses 1-6) of the Bill provides for preliminary matters including the short title and interpretation of terms used in the Bill. It further sets out the transactions to which the Act shall not apply, the guiding principles of the Act and the purpose of undertaking privatisation.

Part II (Clauses 7-17) of the Bill provides for the coordination and oversight of privatisation matters. It outlines the functions of the Cabinet Secretary; provides for the establishment, functions and administration of the Privatisation Authority and the appointment and functions of the Managing Director, the Corporation Secretary and staff of the Authority.

Part III (Clauses 18-24) of the Bill deals with the privatisation programme. It makes provisions for the formulation of the programme which includes identification of entities to be included in the programme in line with the considerations, public consultations during development and ratification by Parliament before implementation of the programme.

It further specifies the validity period of the programme as not exceeding five years from the date of gazettement; and such validity may be extended for a period not exceeding twelve months.

Part IV (Clauses 25-38) of the Bill makes provision for the implementation of the programme. It mandates the Privatisation Authority to implement the programme and empowers the Authority to constitute technical advisory committees in the implementation of a privatisation.

It further provides for who is eligible to participate in a privatisation; the methods of privatisation; the development of a privatisation proposal which shall include stakeholder engagement on the individual privatisations and the approval of the privatisation proposal by the Board of the Authority and the Cabinet Secretary before implementation.

Additionally, the Part provides for restrictions, and obligations on entities scheduled for privatisation.

Part V (Clauses 39- 42) of the Bill provides for privatisation agreement specifying who and when an agreement can be executed. It further provides for publication of finalised privatisation.

Part VI (Clauses 43-44) of the Bill provides for the manner in which the proceeds of privatisation shall be handled.

Part VII (Clauses 45-53) of the Bill provides for objections and appeals. It provides the procedure for lodging an objection and appeal; establishment and conduct of the Privatisation Review Board.

Part VIII (Clauses 54-57) of the Bill provides the financial provisions in respect of the Authority including the sources of funds, the financial year of the Authority, annual estimates, accounts and audit of the financial affairs of the Authority.

Part IX (Clauses 58-64) of the Bill provides the miscellaneous provisions. It provides for the annual report on the privatisation programme; protection from personal liability; submission of information to the Authority; offences under Act and the power of the Cabinet Secretary to make Regulations.

Part X (Clauses 65-71) of the Bill contains repeals, savings and transitional provisions. It provides for the effect of its enactment on existing legislation and for the repeal of the Privatization Act, 2005.

The First Schedule to the Bill provides for the conduct of business and affairs of the Board.

The Second Schedule to the Bill sets out provisions on the methods of privatisation.

The Third Schedule to the Bill sets out the Administrative Procedures for the administration of objections and appeals under the Act.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill confers on the Cabinet Secretary the powers to make Regulations under the Act for the purposes of operationalizing the Act in order to implement the objectives. The Bill does not limit any fundamental rights or freedoms.

Statement on how the Bill concerns County Governments

The Bill does not concern County Governments as it does not affect the functions and powers of County Governments as set out in the Fourth Schedule to the Constitution.

**Statement of the Bill as a money Bill within the meaning of Article 114
of the Constitution**

The Bill is a Money Bill within Article 114 of the Constitution.

Dated the 28th April, 2023.

KIMANI ICHUNG'WAH,
Leader of the Majority Party.

