



**Omtatah v President of the Republic of Kenya (Petition E514 of 2023)
[2025] KEHC 2613 (KLR) (Constitutional and Human Rights) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E514 OF 2023

LN MUGAMBI, J

MARCH 13, 2025

BETWEEN

STELLA NEKESA OMTATAH PETITIONER

AND

PRESIDENT OF THE REPUBLIC OF KENYA RESPONDENT

RULING

Introduction

1. In the Petition dated 13th December 2023; the Petitioner claims that the respondent, H.E. Dr. William Samoei Ruto and the former President H.E. Uhuru Muigai Kenyatta have failed to meet the Petitioner for purposes of considering the proposals the Petitioner has made in her book titled ‘A complete stimulus framework proposal for the successful reformation of Africa’s (Kenyan’s education system)’ and have therefore, violate the petitioner’s constitutional rights.
2. She states that the said recommendations would bring impactful change in the improvement of the education system in Kenya.
3. The respondent reacted to the Petition by filing a Notice of Preliminary Objection dated 4th March 2023 citing the following grounds:
 - i. By dint of the provisions of Article 143(2) of *the Constitution*, this Court lacks the requisite jurisdiction to hear and determine the petitioner’s Notice of Motion Application and constitution petition in so far as the alleged impugned action relates to the Office of the respondent.
 - ii. Under the doctrine of stare decisis this Court is bound by the decision of the Supreme Court in Petition No .12 of 2021 (Consolidated with Petitions Nos. 11 & 13 of 2021) Hon.



Attorney General & 2 others –versus David Ndi & 14 Others that “Civil proceedings cannot be instituted in any court against the President or the person performing the functions of the office of the President during their tenure of office in respect of anything done or not done contrary *the Constitution* of Kenya, 2010.”

Respondent’s Submissions

4. The respondent’s submissions in support of the objection are neither in the Court file nor in the Court Online Platform (CTS).

Petitioner’s Submissions

5. On 3rd May 2024, the petitioner filed submissions in reply to the preliminary objection.
6. The petitioner submitted that Article 1 of *the Constitution* recognizes the supremacy of the Almighty God and the people of Kenya. She asserted that the respondent was elected into the office by the people of Kenya and hence cannot use *the Constitution* to shield himself from his constitutional duties.
7. She argued that the action of the Respondent has denied Kenyans access to the information published in her book. It thus the petitioner’s submission that the respondent has violated Articles 2(1), 10 (1) and (2); 11(2)(a); 19(2), 28 and Article 33(a) and has also violated her rights under 28 and 40 (5) of *the Constitution*.
8. She contended that the fact that the respondent has responded to the petition through the Attorney General’s office, is a demonstration that the respondent is aware of her intention to meet him.

Analysis and Determination

9. It is my humble view that that the issue that arises for determination is:

Whether the respondent’s Preliminary Objection is merited.

10. The fundamental principles that define a preliminary objection were explained by the Supreme Court in the 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”.



11. The Respondent opposes this Petition on grounds that this Court lacks jurisdiction under Article 143 of *the Constitution* which provides as follows:

Protection from legal proceedings

1. Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.
2. Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.
3. Where provision is made in law limiting the time within which proceedings under clause (1) or (2) may be brought against a person, a period of time during which the person holds or performs the functions of the office of the President shall not be taken into account in calculating the period of time prescribed by that law.
4. The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.

12. The above Article 143 of *the Constitution* was judicially considered by the Supreme Court in Attorney-General & 2 others v Ndi & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) where it held thus:

- “32. The immunity of the President was unlike that of the other state actors. The President not only enjoys functional immunity like all public officials who perform state duties, which protected them from civil liability for official functions, he also enjoyed sovereign immunity as the Head of State and the single representation of the sovereignty of the Republic.
33. It was only sovereign immunity that could immunize anyone against both civil proceedings and criminal liability because any other immunity would be related to official functions and therefore would inherently be a ‘qualified immunity’. That was the only explanation why all other public officials would be liable to criminal prosecutions even while in office, but the President would not only not have criminal proceedings instituted against them, but also any criminal proceedings that may have been ongoing would be discontinued in the duration of the President’s tenure of office.
34. It was the sovereign immunity that the Head of State, like all heads of states, enjoys that makes Article 143(4) relevant in that, the immunity should be waived by consent of the Republic through ratification of a treaty that forbade such immunity. Likewise, that was also why this immunity (from any proceedings, and especially from criminal liability) is limited to the duration during which the person represents the sovereignty of the Republic, and expires upon expiry of such term.”



13. The Court thus explained further:

“...The import of Article 143(2) of *the Constitution* with respect to protection of the President was as follows:

- a. Immunity did not extend to acts or omission of sitting President done in purely personal capacity not connected with his office
- b. The immunity was only in respect to acts or omissions connected with the office and functions of that office.
- c. Where an action or inaction/omission was in official capacity but bereft of any constitutional authority or power whatsoever or was in fact done in gross violation or serious violation of *the Constitution* then it was actionable against the President in person but only after he has left office.
- d. For acts and omissions falling under (c) above and which had to be questioned or challenged immediately, the President could be sued, not in his personal name, but through the Attorney General.

The Superior Courts below fell in error in their interpretation and application of Article 143 (2) of *the Constitution* by holding that civil proceedings could be instituted against the President or a person of the President during their tenor of office in respect of anything done contrary to *the Constitution*. Civil proceedings could not be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to *the Constitution*. Such proceedings could be instituted against the President vide the Attorney General...”

14. The Petitioner’s insistence that this suit is maintainable against the President is thus misconceived. The Supreme Court was definitive “the President or a person performing the functions of the office of President” cannot be sued during their tenure of office for acts or omissions relating to those functions but that such actions be brought against the President via the Attorney General. By dint of Article 163 (7), all Courts, other than the Supreme Court, are bound by the decisions of the Supreme Court and this Court is constitutionally duty bound to adopt this position.

15. This petition is thus dead-on arrival. It is legally incompetent. It is hereby struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF MARCH, 2025.

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L N MUGAMBI

JUDGE

