Okoiti v Prime Cabinet Secretary And Cabinet For Foreign and Diaspora Affairs & 3 others (Petition E816 of 2025) [2025] KEHC 18939 (KLR) (Constitutional and Human Rights) (19 December 2025) (Ruling)

Neutral citation: [2025] KEHC 18939 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E816 OF 2025

EC MWITA, J

DECEMBER 19, 2025

BETWEEN

OKIYA OMTATAH OKOITI ..... PETITIONER

AND

THE PRIME CABINET SECRETARY AND CABINET FOR FOREIGN AND DIASPORA AFFAIRS ..... 1ST RESPONDENT

CABINET SECRETARY FOR HEALTH ..... 2ND RESPONDENT

THE NATIINAL TREASURY ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

RULING

1. The petitioner has filed a petition challenging the Cooperation Framework entered into between the governments of Kenya and the United States of America. Simultaneous with the petition, the petitioner has filed an application seeking conservatory orders to restrain the government of Kenya from implementing, operationalizing and or executing that cooperation Framework between the government of the Republic of Kenya and the government of the United States of America on Health signed on 4th December 2025, pending the hearing and determination of the petition.

2. The motion is based on the grounds on its face and, in particular, that Framework violates the principle of public participation in articles 10 and 118 of the *Constitution* as no consultation was held prior to the signing of the Framework notwithstanding that the Framework directly impacts on health rights of the people of Kenya guaranteed under article 43(1) (a) of the *Constitution*.

3. The petitioner states that the framework breaches the treaty making procedures in article 2(6) of the *Constitution* and *Treaty Making and Ratification Act*; infringes on fiscal responsibility and accountability in articles 201, 220 221 and 232 of the *Constitution* and *Public Finance and Management Act*.

4. The according to the petitioner, channeling of funds through government institutions while eliminating third party intermediaries lacks safeguards against mismanagement. Commitment to spend money (USD 850million) in additional health spending is a burden to national spending without independent fiscal modelling which contravenes the principles of sustainable public finance. In that regard, the petitioner states, the Framework is a threat to the right to health and non-discrimination guaranteed under articles 21, 23, 27 and 232 of the *Constitution*.

5. The petitioner asserts that the Framework is a threat to the right to privacy guaranteed under article 31 of the *Constitution* and the *Data Protection Act* by allowing broad foreign access to sensitive data held in health facilities.

6. The petitioner further asserts that the Framework requires employment of thousands of workers in the health sector which is contrary to the Fourth Schedule to the *Constitution* as the health sector devolved thus, there is a potential conflict with the counties' autonomy. By prescribing procurement timelines, the Framework will also be in conflict with the law on procurement.

Response

7. The respondents have opposed the application through a replying affidavit sworn by Dr. Ouma Oluga, the Principal Secretary, Department of Medical Services. The respondents state that the government has an obligation under article 21(2) of the *Constitution* to take legislative and other policy measures, including setting standards to achieve the highest attainable standard of health.

8. In that regard, the government identified healthcare delivery as one of the co pillars of the Bottom-Up Transformation Agenda towards delivery of Universal Health Coverage in line with Vision 2030. The government has therefore embraced government to government arrangements which offer a formal mode of cooperation or engagement directly between governments.

9. According to the respondents, WHO recognizes HIV; Tuberculosis and Malaria as global health security risks due to their catastrophic impacts. Due to these epidemics on public health, social and economic effects, they require coordinated cross border management and uninterrupted treatment which the government cannot manage on its own or individually. This requires funding through the government, funding through international bodies and implementing partners.

10. The respondents assert that US assistance had been a key funder of the health sector and withdrawal of Direct funding led to immediate pause causing uncertainty in US funded operations, supporting key several aspects of the health sector, including commodities, health workforce training and deployment, public health research, HIV, Tuberculosis, Malaria, immunization, nutrition, reproductive health services, development of health policies and systems, and, generally, strengthening health systems blocks-governance, financing, and service delivery.

11. The respondents contend that the management of HIV, Tuberculosis, Malaria and other epidemics requires a multipronged approach, including domestic funding by the Government, foreign aid and collaboration with other partners such as the WHO. The US government was a major contributor of the external funding.

12. The respondents assert that the abrupt withdrawal directly threatened continuity in service delivery, commodity security human resources for health, and health data infrastructure, among other strategic health systems components, with potentially catastrophic impacts on Kenya's overall health system performance and related outcomes.

13. The change in policy and off-budget modality significantly constrained the Government's ability to comprehensively track, monitor, and account for the utilization of resources allocated for eessential programmes, thereby undermining budgetary oversight, fiscal transparency, accountability, and the principles of prudent and efficient use of resources hence the adoption of government to government policy shift.

14. The respondents maintain that the Framework provides for the strengthening of the Kenya National Public Health Institute (NPHI), establishment of regional hubs and County Emergency Operations Centres, the training of staff focused on detection, notification and response processes to meeting outbreak response goals.

15. The proposed collaboration in surveillance and outbreak response will enable faster detection and control of epidemics, reduce disease spread and lower mortality. It is intended to improve on Health surveillance, and strengthen border health security and detection preparedness.

16. The respondents maintain that the Framework will assist county lab systems and improve on nationwide capacity for accurate, rapid diagnostics, reduction in dependence on foreign labs, safer handling of dangerous pathogens, stronger blood safety and national quality controls, enhanced genomic sequencing, improving outbreak forecasting and response and boost local laboratory accreditation and workforce professionalization.

17. They assert that the Framework also provides for gradual absorption of Kenyan-US-funded health workers covering various cadres such as nurses, clinical officers, laboratory technicians, pharmacy staff and counsellors and ensure more stable and predictable staffing across facilities and reduce parallel systems and better aligned schemes of service.

18. It is the respondents' position that the Framework provides for strategic health interventions such as expanding innovations, scaling integrated specimen referral systems, modernizing labs, supply chain, and quality assurance, and supporting regulatory capacity and vaccine production.

19. The respondents urge that implementation of such crucial interventions will ensure access to cutting-edge health technologies, strengthen preparedness for pandemics, position of Kenya as a regional hub for diagnostics and vaccines, reduce reliance on donors and improve maternal, newborn and child health outcomes. They deny any of the alleged violations or threatened violations of the *Constitution*, the law or rights and fundamental freedoms.

Submissions

20. During the hearings, Mr. Omtatah has argued that if conservatory orders are not granted, the petition will be rendered an academic exercise and the issues raised will be irreversible. Mr. Omtatah asserts that the Framework which is in form of a treaty was signed without consultation or public participation and without reference to article 2(6) of the *Constitution* and the *Treaty Making and Ratification Act* and process. He argues that section 3(2) (b) of the *Act* applies expressly to bilateral treaties dealing with sovereignty and territorial integrity of Kenya.

21. It is Mr. Omtatah's case that there ought to be Parliamentary approval of the treaty with public participation which was not the case; that there is the question of data privacy and protection since

medical data is a private right which can only be shared with the affected person's permission. In the circumstances of the Famework, he argues, personal sensitive data will be affected in violation of the *Constitution* and the *Data Protection Act*.

22. On the financial aspect, Mr. Omtatah argues that the Framework commits the country to financial expenditure outside the constitutional requirements and *Public Finance Management Act*, and without Parliamentary participation and oversight.

23. Mr.Omtatah maintains that absorption or employment of health workers is a devolved function and the mandate of county governments; the entire contract affects counties and cannot be adopted by the national government and loaded on county governments. He argues that the Framework assaults the *Constitution* and therefore there is good reason to grant conservatory orders to protect the *Constitution* and preserve the substratum of the petition.

24. Mr. Omtatah has relied on several decisions, including *Mrao Ltd v First America Bank of Kenya Ltd 7 2others* [2003] KECA 175(KLR); *Mohammed v Ministry of Education & another; Registered Trustees of the Baptist Convention of Kenya (Interested Party)* [2022] KEHC 115(KLR) on a prima facie case and *Centre for Rights Education and Awareness (CREAW) v Speaker of the National Assembly & 2 others* [2017] KEHC 9419(KLR) that a party seeking conservatory orders should show that rights are threatened, among other decisions.

25. Mr. Kuria, learned counsel for the respondents, has urged the court not to grant conservatory orders at this stage since the Framework for cooperation is a non-binding legal instrument and is intended to strengthen partnership between the two governments in the areas of cooperation.

26. According to Mr. Kuria, the legal status of the cooperation agreement is not binding and negotiations over the instruments are expressly provided for in section 3 (4)(a)(b) of the *Treaty Making and Ratification Act*. He maintains that the Framework provides guidance to the government of Kenya which falls outside the scope of the *Treaty Making and Ratification Act* and that parliamentary oversight was not required before execution of the Framework.

27. Mr. Kuria points out that the framework is yet to come into operation and there is a window of 90 days from the date of its execution which makes the application and petition premature since there is no violation of the *Constitution* when the plan for implementation is yet to be formalized. According to counsel, the joint Framework Implementation Committee to monitor progress is yet to be established.

28. Learned counsel argues that the petitioner should have waited until the time of implementation before filing the petition to bring out issues that are alive. He urges that conservatory orders should not be issued at this stage before the system of implementation is put in place. Counsel points at paragraphs 2, 9 and 17 of the Framework which require implementation in accordance with the laws of Kenya. "The full extent of the framework can be tested after implementation." He argues. In that respect, counsel argues, the application is not ripe at this stage.

Rejoinder

29. In a brief rejoinder, Mr. Omtatah argues that Mr. Kuria, in essence, admits that there was no public participation. He maintains that people are sovereign and the government cannot bind its people without their consent, which goes to the heart of the petition. He maintains that the argument that the Framework is not a treaty is not helpful to the respondents since the document shows in substance that it is a treaty as the details determine its character. Mr. Omtatah urges that threats to violate the *Constitution* are justiciable and the court has a preventive mandate in that regard.

Determination

30. I have considered the application, the response and arguments by parties. The petitioner has sought conservatory orders to restrain the government of Kenya from implementing, operationalizing and or executing the cooperation framework between the government of the Republic of Kenya and the government of the United States of America on Health signed on 4th December 2025, pending the hearing and determination of the petition.

31. The petitioner argues that the Framework violates not only the *Constitution* and the law, but is also a threat to rights and fundamental freedoms, including the right to privacy. The petitioner argues that the Framework threatens the principles of public participation, Parliamentary oversight, public finance and devolution.

32. The respondents have opposed the application, arguing that the petition is premature since the Framework has not been implemented; the Framework is a non-binding legal instrument and is intended to strengthen partnership between the two governments in the areas of cooperation.

33. The respondents assert that negotiations over the Framework instruments are expressly provided for in section 3 (4)(a)(b) of the *Treaty Making and Ratification Act* on technical assistance, administrative and executive matters. Further, that the Framework provides guidance to the government of Kenya which falls outside the scope of the *Treaty Making and Ratification Act*.

34. According to the respondents, the petitioner should have waited until the implementation of the Framework before filing the petition thus, the court should not grant conservatory orders.

35. The issue before the court now is whether the court should grant the conservatory orders sought. While determining this issue at this stage, the court is not required to make a definite and conclusive finding of fact or law. Doing otherwise would prejudice the hearing of the main petition. In *Centre for Rights Education and Awareness (CREAW) & 7 others* (supra), Musinga J, (as he then was) stated that when considering an application for conservatory orders, the court should not delve into a detailed analysis of facts and law. At this stage, a party seeking conservatory orders is only required to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory orders, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.

36. In *Centre for Human Rights and Democracy & others v The Judges and Magistrates Vetting Board & others*-Eldoret Petition No. 11 of 2012, the court held that:

> [W]here a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in the contravention of any constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.

37. Again, in *Judicial Service Commission v Speaker of the National Assembly & Another* [2013] eKLR, the court stated:

> Conservatory orders...are not ordinary civil law remedies but are remedies provided for under the *Constitution*, the Supreme law of the land. They are not remedies between one

> individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.

38. The above position was reinforced by the Supreme Court in *Gitirau Peter Munya v Dickson Mwenda Kithinji and 2 others* [2014] eKLR that:

> Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success' in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

(See also *Board of Management of Uhuru Secondary School v City County Director of Education and 2 Others* [2015])

The court should, in applying the above principles, avoid the temptation to determine substantive issues raised in the petition at this stage of the proceedings.

39. When considering whether or not to grant conservatory orders, the court should also take into account the principle of proportionality. In *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589, Ojwang, AJ (as he then was) observed that in responding to prayers in an application, the court should always opt for the lower rather than the higher risk of injustice.

40. In this application, the first concern is whether the petitioner has made out a prima facie case for purposes of granting conservatory orders. A prima facie case is not one that must succeed at the hearing of the main petition; but it is also not a case which is frivolous. A party has to demonstrate that his case discloses arguable constitutional issues.

41. The petitioner states that the issues he raises in the petition which he will argue at the hearing, include whether the framework violates the *Constitution*; whether the Framework violates the principles of public finance, parliamentary oversight, devolution and threatens rights and fundamental freedoms, including the right to privacy.

42. In other words, there is the question whether implementation of the Framework would cause irreversible constitutional harm or threatens to cause irreversible violation to fundamental rights and freedoms in the Bill of Rights, including those guaranteed under article 31 of the *Constitution* and the *Data Protection Act*, and whether the Framework violates any other aspects of the *Constitution*.

43. The respondents maintain that the Framework is yet to be implemented and that it is a non-binding instrument. The respondents have pointed out paragraph 19.1 to argue that it is not an international agreement and does not give rights and obligations. This the petitioner asserts is not true since the substantive provisions contain mandatory an prescriptive language creating detailed obligations without any public consultation or participation.

44. I have read the pleadings arguments by parties and perused a copy of the Framework. The petitioner has pointed out with reasonable precision the constitutional and legal provisions as well as rights and fundamental freedoms in the Bill of Rights that are alleged to be violated or threatened thereby bringing the claim within the ambit of article 23(1) as read with article 165(3) of the *Constitution*.

45. The petitioner has contended that the respondents have acted or are acting outside the *Constitution* and the law and that the Framework will violate fundamental rights guaranteed under article 31 of the *Constitution*. The petitioner argues that threatened violation of the *Constitution* or rights and fundamental freedoms is justiciable. Indeed article 23(1) read with article 165(3) is clear that threatened violation is actionable.

46. In *Peter Kyalo v Alfred Mutua & 6 others* [2018] eKLR, the court observed that a party seeking an order for a declaration that the *Constitution* has been contravened, or is threatened with contravention is not undeserving of conservatory orders under article 23(2)(c) of the *Constitution* as long as he brings himself within the ambit of the provisions of article 23(1) of the *Constitution*.

The issues the petitioner has raised in this petition, in my view, fall within the purview of article 23 (1) of the *Constitution*.

47. The petitioner has sought relief in the nature of conservatory orders meant to advance the obligation of every person to respect, uphold and defend the *Constitution* as demanded by article 3(1) of the *Constitution*. It follows, therefore, that the respondents' argument that since the Framework has not been implemented and the signing of the framework did not have to comply with the provisions of the *Treaty Making and Ratification Act* is demonstration that the petition raises triable constitutional issues.

48. The respondents' claim that adverse conservatory orders should not issue since there is still time (about 90 days) to prepare for implementation of the Framework, is not on its own a persuasive argument. This is because conservatory orders are granted to preserve the substratum of the petition and, therefore, where it is contended that there is a threat to violate the *Constitution*, the law and or fundamental rights and freedoms in the Bill of Rights, the action is the proper subject of a conservatory order as long as the impugned action is consequential to the proceeding before court and the court is satisfied that the constitutional threshold for granting conservatory orders has been met.

49. In this respect, it is the finding of this court, that considering the issues raised in the petition and without attempting to make definitive findings over the petition, the petitioner has disclosed arguable constitutional and legal issues for consideration at the hearing. In short, it cannot be argued that the issues raised in the petition are frivolous or unarguable.

50. The Petitioners having demonstrated an arguable case, the next question to consider is whether there is real danger that prejudice will be suffered as a result of the alleged violation or threatened violation of the *Constitution*; the law and rights and fundamental freedoms, if conservatory orders are not granted.

51. In *Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 Others* [2014] eKLR, the court dealt with what amounts to real danger stating:

> The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.

52. In this application, the court is called upon to assess and determine whether there is real danger so that by the time the petition is determined, some of the issues raised will have been rendered superfluous by the impugned Framework. The petitioner has argued that the Framework threatens to violate the *Constitution* in many respects. These include, Parliamentary oversight through the *Treaty Making and Ratification Act*, public participation and consultation; public finance and management principles, devolution and the right to privacy, among others. The petitioner postulates that these threatened

violations will have crystalized should the court finally find the Framework unconstitutional and unlawful.

53. Based on these contentions, it would appear clearly, that arguments such as whether the impugned Framework is anchored in the *Constitution*, the law or is a threat to violate the *Constitution* and the law, are not frivolous. This court is not required to state with certainty at this stage that the Framework is lawful or does not violate Constitution and fundamental freedoms. It cannot, however, be denied that some of the issues for determination in this petition revolve around the constitutionality and legality of the Framework and or some of its aspects. It emerges therefore that unless implementation of the Framework is suspended, the substratum of the petition may have ceased to exist by the time the petition is heard and determined.

54. This court takes the view, that since the issues that fall for determination are whether the Framework violates the *Constitution* and the Bill of rights, the court should have an opportunity to interrogate the tissues raised and determine not only the constitutionality but also the legality of the Framework.

55. Taking into account the competing claims in this petition against the background of the public cause, the court has to focus on public interest and good governance which favour compliance with the *Constitution* and the law. Indeed, as the Supreme Court stated in *Gitirau Peter Munya v Dickson Mwenda Kithinji and 2 others* (supra), the court should consider the inherent merit of the case, bear in mind public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes when deciding whether to grant conservatory orders.

56. In this petition, if the impugned Framework was to be implemented as the court considers its constitutionality, the substratum of the petition would be substantially lost since violation of either the *Constitution*, the law or rights and fundamental freedoms would continue. Any orders the court might make after hearing the petition and concluding that the Framework or its aspects are unconstitutional, would very well be merely academic since violation of the *Constitution*, the law or rights and fundamental freedoms cannot be reversed once they occur. The court must therefore prioritize protection of the *Constitution* since there can be not greater public interest than to demand compliance with the *Constitution*.

57. In the circumstances, therefore, all factors considered and without deciding with finality the issues raised in this petition, this court is of the view, and finds, that it is in the public interest and interest of the rule of law, transparency and accountability that conservatory orders be granted.

58. Consequently, and for the above reasons;

    1. A conservatory order is hereby granted restraining the respondents on behalf of the government of Kenya from implementing, operationalizing and or executing the Cooperation Framework Between the Government of the Republic of Kenya and the Government of the United States of America on Health signed on 4th December 2025, in its entirety, pending the hearing and determination of the petition.

    2. Given the urgency of this matter, this petition be processed and heard on priority basis.

    3. Costs of the application to be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2025

E C MWITA

JUDGE