

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. E816 OF 2025**

**BETWEEN**

**OKIYA OMTATAH OKOITI.....**  
**PETITIONER**

**VERSUS**

**PRIME CABINET SECRETARY & CABINET SECRETARY**  
**FOR FOREIGN AND DIASPORA AFFAIRS.....**

**1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY FOR HEALTH..... 2<sup>ND</sup>**  
**RESPONDENT**

**NATIONAL TREASURY.....3<sup>RD</sup>**  
**RESPONDENT**

**ATTORNEY GENERAL.....4<sup>TH</sup>**  
**RESPONDENT**

**AND**

**KATIBA INSTITUTE.....1<sup>ST</sup>**  
**INTERESTED PARTY**

**KENYA MEDICAL PRACTITIONERS, PHARMACISTS**  
**AND DENTISTS' UNION.....2<sup>ND</sup> INTENDED**  
**INTERESTED PARTY**

**NATIONAL EMPOWERMENT NETWORK OF**  
**PEOPLE LIVING WITH HIV (NEPHAK).....3<sup>RD</sup> INTENDED**  
**INTERESTED PARTY**

**MOST AT RISK YOUNG MOTHERS AND TEENAGE GIRLS**  
**... LIVING WITH HIV INITIATIVES (MOYOTE)...4<sup>TH</sup> INTENDED**  
**INTERESTED PARTY**

**FRANKLIN WANYAMA.....5<sup>TH</sup> INTENDED**  
**INTERESTED PARTY**

**CHARLES ODUK OTIENO.....6<sup>TH</sup> INTENDED**  
**INTERESTED PARTY**

**CLEOPATRA WANJIKU MACHIRA.....7<sup>TH</sup> INTENDED  
INTERESTED PARTY**

**PHILIP NYAKWANA.....8<sup>TH</sup> INTENDED  
INTERESTED PARTY**

## **R U L I N G**

### **Introduction**

1. The Petition dated 8<sup>th</sup> December 2025 assails *the Kenya-United States Health Cooperation Framework* that was signed by the Prime Cabinet Secretary and Cabinet Secretary for Foreign and Diaspora Affairs, Hon. Musalia Mudavadi and witnessed by His Excellency, the President Dr. William Ruto on 4<sup>th</sup> December 2025.
2. Under the said Cooperation Framework, the Government of the United States commits to provide US\$1.6 billion over five-year period, directly to government institutions, to be used for ***medical equipment supply, health commodities delivery, workforce upscaling, and health insurance expansion.***
3. The Petitioner alleges that the aforesaid Cooperation Framework was executed unilaterally by the Executive, *without the requisite parliamentary approval, an inclusive public consultation or transparent fiscal impact assessment and/or without due consideration for data protection* hence

arbitrary and unconstitutional as it contravenes various constitutional principles and applicable statutes.

### **2<sup>nd</sup> Intended Interested Party's Application**

4. The 2<sup>nd</sup> Intended Interested Party in its Notice of Motion Application dated 24<sup>th</sup> December 2025 seeks orders that:

- i. Spent.***
- ii. The Applicant, KENYA MEDICAL PRACTITIONERS, PHARMACISTS AND DENTISTS' UNION (KMPDU), be enjoined as the 2<sup>nd</sup> Interested Party in Petition No. E816 of 2025 and Petition No. E809 of 2025.***
- iii. Petition No. E816 of 2025 and Petition No. E809 of 2025 be consolidated for hearing and determination, with Petition No. E809 of 2025 having been filed earlier being designated as the lead file.***
- iv. Pending the inter-partes hearing and determination of the Consolidated Petitions, this Court be pleased to vacate, set aside and/or discharge the blanket conservatory order issued on 19<sup>th</sup> December 2025 in the present, which stayed the implementation of the Health Cooperation Framework in its entirety.***
- v. In the alternative to prayer 4 above only, this Court be pleased to vary and/or modify the conservatory orders issued on 19<sup>th</sup> December 2025 to allow for the continued implementation of those specific components of the Health Cooperation Framework related to:***

- vi. The procurement and distribution of life-saving medical commodities for HIV, Tuberculosis (TB), and Malaria;*
  - vii. The operationalization of the "7-1-7" outbreak detection metrics and related emergency response systems;*
  - viii. The transition of 515 frontline laboratory and health workers to the Government of Kenya payroll as scheduled for 2028.*
  - ix. A conservatory order be issued restraining the Respondents from taking any administrative action that would result in the stock-out of essential medicines or the cessation of technical support for infectious disease surveillance pending the determination of the Petition.*
  - x. This Court be pleased to issue further directions for the 2<sup>nd</sup> Interested Party and all other parties to file its submissions and the expedited hearing of the Petitions whether consolidated or otherwise to resolve the legal status of the Health Cooperation Framework and the Data Sharing Agreement.*
  - xi. This court be pleased to issue any further orders and directions as it may deem fit in the circumstances and in the interest of justice.*
  - xii. The cost of the application be in the cause.*
5. The application is supported by the 2<sup>nd</sup> Intended Interested Party's affidavit, sworn on even date by **Dr. Davji Bhimji Atellah**, its Secretary General and the grounds on the face of the application.

6. The 2<sup>nd</sup> Intended Interested Party is a registered trade union whose members are the primary frontline providers of health services in Kenya and are directly responsible for the implementation of the programs governed by the impugned Framework. It is noted that the impugned Framework specifically provides for the transition of *five hundred and fifteen 515 frontline laboratory and health workers to the Government of Kenya payroll by 2028.*
7. By way of background, he depones that for over 25 years, Kenya and the United States of America have maintained strategic partnership in the health sector, through the *United States Agency for International Development (USAID)* and the *President's Emergency Plan for AIDS Relief (PEPFAR)*, which have provided billions of shillings in support for HIV, Tuberculosis (TB), and Malaria programmes.
8. He states that this relationship was on 24<sup>th</sup> January 2025 disrupted following the issuance of an *Executive Order on Reevaluating and Realigning United States Foreign Aid* by the President of the United States. It mandated an immediate pause on all new funding obligations and prompted a review of all foreign assistance programmes. This in effect halted the procurement of essential medical commodities and threatened the continuity of health services thus creating an urgent need for a structured

framework to transition Kenya towards health self-reliance, while securing interim funding.

9. He avers that this lays the background which led to the execution of the impugned Framework-a policy document meant to provide a roadmap for the 2026–2030 period so as to restore funding stability and manage the phased handover of health responsibilities to the Kenyan government.
10. He states that soon after the impugned Framework was executed, **HCCHRPET/E809/2025 Consumers Federation of Kenya -Vs- State Law Office and Senate And 3 Others** was filed on 9<sup>th</sup> December 2025, challenging the Framework on grounds of data privacy and alleged violations of the Data Protection Act. Subsequently, the instant Petition was filed raising new and overlapping constitutional concerns regarding treaty-making processes and public participation.
11. In his view, the two Petitions fundamentally seek the same relief, being permanent nullification of the impugned Framework. According to him, the factual matrix in both is identical, the respondents largely the same and the legal foundations centering on Articles 10, 31, and 43 of the Constitution.

12. On this premise, he argues that the existence of two parallel petitions challenging the same instrument risks issuance of conflicting judicial pronouncements, as such urges that the matters be consolidated to save on judicial time.
13. Furthermore, he asserts that the conservatory orders issued on 19<sup>th</sup> December 2025 have catastrophic implications owing to the dire status of the Kenyan health sector. He states that these orders have created a functional vacuum in the health sector at the most volatile time of the year characterized by high population mobility including minors and expectant mothers, which correlates with a spike in infectious disease transmission. It is noted that the conservatory orders disabled the 7-1-7 outbreak detection metric—an international performance target leaving the Country vulnerable to undetected infectious disease outbreaks during this season.
14. Moreover, he stresses that the impugned Framework is the administrative engine for the 2026 procurement cycle. He enlightens that international health funding cycles, particularly those involving USAID and Global Fund partners, operate on rigid 'use-it-or-lose-it' fiscal windows. Therefore, he emphasizes that by freezing the Framework during the recess, the Court has inadvertently locked Kenya out of the January 2026 disbursement window, ensuring that even if the orders are lifted in February, the supply chain gap will

have already been triggered, leading to a minimum of a three-month national stock-out.

15. He contends that the Petitioner mischaracterized the impugned Framework *as a treaty, whereas the document itself stipulates that it is a non-binding arrangement between the participants and does not create legal obligations under international law*. He notes therefore that the 2<sup>nd</sup> Intended Interested Party, if allowed, will demonstrate that the Data Sharing Agreement is fully compliant with the **Data Protection Act (Cap 411C)** and the **Digital Health Act, 2023**, and expressly provides that Kenyan law shall prevail in the event of any divergence.
16. In sum, he argues that the balance of convenience tilts in favour of the 2<sup>nd</sup> Intended Interested Party and the public, as the risk of catastrophic loss of life due to treatment interruption far outweighs the procedural concerns raised by the Petitioner regarding the designation of the agreement. He as such, implores the Court to allow this Application.

### **Petitioner's Case**

17. In reaction to the Application, the Petitioner filed Grounds of Opposition dated 5<sup>th</sup> January 2026 on the basis that:
  - i. *The Application is misconceived, frivolous, incompetent and an abuse of the process of this Court.*

- ii. *The Applicant has not satisfied the constitutional and jurisprudential threshold for joinder as an Interested Party, having failed to demonstrate a proximate, identifiable, and legally protectable interest distinct from that of the respondents.*
- iii. *The Applicant's alleged interests are speculative, contingent, and future-oriented, and do not amount to accrued or vested legal rights capable of protection in a constitutional petition.*
- iv. *The issues raised by the Applicant are substantially identical to those already pleaded, argued, and determined inter partes between the Petitioner and the Respondents at the conservatory stage.*
- v. *The Applicant seeks, through the guise of joinder, to mount an impermissible collateral attack on the ruling and conservatory orders issued by this Court on 19<sup>th</sup> December 2025.*
- vi. *The Applicant has not met the legal threshold for the setting aside, discharge, or variation of conservatory orders, no new evidence, error apparent on the face of the record, or supervening circumstances having been demonstrated.*
- vii. *The conservatory orders were issued after due consideration of public interest, proportionality, and constitutional supremacy, and the applicant has not demonstrated any basis for their disturbance.*
- viii. *Selective or partial suspension of the conservatory orders would defeat the substratum of the Petition and render the eventual determination of the constitutional questions nugatory.*
- ix. *Constitutional compliance, public participation, parliamentary oversight, data protection, and*

*devolution cannot be subordinated to administrative convenience, donor conditionalities, or asserted funding exigencies.*

*x. The Application is an attempt to prioritize utilitarian expediency over constitutional supremacy, contrary to Articles 2, 3, 10, and 23 of the Constitution.*

*xi. The Application should be dismissed with costs to the Petitioner.*

18. The Petitioner as well filed his Replying Affidavit and Response of even date to this Application.
19. On the onset, he avers that the prayers seeking vacation of the issued conservatory orders dated 19<sup>th</sup> December 2025 constitutes a collateral attack on a valid and reasoned Ruling of this Court, which was delivered after consideration of all the parties' submissions. Moreover, he claims that the instant application does not raise new factual or legal grounds that were unavailable to the Respondents at the time of the hearing. He asserts instead that the application seeks to re-argue the same issues that were raised by the Respondents.
20. He asserts that the deponent who seeks to have Kenyans choose between their health and upholding of the Constitution does not display personal knowledge of intergovernmental negotiations; diplomatic communications; treaty-making procedures; parliamentary processes; national budgetary approvals; or constitutional compliance.

Accordingly, he opposes the 2<sup>nd</sup> Intended Interested Party's averments in his supporting affidavit.

21. Further to this, he contends that the 2<sup>nd</sup> Intended Interested Party has no identifiable legal interest warranting joinder as its alleged interest is not unique and can be adequately addressed through amicus curie submissions without formal joinder. He adds that the Interested Party herein, Katiba Institute, represents public interest in the issues raised in the Petition. Besides, that its alleged interests are deemed as speculative and contingent upon future events.
22. He argues that the assertion that numerous Kenyans will run out of medication by late January 2026 and a three-month national stock out, is not supported by any evidence from the National Treasury, the Ministry of Health, or the Kenya Medical Supplies Authority.
23. The Petitioner contends moreover that the assertions touching of the substratum of the Petition revolve around substantive issues which are to be determined in the main Petition thus accuses the 2<sup>nd</sup> Intended Interested Party of seeking to have the Court pre-judge the Petition in its favour contrary to the issued conservatory orders.
24. On consolidation, he contends that the same is premature and unsupported by any evidence. He asserts that while the two petitions challenge the impugned Framework, **Petition**

**E809 of 2025** focuses primarily on data privacy under the Data Protection Act, whereas this Petition addresses constitutional violations which include sovereignty, public finance, and devolution. For this reason, he maintains that consolidation risks conflating distinct issues and delaying justice. In conclusion, he argues that the Petition lacks merit and thus should be dismissed.

### **Respondents' and Interested Parties Case**

25. These parties' response and submissions to the Application are not in the Court file or Court Online Platform (CTS).

#### **3<sup>rd</sup> - 8<sup>th</sup> Intended Interested Parties Application**

26. These Intended Parties in their Notice of Motion Application dated 16<sup>th</sup> January 2026 seek orders that:

- i. Spent.***
- ii. The 3<sup>rd</sup> to 8<sup>th</sup> Proposed Interested Parties be enjoined in these proceedings and/or Petition as Interested Parties.***
- iii. Consequent to joining the Proposed Interested Parties, this Court hears them on their request for the Court to vary, set aside, discharge or otherwise stay the Conservatory Orders it granted on 19<sup>th</sup> December 2025.***
- iv. The Interested Parties upon being admitted, be granted leave to file and serve its pleadings within such time as the Court may direct.***

**v. The costs of this Application abide the outcome of the Petition.**

27. The application is supported by these Parties supporting affidavits abridged on the grounds on the face of the application as follows:

- a) *The 3<sup>rd</sup> to 8<sup>th</sup> Proposed Interested Parties are directly affected by the conservatory orders issued by this Court on 19<sup>th</sup> December 2025 restraining the Respondents, on behalf of the Government of Kenya, from implementing, operationalizing or executing the Kenya-United States Cooperation Framework on Health signed on 4<sup>th</sup> December 2025.*
- b) *The 3<sup>rd</sup> Proposed Interested Party, NEPHAK, is a duly registered national network that unites persons living with HIV and affected communities and represents community-based organizations and constituencies directly engaged in HIV and related health programmes, whose members depend on the continuity, coordination and availability of HIV and related services.*
- c) *The 4<sup>th</sup>, Proposed Interested Party, MOYOTE, is a duly registered public benefit organization serving and representing women, young mothers and communities affected by HIV and TB and its perspective grounded in the lived realities of these communities is not otherwise before this Court.*
- d) *The 5<sup>th</sup> to 8<sup>th</sup> Proposed Interested Parties are persons living with HIV and/or leaders of community structures engaged in the coordination and oversight of HIV and TB responses and the outcome of these proceedings has a direct, immediate and practical bearing on their health, dignity, survival and livelihood.*

- e) *The lived experiences and collective realities of persons living with HIV, women, young mothers, adolescents and affected communities are not otherwise represented before this Court and unless the Proposed Interested Parties are enjoined, the Court will determine issues that directly affect their lives, health and dignity without hearing from those most affected.*
- f) *It is in public interest and interest of justice that the 3<sup>rd</sup> to 8<sup>th</sup> Proposed Interested Parties be enjoined in these proceedings and be heard before this Court determines matters that directly govern their access to treatment, care and support.*
- g) *Unless the Court joins these Proposed Interested Parties, the Petition will proceed without the participation of those whose constitutional right to the highest attainable standard of health under Article 43(1)(a) is directly implicated, thereby occasioning grave prejudice and undermining the public interest.*

### **Petitioner's Case**

- 28. Opposing this application, the Petitioner filed his Replying Affidavit sworn on 26<sup>th</sup> January 2026.
- 29. The Petitioner faulted the Intended Interested Parties late filing of an application challenging Conservatory Orders issued way back on 19<sup>th</sup> December 2025. He contends that their delay is unjustified and inconsistent with the claim of urgency. For this reason, he contends that they have failed to demonstrate any immediate or irreparable prejudice that could not have been addressed earlier.

30. He maintains that the Petition primarily challenges the constitutionality, legality and procedural validity of the impugned Framework hence raises pure questions of constitutional and statutory compliance. Particularly, that these issues are *whether the impugned Framework constitutes a treaty or international agreement under Article 2(6) of the Constitution, whether it was subjected to mandatory parliamentary approval, whether there was meaningful public participation and whether the Framework complies with constitutional safeguards on data protection, fiscal governance, and sovereignty.*
31. In light of this, he affirms that the Petition does not concern the desirability of the impugned Framework as a policy instrument in relation to service delivery, funding allocation, programme management, or the operational implementation of HIV or TB interventions, as erroneously understood.
32. He further asserts that the application does not meet the legal threshold for joinder as these Parties lack proximate legal interest as guided under Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. This is because none of the Parties is a signatory to the impugned Framework, participated in its negotiation, approval or ratification, has any constitutional or statutory role in treaty-making, foreign

relations or parliamentary oversight and has demonstrated expertise in the subject matter.

33. He stresses that a generalized public interest, policy preference, or advocacy position does not meet the threshold for joinder. Additionally, he theorizes that the Parties alleged interest is speculative as premised on anticipated funding implications rather than on the legality of the Framework. Equally, he states that while he acknowledges and respects these parties lived experiences, he maintains that lived experience and advocacy are not grounds for joinder.
34. Further to this, he claims that the Parties assertion that the perspectives of affected communities are not represented is incorrect as the Interested Party herein, Katiba Institute is a public interest constitutional litigation organization with expertise in health rights under Article 43 of the Constitution.
35. He claims that the Application is an improper and premature attempt to set aside conservatory orders and a disguised attempt to re-litigate the conservatory relief, without meeting the legal threshold for review, variation or appeal. He contends that he and the public will be prejudiced by the delay that will result from joining these Parties in these proceedings. He reasons that these parties' contribution can

be by way of amicus curiae submissions so as not to cause a delay in the proceedings.

### **Respondents' and Interested Parties Case**

36. These parties' response and submissions to the Application are not in the Court file or Court Online Platform (CTS).

### **SUBMISSIONS**

#### **2<sup>nd</sup> Intended Interested Party**

37. The 2<sup>nd</sup> Interested- party filed submissions dated 19<sup>th</sup> January 2026 by their advocates Wafula, Washika and Associates. The issues for discussion were identified as: *whether the Applicant meets the threshold for enjoinder as an Interested Party, whether Petition No. E816 of 2025 and Petition No. E809 of 2025 should be consolidated with E809 of 2025 as the lead file considering potential conflict between orders, whether the consolidated petitions raise substantial questions of law that warrant certification under Article 165(4) of the Constitution and whether the blanket conservatory order of 19<sup>th</sup> December 2025 should be vacated or varied to protect essential health services.*
38. On the first issue, Counsel submitted that this Party has a stake in the proceedings as *represents the 515 workers mentioned in the impugned Framework and the practitioners implementing the 7-1-7 metrics.* As such, Counsel argued

that this Party's presence is indispensable for an informed determination. Reliance was placed in **Francis Kariuki Muruatetu & another v Republic [2021] eKLR**, where the Supreme Court established that a party should be joined if they have a stake in the matter and their participation will assist the court in reaching a just conclusion.

39. Turning to the issue of consolidation, Counsel submitted that the law dictates that where multiple suits involve the same subject matter, they should be consolidated to avoid the risk of conflicting decisions. Counsel argued that being that the instant petition and **Petition E809 of 2025** revolve around the same issues they ought to be consolidated.
40. Counsel as well submitted that the issues raised herein raises a substantial question of law as defined in **Harrison Kinyanjui v Attorney General & another [2012] eKLR**. Particularly, the novel issue being the alleged conflict between the Executive's power to sign international arrangements and Parliament's oversight role under Articles 94 and 95 of the Constitution. Also, that the Court must determine whether the impugned Framework constitutes a Treaty under the Treaty Making and Ratification Act (2012) or a mere Administrative Arrangement.
41. Counsel postulated that these issues invoke great public interest. Reliance was placed in **Okiya Omtatah Okoiti & Another v Anne Waiguru & 4 Others [2017] KECA 679**,

where the Court of Appeal emphasized that certification is necessary where the issues at hand have a significant bearing on the public interest and constitutional order.

42. Counsel as well urged the Court to vary the conservatory orders issued on 19<sup>th</sup> December 2025 as they create a clear and present danger to the right to health under Article 43 of the Constitution. Counsel noted that the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**, emphasized that the balance of convenience must favour the preservation of human life and public interest. In light of this, Counsel urged that the Court find in favour of the 2<sup>nd</sup> Intended Interested Party.

### **3<sup>rd</sup> to 8<sup>th</sup> Intended Interested Party's**

43. On 23<sup>rd</sup> January 2026, these Parties through Bond Advocates LLP filed submissions and highlighted the issues for discussion as: *whether these parties have fulfilled the conditions to be joined as an interested party and whether this Court has jurisdiction to vary, set aside, discharge or otherwise stay conservatory orders.*
44. On the first issue, Counsel submitted that the principles for making such a determination were set out in **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2015] eKLR** as follows:

- i. The applicant to demonstrate a clear and proximate interest in the matter beyond the peripheral;*
- ii. The applicant to show the prejudice they would suffer if excluded; and*
- iii. The applicant to outline the distinct submissions they intend to advance, demonstrating their relevance and non-duplication of other parties' arguments.*

45. Counsel stated that these parties' interests are made manifest in that the 3<sup>rd</sup> Intended Interested Party is the national network representing communities living with and affected by HIV and the 4<sup>th</sup> to 8<sup>th</sup> Intended Interested Parties, are persons living with HIV and whose continued access to treatment, diagnostics, prevention and psychosocial support is directly funded and operationalized through the impugned Framework.

46. Moving on, Counsel submitted in the second issue that according to the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 this Court upon application by any party may vary, discharge or extend conservatory orders. To buttress this point reliance was placed in **Okiya Omtatah Okiiti & Others v Cabinet Secretary for the Treasury & Others (2023) eKLR** where the Court held that it has inherent jurisdiction to exercise status quo through conservatory orders pending final determination of the substantive

petition. Accordingly, Counsel argued that the blanket suspension causes immediate disruption of life-saving treatment, diagnostics, maternal and child health services, community health systems and livelihoods thus justify variance of this Orders.

### **Petitioner's Submissions**

47. The Petitioner filed one set of submissions dated 5<sup>th</sup> January 2026 in response to both applications. He underscored the key issues as: *whether the applicant has met the legal threshold for joinder as an interested party, whether the applicant has established grounds for setting aside, varying, or discharging the conservatory orders issued on 19<sup>th</sup> December 2025 and whether public interest favours the preservation or disturbance of the conservatory orders.*
48. The Petitioner also relying in the opine in **Trusted Society of Human Rights Alliance** (supra) stated that the law on joinder is settled. The Petitioner theorized that the Intended Interested Parties interest chiefly concerns the anticipated funding flows, possible future absorption of health workers by 2028 and programmatic expectations dependent on the impugned Framework. According to him these are contingent expectations, not legally enforceable rights.
49. The Petitioner urged against their joinder noting that the Supreme Court in **Murutetu & another v Republic;**

**Kenya National Commission on Human Rights & others (Interested Parties); Death Penalty Project (Intended Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2016] KESC 12 (KLR)** cautioned against joinder where the intended party merely seeks to repeat arguments already before the Court or to introduce parallel interests adequately represented by the existing parties. He stressed that the Respondents are already adequately defending the impugned Framework in its entirety thus the intended parties' participation would be duplicative, prejudicial and unnecessary. As such, he argued that the Intended Parties had failed to meet the threshold for joinder.

50. On the next issue, Counsel submitted that the intended parties had not demonstrated any recognized grounds for interference with the issued conservatory orders being discovery of new and material evidence; an error apparent on the face of the record and supervening circumstances. He emphasized that all the issues raised were already underscored by the Respondents and ultimately considered by the Court prior to issuance of the conservatory orders.
51. To buttress this point reliance was placed in **Centre for Rights Education and Awareness (CREAW) v Speaker of the National Assembly & 2 Others [2017] eKLR** where the Court held that threatened violations of the Constitution are justiciable and warrant preventive relief.

52. Finally, the Petitioner submitted that Public interest cannot be equated with expediency or convenience. He noted that the Court in **Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR** held that conservatory remedies are remedies in rem intended to uphold constitutional order. Like dependence was placed in **Suleiman v Amboseli Resort Limited [2004] 2 KLR 589**.
53. The Petitioner submitted that this Court in the impugned Ruling affirmed that there can be no greater public interest than fidelity to the Constitution. As such, partial implementation of a contested framework would irreversibly undermine constitutional safeguards on public participation, devolution, public finance and data protection. Equally, he argued that the Intended Parties had failed to lay a lawful basis for setting aside of the issued conservatory orders.

### **Analysis and Determination**

54. Before I delve into the determination of the key issues that were raised and canvassed in the applications and the responses thereto, it is necessary to point out that the the 2<sup>nd</sup> Intended Interested Party, in its submissions, introduced, for the first time, the issue of empanelment of a bench which was neither raised in that Party's pleadings or in the orders sought in the Application. That qualifies the description of what commonly referred to as litigation by ambush for lack of reasonable notice, procedural fairness and due

process. I will not thus devote any attention to that particular monologue. In any case, as was held by the Supreme Court in **Raila Amolo Odinga & Stephen Kalonzo Musyoka v Independent Electoral and Boundaries Commission, Chairperson Independent Electoral and Boundaries Commission & Uhuru Muigai Kenyatta (Election Petition 1 of 2017) [2017] KESC 31 (KLR)**, a party is bound by its pleadings. The Court stated:

***“[62] Having addressed our minds to the above issues, it is our view that first, we note that as correctly argued by Counsel for the 3<sup>rd</sup> Respondent, a party must be bound by its pleadings... Any prayer in the application that would seem to be an expansion of the case for the Petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the Petition would and must be rejected.”***

55. Further, Court of Appeal in **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] KECA 890 (KLR)** citing the Nigerian Supreme Court with approval observed that:

***“First ,in ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;***

***“....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the***

***averments of the pleadings goes to no issue and must be disregarded.”***

56. I will now venture into the pertinent issues that were raised and argued by the Parties in respect of the Applications under consideration. They were:

- i. Whether the Intended Interested Parties Applications for joinder should be allowed.***
- ii. Whether the instant Petition ought to be consolidated with Petition No. E809 of 2025.***
- iii. Whether this Court should vary set aside and/or discharge the blanket conservatory order issued on 19th December 2025.***

***Whether the Intended Interested Parties Applications for joinder should be allowed.***

57. The law on joinder of interested parties in constitutional petitions is provided for in the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Rule 2** defines an ‘interested party’ as follows:

*‘a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation’.*

58. Inclusion of an interested party in a proceeding is provided for under **Rule 5 (d) (ii)** which states as follows:

The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

59. The Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR)** discussed joinder of an interested party as follows:

***“[22] In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court’s Ruling in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held:***

***“[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”***

***[23] Similarly, in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:***

***“(i) Joinder of a person because his presence will result in the complete***

**settlement of all the questions involved in the proceedings;**

**(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;**

**(iii) joinder to prevent a likely course of proliferated litigation.”**

**[24] We ask ourselves the following questions:**

**(a) what is the intended interested party’s stake and relevance in the proceedings?  
And,**

**(b) will the intended interested party suffer any prejudice if denied joinder?”**

**18. Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”**

60. Equally, the applicable principles in an application for joinder of an interested party were set by the Supreme Court in **Muruatetu & another (supra)** where it underscored as follows:

**“a. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough,**

**to stand apart from anything that is merely peripheral.**

- b. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.**
- c. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”**

61. Furthermore, at Paragraph 41, the Superior Court noted as follows:

**“[41] Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.”**

62. Equally, in **Joan Akoth Ajuang & another v Michaels Owuor Osodo - Chief Simur Kondiek, Ukwala Location**

**& 3 others; Malaika Foundation (Proposed Interested Party) [2020] KEHC 5840 (KLR)** as follows:

***“20. The main purpose of joining parties is to enable the court to deal with matters brought before it fully and exhaustively and to avoid a multiplicity of suits. It is a fundamental consideration that before a person can be joined as a party, it must be established that the party has an interest in the case. In addition, it must be clearly demonstrated that the orders sought in the case in question would directly and legally affect the party seeking to be enjoined. These considerations were augmented by the Supreme Court of Uganda in *Departed Asians Property Custodian Board v. Jaffer Brothers Ltd* [1999] I.E.A 55. where the court held:***

***“...for a party to be joined on ground that his presence is necessary for the effective and complete settlement of all questions involved in the suit, it is necessary to show either that the orders sought would legally affect the interest of that person and that it is desirable to have that person joined to avoid multiplicity of suit, or that the defendant could not effectually set up a desired defence unless that person was joined or an order made that would bind that other person.”***

63. The core issue that the Petition is founded on is the constitutionality of the impugned Cooperation Framework Agreement whereby the Petitioner questions the alleged unilateral Executive decision he alleges was carried out without seeking the requisite parliamentary approval, public

participation or transparent assessment of the fiscal implications, in violation of constitutional principles and the relevant laws.

64. The 2<sup>nd</sup> Intended Interested Party argued that the said Cooperation Framework Agreement has made provisions for 515 frontline primary health workers, who constitute its membership, as the persons that would be directly responsible for the implementation of the programs therein hence non-implementation would be prejudicial in that regard. Further, that there is a risk of catastrophic loss of life due to interruption in treatment that could arise from non-supply of essential medical commodities.
65. The 3<sup>rd</sup> to 8<sup>th</sup> Intended Interested Parties contended that they are persons living with HIV and leaders of community structures engaged in the coordination and oversight of HIV and TB responses and thus the outcome of these proceedings has a direct, immediate and practical impact on their health, dignity, survival and livelihood. As such, their joinder is justified as the Petition deals with a matter that has direct nexus in respect of their access to treatment, care and support.
66. This Petition is indeed about the Constitutionality or legality of the Cooperation Framework Agreement but the bottom

line is that, the 2<sup>nd</sup> and 3<sup>rd</sup> -8<sup>th</sup> Interested Party, have demonstrated, given the scope, the content and the implication of the said Cooperation Framework Agreement, that it has a direct practical bearing on their rights and interests in a substantial way. Allowing therefore their participation in these proceedings will give them a voice to articulate their concerns on safeguarding these rights and interests in the context of the broader constitutional questions that this Petition raises to enable the Court reach a just determination that considers all the relevant dimensions of the whole matter.

67. I am persuaded thus that the joinder of these Parties is therefore necessary and I thus allow their participation in these proceedings as Interested Parties.

***Whether the instant Petition ought to be consolidated with Petition No. E809 of 2025.***

68. The legal foundation for making an application for consolidation is provided for under Rule 17 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** as follows:

***Consolidation.***

***The Court may on its own motion or on application by any party consolidate several petitions on such terms as it may deem just.***

69. Consolidation was defined in **Nyati Security Guards & Services Ltd vs Municipal Council of Mombasa (Civil Suit No. 992 of 1994)** as cited with approval in **Lakhamshi Khimji Shah & another v Ajay Shantilal Shah & 2 others [2010] KEHC 3192 (KLR)** as follows:

***“Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.”***

***The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where: -***

- a. some common question of law or fact arises in both or all of them; or***
- b. the rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or***
- c. for some other reason it is desirable to make an order for consolidating them.***
- d. The circumstances in which suits can be consolidated are broadly similar to those in which parties may be joined in one action. Accordingly, actions relating to the same subject matter between the same plaintiff and the same defendant, or between the***

**same plaintiff and the same defendant, or between the same plaintiff and different defendants or between different plaintiffs and the same defendants may be consolidated.**

- e. There are however situations where consolidation is undesirable like where in two action a plaintiff in one is a defendant in the other unless the claim in one is to be treated as a counterclaim in the other. The other situation where consolidation is undesirable is where the plaintiffs in two or more actions are represented by different advocates. In such situation the hearing will be longer than take long and the purpose of saving time will be defeated.”**

70. The principle on consolidation of suits was expounded in the case of **Stumberg and another v Potgieter, (1970) EA 323** which was cited with approval by the Court of Appeal in **Joseph Mzungu Nyoka v Vros Produce Limited & 525 others [2015] KECA 902 (KLR)** where it held thus:

**“The ratio decidendi of *Stumberg & Another vs Potgieter (supra)*, is that consolidation of suits is appropriate where there are common questions of law or facts cutting across the suits intended to be consolidated, and the common questions are of sufficient importance to justify the suits being disposed of at the same time. This is in line with the overriding objectives of the Civil Procedure Act and the Rules made thereunder as stated in section 1A of the Civil Procedure Act, that is, to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. As noted by the learned Judge**

**consolidation of suits is provided under Order 11 Rule 3(h) of the Civil Procedure Rules 2010 as a case management strategy. This supports the position taken by the learned Judge that the principle enunciated in *Stumberg & Another v. Potgieter (supra)* is good law. However, an order for consolidation presumes that the matters that are being consolidated are matters that are still pending and that there are common questions or issues which are yet to be determined. Thus, it is desirable that consolidation be made at the earliest opportunity.**

71. The threshold for consolidation was further discussed by the Supreme Court in **Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] KESC 29 (KLR)** as follows:

***“[43] The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed.”***

72. As is discernible from the above authorities, consolidation of cases is possible where common questions of law and facts

arise from the same transaction to eliminate multiplicity of suits so as to enhance efficiency and convenience in case management.

73. I have only heard the intended interested Parties and the Petitioner in PET E816/2025. I have not heard the Petitioner in E809/2016 or the rest of the Parties in that Petition on whether or not it is desirable to merge the two Petitions.
74. I am fully aware this Court can on its own motion, discretionary decide to consolidate the matters if it considers it appropriate to do so. Here, however, it is not the Court acting on its own motion, it is being moved through an application by some of the parties in one of the proceedings. I do not think it is proper for the Court to proceed and make a consolidation order in the circumstances without also hearing the other parties in the E809/2025 on the question of the proposed consolidation.
75. I therefore decline to make a decision on the issue of consolidating PET E816 of 2025 with E809/2025 until the Parties in E809/2025 have also been heard to enable the Court arrive at an informed resolution.

***Whether this Court should vary set aside and/or discharge the blanket conservatory order issued on 19<sup>th</sup> December 2025.***

76. The Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 does not expressly provide for review of Court orders.

77. In view of such a lacuna in law, the Court of Appeal in **Karl Wehner Claasen v Commissioner of Lands & 4 others [2019] KECA 766** opined as follows:

***“...in the absence of express provisions in the Practice Procedure Rules, an application for substitution may be based on the applicable Civil Procedure Rules. However, we add that Rule 3(8) of the Practice and Procedure Rules gives the court inherent power to make such orders as may be necessary for the ends of justice and that Article 159(2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of the Constitution.”***

78. Likewise, in **James Omariba Nyaoga, James Ariga Orina, John Matunda Omwenga, Zachary N. Orina, Margaret Momanyi, Damaris Nyachiro, Dorcas Momanyi, Berina K. Ondiek & Bom, Kenyoro Secondary School v County Education Board-Kisii County, National Education Board & County Director Of Education; Principal, Kenyoro Secondary School (Interested Parties), Teachers Service Commission, Cabinet Secretary,**

**Ministry Of Education & Attorney General [2021]**

**KEHC 5078 (KLR)** it was held that:

***“20. The Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules does not specifically provide for review. However, as held in the above persuasive decisions of the courts, where there is a lacuna in the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, the Civil Procedure Act and the Civil Procedure Rules will apply. Moreover, the invocation of the wrong provision of the law will not of itself be fatal to an application. Courts are charged to do substantive justice to parties and will not pay undue regard to procedural technicalities. The reliance on the Civil Procedure Act and the Civil Procedure Rules is therefore not fatal to the application. This position finds support in the case of Karl Wehner Claasen v Commissioner of Lands & 4 others [2019] eKLR where the Court of Appeal held thus;***

***“There is no cross-appeal against the finding of the trial judge that in the absence of express provisions in the Practice Procedure Rules, an application for substitution may be based on the applicable Civil Procedure Rules. However, we add that Rule 3(8) of the Practice and Procedure Rules gives the court inherent power to make such orders as may be necessary for the ends of justice and that Article 159(2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities***

***and to protect and promote the purpose and principles of the Constitution.”***

79. The guiding legal principles upon which Kenyan Courts make findings on grant of an order for review is explicitly provided for under Section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 45 of the Civil Procedure Rules. These provisions provide as follows:

***Section 80 - Review***

- a) *Any person who considers himself aggrieved—*
- b) ***by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
- c) *by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*

***Order 45 Rule 1***

- a) *Any person considering himself aggrieved—*
- b) ***by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
- c) *by a decree or order from which no appeal is hereby allowed,*
- d) *and who from the discovery of new and important matter or evidence which, after the exercise of*

*due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

80. The Court in **Jimi Wanjigi & another v Inspector General of Police & 3 others [2021] eKLR** observed as follows:

***“37. Courts have severally dealt with the issue of review. The Supreme Court in Application No. 8 of 2017, Parliamentary Service Commission -vs- Martin Nyaga Wambora & others [2018] eKLR, quoted with approval the findings of the East Africa Court of Appeal in Mbogo and Another -vs- Shah [1968] EA, upon establishing the following principles: -***

***[31] Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:***

***A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.***

***Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;***

**An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.**

**In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.**

**During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.**

**The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:**

- a) as a result, a wrong decision was arrived at; or**
- b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.**

**38. The Court of Appeal in Civil Appeal No. 2111 of 1996, National Bank of Kenya vs. Ndungu Njau observed as follows in respect of reviews applications: -**

**A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review**

***that the court proceeds on an incorrect expansion of the law.”***

81. Likewise, the Court of Appeal in **Nyamogo & Nyamogo v Kogo 2001 EA 173** as cited with approval in **George Gikubu Mbuthia v Kenya Power & Lighting Company Ltd [2004] KEHC 2644 (KLR)** underscored as follows:

***“We have carefully considered the submissions made to us by the advocates of the parties to this appeal. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which as to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”***

82. The Intended Interested Parties vehemently opposed the conservatory orders issued by the Court on 19<sup>th</sup> December 2025. The 2<sup>nd</sup> Intended Interested Party decried the difficulty it would encounter in implementation of the impugned

Framework and disastrous effect on health care. Similarly, the 3<sup>rd</sup> to 8<sup>th</sup> Intended Interested Parties raised apprehension that the existence of the conservatory orders poses a real risk to their continued access to treatment and care under the impugned Framework.

83. This Court, in a ruling delivered on 19/12/2025 by Mwita, J (as he then was), after hearing the oral submissions of all the parties, held as follows in paragraphs 42, 49, 50, 56 and 57 of the ruling:

**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...**

**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...**

**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.”**

84. I perused this Court’s record and came across a Notice of Appeal dated 19/12/2025 against the impugned ruling filed by the Respondents. This is the same ruling that the

Interested Parties want this Court to review, vary and/or modify. This Court’s jurisdiction on review is extinguished if an appeal is preferred against a decision that the Court may exercise its power of review as per Section 80 (b) of the Civil Procedure Act as read with Order 45 (1) of the Civil Procedure Rules).

85. Without jurisdiction, I cannot probe this particular issue further.
86. The upshot is that the prayers for review of the conservatory order is declined. Equally, consolidation of the instant matter with E809 of 2025 is also rejected until parties in both Petitions are heard on that particular issue.
87. Joinder of the 2<sup>nd</sup> - 8<sup>th</sup> Interested Party in this Petition is allowed. The Deputy Registrar shall cause a rearrangement of the Parties and notify them accordingly.
88. Costs shall be in the cause.

***Dated, signed and delivered virtually at Nairobi this 12<sup>th</sup> day of February, 2026.***

.....

**L N MUGAMBI**

**JUDGE**