

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E389 OF 2023

BETWEEN

EKURU AUKOT.....1ST PETITIONER
MIRURU WAWERU.....2ND PETITIONER
THIRDWAY ALLIANCE KENYA.....3RD PETITIONER

AND

THE NATIONAL SECURITY COUNCIL.....1ST RESPONDENT
THE INSPECTOR-GENERAL OF
THE NATIONAL POLICE SERVICE.....2ND RESPONDENT
CABINET SECRETARY, MINISTRY OF INTERIOR
AND NATIONAL ADMINISTRATION.....3RD RESPONDENT
SPEAKER OF THE NATIONAL ASSEMBLY.....4TH RESPONDENT
HON. ATTORNEY-GENERAL.....5TH RESPONDENT
WILLIAM SAMOEI RUTO.....6TH RESPONDENT

GROUND OF OPPOSITION

TAKE notice that the Attorney-General shall oppose the petition on the following grounds;

1. That the 6th Respondent enjoys constitutional immunity from the present proceedings as enunciated 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) (the BBI case)*, where the Supreme Court interpreted the provisions of Article 143(2) and held *inter alia* as follows: -

“235. Pursuant to article 143(2) of the Constitution, civil proceedings ought not to 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 the Constitution.”
2. That to the extent that the entire petition is in respect to proposed deployment of police officers to Haiti and the same having been instituted prior to Parliamentary consideration, the same is non-justiciable on account of the legal principle of ripeness.
3. That to the extent that standing orders no. 219 to 229 of the National Assembly Standing Orders (6th Edition) provide for the presentation of petitions in exercise of Articles 37 and 119 of the Constitution, the present petition is bad in law for contravening the legal doctrine of exhaustion.
4. That to the extent that there exists alternative, sufficient and adequate avenue for ventilation of the Petitioner’s grievance, the present claim ought not be heard and determined under the doctrine of constitutional avoidance.

5. That the Honourable Court ought to decline the exercise of its jurisdiction over the present claim in deference to Parliament's primary jurisdiction over the same under the doctrine of separation of powers.
6. That Parliament's power to grant approval for deployment does not stem from any statutory provision but is conferred under Article 240 of the Constitution.
7. The provisions of section 107, 108 and 109 of the National Police Service Act are constitutional and valid.
8. That it is improper for the Petitioner to seek costs in a public interest suit, the Supreme Court in the case of Okiya and 2 others vs Attorney-General and 14 others (Petition (Application) 2 (E002) of 2021) (2023) KESC 31 (KLR) (21 April 2023) (Ruling) Neutral citation; (2023) KESC 31 (KLR) the Supreme Court stated that public interest litigants ought not seek costs in public interest litigation because in doing so self-interest as opposed to public interest will be manifest.
9. That the petition is premised on bare unsubstantiated allegations, mere citations of constitutional provisions with no demonstration of how specific articles of the Constitution have been or are threatened with violation.
10. That the alleged failure by Parliament to facilitate public participation has been made even before the matter is tabled before Parliament and is therefore not only premature but also presumptuous.
11. The entire petition is premised on nescience of the applicable procedure on deployment.
12. The Petition is premised on hearsay, supposition, assumptions and on matters not ordinarily within the knowledge of the 1st Petitioner who does not disclose the sources of his purported information, in sum the petition has no probative evidentiary basis.

Dated at Nairobi this 17th day of October, 2023



Emmanuel Bitta
Chief State Counsel
For; Attorney-General

DRAWN AND FILED BY:
THE ATTORNEY-GENERAL
SHERIA HOUSE, 7TH FLOOR
HARAMBEE AVENUE
NAIROBI
c/o: E-mail: communications@ag.go.ke

TO BE SERVED UPON;

MIDEGA & CO.

ADVOCATES

AGIP HOUSE, 6TH FLOOR-WING B, FLAT NO.8

HAILE SELASSIE AVENUE

P.O.BOX 42724-00100

NAIROBI

info@midengaadvocates.com

midengaadvocates@gmail.com