



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 38 OF 2017**

**In the matter of Articles 1, 2, 3, 10, 22, 23, 27, 35, 75, 76, 77, 93, 94, 95, 96, 101, 102, 103(f), 122(3), 201 of the Constitution**

**DISMAS WAMBOLA.....PETITIONER**

**VERSUS**

**CABINET SECRETARY, TREASURY.....1<sup>ST</sup> RESPONDENT**

**PARLIAMENTARY SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

**SALARIES AND REMUNERATION COMMISSION.....3<sup>RD</sup> RESPONDENT**

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

**THE NATIONAL ASSEMBLY.....5<sup>TH</sup> RESPONDENT**

**THE SENATE.....6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**The parties.**

1. The Petitioner, an advocate of the High Court of Kenya. He avers that he has a keen interest in matters of good governance, rule of law, human rights and constitutionalism, and, that he brings this Petition in public interest as a person under an obligation to respect, uphold and defend the Constitution.
2. The first Respondent is the Cabinet Secretary in charge of the Treasury responsible for presenting supplementary and annual budgets for debate and approval by the fifth and sixth Respondents.
3. The second Respondent, the Parliamentary Service Commission is a constitutional Commission established under Article 127 of the Constitution. Its functions include preparing annual estimates of expenditure of the Parliamentary service and submitting them to the National Assembly for approval, exercising budgetary control over the service, and, performing other functions—necessary for the well-being of the members and staff of Parliament.
4. The third Respondent, the Salaries and Remuneration Commission is a constitutional Commission established under Article 230. Its powers and functions as set out under Article 230 (4) are to set and regularly review the remuneration and benefits of all State officers, and advise the national and county governments on the remuneration and benefits of all other public officers.
5. The fourth Respondent is the Hon. Attorney General. Under Article 156(4), the Attorney General is the principal legal adviser to the Government. He represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings and performs any other functions conferred on the office by an Act of Parliament or by the President.
6. The fifth and sixth Respondents, namely, the National Assembly and the Senate constitute the Parliament of Kenya established under Article 93 of the Constitution. Parliament performs its functions in accordance with the Constitution as prescribed in Article 94. The respective of the National Assembly and Senate are in Articles 95 and 96.

## **The factual matrix**

7. The substance of the Petitioner's case is that there was information in the public domain to the effect that members of fifth and sixth Respondents (the 11<sup>th</sup> Parliament) piled pressure on the government and demanded that they be paid salaries and allowances covering the period after the expiry of the life of the 11<sup>th</sup> Parliament.

8. He also contended that there were reports that on 7<sup>th</sup> February 2017, officials of the first Respondent held a meeting with the members of the second Respondent and Parliament's Budget and Appropriation Committee and the third Respondent to discuss the matter.

9. Additionally, the Petitioner averred that Members of the 11<sup>th</sup> Parliament were demanding that the pay should be included in the supplementary budget which was scheduled to be tabled in Parliament in default they would shoot down the 2017/2018 budget.

## **Legal foundation of the Petition.**

10. The Petition contended that there was no constitutional basis for the financial demands made by the members of the 11<sup>th</sup> Parliament. He anchored the Petition on provisions of Articles 1(1) (2) (3), 2(1) (3) (4), 10, 22, 23, 27(1), 75, 76(2) (b), 94(2) (4), 95(4), 96, 102(1), 103 and 201.

11. He also contended that the financial demands are unconstitutional, because they do not represent the sovereign will of the people of Kenya, and, that, by asserting that their terms shall be ended pre-maturely on 8<sup>th</sup> August 2017, rendering them entitled to the 8-month pay; they were challenging the validity of the Constitution, which fixed the election date.

12. He further averred that the acts complained of are inconsistent with the values and principles of governance. Also, he contended that Article 77(4) prohibits a retired State Officer from receiving remuneration from public funds, while that Article 122(3) prohibits a Member of Parliament from voting on any question in which he has a pecuniary interest.

## **The Reliefs sought.**

13. As a consequence, the Petitioner prays for the following orders/declarations:-

*a. A declaration that the members of the fifth and sixth Respondents are not constitutionally entitled to salaries and allowances covering the period after the term of the 11<sup>th</sup> Parliament ends on 8<sup>th</sup> August 2017.*

*b. A declaration that any threat by the fifth and sixth Respondents not to pass any laws or budgetary estimates unless they are paid salaries and allowances for the period after the expiry of the term of the Parliament on 8<sup>th</sup> August 2017 amounts to a threat to abdicate their constitutional duty and is therefore unconstitutional.*

*c. An order restraining the first, second, third and fourth Respondents either directly or through their agents and or servants jointly and or separately from considering, advising, recommending, offering, approving or making the payments of salaries and allowances to MPs.*

*d. Costs of the Petition.*

*e. Any other or further relief that this court shall deem fit to grant in the interests of justice.*

## **The Second Respondents Replying Affidavit**

14. **Jeremiah Nyengenyé** CBS, the Clerk of the Senate and the Secretary to the Parliamentary Service swore the Replying Affidavit dated 25<sup>th</sup> July 2017. He averred that the Petitioner stands on unfounded and unproven allegations against members of the second, fifth and sixth Respondents. He averred that the allegations are grounded on speculative newspaper reports, which constitute in admissible evidence, and, that, the Petition does not disclose violations or threat of violation of the Constitution.

15. He also deposed that he was not aware of any threat or attempt by Members of the 11<sup>th</sup> Parliament to shoot down the 2017/2018 national budget if payments for an eight-month period after the August 8<sup>th</sup> 2017 general elections are not made.

16. Mr. Nyengenyé further averred that the second Respondent is an independent constitutional commission established under Article 127(1), and in the exercise of its constitutional mandate, it is not subject to direction or control by any person or authority, including members of the 11<sup>th</sup> Parliament.

17. He also averred that in tandem with the spirit of cooperation and consultation enunciated under the Constitution, the second Respondent holds routine meetings and engagements with state organs and independent commissions on matters of mutual interest, hence, any meeting with the third Respondent should be understood in the said regard.

## **The Fifth Respondent's Replying Affidavit.**

18. Michael Sialai, the Clerk to the National Assembly, swore Replying Affidavit dated 25<sup>th</sup> July 2017. Its contents are substantially a replica

of Mr. Nyengenyé's affidavit. In addition, he averred that the National Assembly debated and approved the 2017/2018 annual budget in accordance with Article 221(1). Further, he averred that no payment has been made to members of the National Assembly nor has there been any authorization or recommendation that they be paid the salaries and benefits for the period after 8<sup>th</sup> August 2017. In addition, he deposed that there has not been any authorization or recommendation for payment for the 8 months after the date of the last general elections.

### **The Sixth Respondent's Replying Affidavit.**

19. Mr. Nyengenyé also swore another Replying Affidavit dated 25<sup>th</sup> July on behalf of the sixth Respondent. He averred that the Petition is misconceived and, that the Senate did not threaten to shoot down the 2017/2018 budget, nor does the Senate have the constitutional mandate of debating or approving the national budget. Lastly, he averred that no Senator had been paid salaries/benefits for the 8 months nor was there any authorization for such payment.

### **The first and fourth Respondents.**

20. The first and fourth Respondents did not file any responses to the application nor did they file submissions. On his part, counsel for the fifth and sixth Respondent relied on the submissions filed by the second Respondent.

### **Issues for determination.**

21. The facts disclosed in this case bring into sharp focus the law of mootness, which inquires whether events subsequent to the filing of a suit have eliminated the controversy between the parties. I find it appropriate to address the issue whether this suit is bad by virtue of the doctrine of mootness.

22. Perhaps conscious of the above doctrine, the Petitioner's counsel submitted that the 11<sup>th</sup> Parliament against whom the orders are sought no longer exists. He concedes that on 8<sup>th</sup> August 2017, Kenya ushered in the 12<sup>th</sup> Parliament. He however contended that he would "demonstrate by way of the submissions" that this Petition has not been overtaken by events and, that, he would demonstrate the significance of the Petition as far as the development of the law and jurisprudence is concerned.

23. Counsel framed and addressed the following issues. (a) Whether the term of the 11<sup>th</sup> Parliament was to run for 5 years until March 2018. (b) Whether members of the 11<sup>th</sup> Parliament were entitled to payments of Salaries and allowances until March 2018. (c) Whether it was unconstitutional for the MPS to threaten not to pass the budget unless the demanded payment was factored into the budget. It was his view that some of the prayers sought in the Petition are declaratory; merely seeking to pronounce the position in law, hence, the reason why the Petition is not moot.

24. Counsel for the second Respondent did not address this issue at all in his submissions. The crux of his submissions was that this Petition lacks merit. In support of this proposition, he cited numerous cases and urged the court to dismiss the petition.

25. Similarly, counsel for the third Respondent did not address this issue also. The substance of his submission was that any legislation enabling MPs to be paid after the expiry of their term would be illegal.

26. On his part, counsel for the fifth and sixth Respondent relied on the submissions rendered by the second Respondent.

27. Mootness issues can arise in cases in which the plaintiff challenges actions or policies which are temporary in nature, in which factual developments after the suit is filed resolve the harm alleged, and in which claims have been settled.

28. Generally, a case is not moot so long as the plaintiff continues to have an injury for which the court can award relief, even if entitlement to the primary relief has been mooted and what remains is small.<sup>[1]</sup> Put differently, the presence of a "collateral" injury is an exception to mootness.<sup>[2]</sup> As a result, distinguishing claims for injunctive relief from claims for damages is important. Because damage claims seek compensation for past harm, they cannot become moot.<sup>[3]</sup> Short of paying plaintiff the damages sought, a defendant can do little to moot a damage claim.

29. A matter is **moot** if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby, the matter has been deprived of practical significance, or rendered purely academic. **Mootness** arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.

30. As a general principle, the rights and liabilities of parties to any judicial proceedings pending before court are determined in accordance with the law as it was at the time when the suit was instituted and by applying the facts to the law and circumstances. Repeatedly, it has been expressed that a court should not act in vain.<sup>[4]</sup> No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose.

31. It is contended that Members of the 11<sup>th</sup> Parliament threatened to shoot down the 2017/2018 budget if the budget did not include their salaries and remuneration for 8 months after the general elections scheduled for 8 August 2017. The Petitioner states that the basis of the MPs demand was their contention that the term of the 11<sup>th</sup> Parliament would be cut short by the elections scheduled for 8<sup>th</sup> August 2017, hence, they were demanding salary and remuneration for the "remainder of the term."

32. The following developments are worth mentioning. *First*, the 2017/2018 budget was passed without any hitch. *Second*, budget did not include the alleged payments. *Third*, the general elections were held as scheduled on 8<sup>th</sup> August 2017. *Fourth*, the term of the 11<sup>th</sup> Parliament

ended on 8<sup>th</sup> August 2017 after a new Parliament was elected. *Fifth*, the elections held on 8<sup>th</sup> August 2017 ushered in the 12<sup>th</sup> Parliament. *Sixth*, there is nothing in this Petition to show that the 12<sup>th</sup> Parliament intends or has threatened to effect the same the same payments or include it the budget. *Seventh*, the accusations in the Petition are specifically labelled against the 11<sup>th</sup> Parliament, which no longer exists, and the blame cannot be transferred to the 12<sup>th</sup> Parliament against whom no accusations have been made; *Eighth*, the Petitioner did not amend the Petition to include the 12<sup>th</sup> Parliament if at all he had any complaint against its members.

33. In addition, it is necessary to study the reliefs sought to establish whether the mischief to be addressed by the prayers in question is moot. Prayer (a) seeks “A declaration that the members of the fifth and sixth Respondents are not constitutionally entitled to salaries and allowances covering the period after the term of the 11<sup>th</sup> Parliament ends on 8<sup>th</sup> August 2017.” As stated above, the 2017/2018 budget was passed. The term of the 11<sup>th</sup> Parliament lapsed. It never passed any motion or Bill authorizing the alleged payments. There is nothing to show that there is a plan to pay them. There is nothing to show that the 12<sup>th</sup> Parliament has threatened or has taken any steps to make the payments. Even if it had, the Petition has not been amended to link the current Parliament with the complaints.

34. The Petitioner also seeks “A declaration that any threat by the fifth and sixth Respondents not pass any laws or budgetary estimates unless they are paid salaries and allowances for the period after the expiry of the term of the Parliament on 8<sup>th</sup> August 2017 amounts to a threat to abdicate their constitutional duty and is therefore unconstitutional. Clearly, this prayer is directed against the 11<sup>th</sup> Parliament, which no longer exists. There was no attempt to amend the Petition to link the 12<sup>th</sup> Parliament with the complaints to warrant such a prayer against them. If such a prayer is granted, it would be in futility since the 11<sup>th</sup> Parliament no longer exists.

35. Additionally, the Petitioner prays for “An order restraining the first, second, third and fourth Respondents either directly or through their agents and or servants jointly and or separately from considering, advising, recommending, offering, approving or making the payments of salaries and allowances to MPs. A contextual reading of the Petition shows that the MPs referred to were members of the 11<sup>th</sup> Parliament not the 12<sup>th</sup> Parliament. There was attempt to amend the Petition to enjoin the current Parliament and link it with the accusations made in this Petition to warrant the issuance of an order against them. Simply put, contrary to the Petitioner’s counsels submissions, the reliefs sought are moot and of no utilitarian value.

36. The Petitioner’s counsel contended that he would demonstrate by way of submissions that this dispute is still alive. Unfortunately, submissions are not pleadings. Issues for determination flow from pleadings not the submissions. Counsel cannot convert legal arguments into pleadings and breathe life into a case that is moot. As found above, the issues presented in this Petition disclose a cosmetic exercise. They are of no utilitarian value or benefit as the aim of the case has been overtaken by events.<sup>[5]</sup> A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations.<sup>[6]</sup>

37. A case or issue is moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.<sup>[7]</sup> This exception could have been satisfied had the Petitioner amended the Petition to plead that the current Parliament was threatening or was intending to do the same mischief complained of against its predecessor. The 11<sup>th</sup> Parliament cannot execute then plan from home. This is what the Petitioner seems to be inviting this court to find. I decline the invitation.

38. Applying the above time tested and refined principles of law to the instant case, it is obvious that there remains no unresolved justiciable controversy in this Petition. Because courts generally only have subject-matter jurisdiction over live controversies, when a case becomes moot during its pendency, the appropriate first step is a dismissal of the case.<sup>[8]</sup> On this ground alone, this case falls for dismissal.

39. Accordingly, I dismiss this Petition on grounds that the issues raised in the Petition are moot and that the Petition does not present a justiciable controversy. Each party shall bear its costs.

Orders accordingly.

**Signed and Dated at Nairobi this 29<sup>th</sup> day of April 2019.**

**John M. Mativo**

**Judge**

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[1] In *Chafin vs. Chafin*, 133 S. Ct. 1017 (2013), the Supreme Court discussed mootness at length in a complex child abduction case and held that the dispute between the parents was not moot because issues regarding the custody of the child remained unresolved. The Court noted that the prospects of success of the suit were irrelevant to the mootness question, and uncertainty about the effectiveness and enforceability of any future order did not moot the case. *Chafin*, 133 S. Ct. at 1024-26. A case is moot, however, when the court cannot give any “effectual” relief to the party seeking it. See *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012); *Church of Scientology of California vs. United States*, 506 U.S. 9, 12 (1992); *Firefighter’s Local 1784 vs. Stotts*, 467 U.S. 561, 571 (1984); see also *Tory vs. Cochran*, 544 U.S. 734, 736-37 (2005) (death of attorney Johnnie Cochran did not moot injunction enjoining plaintiff from defaming Cochran). A case can, of course, become moot when the plaintiff has abandoned their claims, but such abandonment must be unequivocal. *Pacific Bell Telephone Company vs. Linkline Communications*, 555 U.S. 438, 446 (2009).

[2] [In re Burrell](#), 415 F.3d 994, 998 (9th Cir. 2005).

[3] [Board of Pardons vs. Allen](#), 482 U.S. 369, 370 n.1 (1987), illustrates the use of a damage claim to avoid mootness. Prisoners who were denied parole without a statement of reasons challenged the denial. They claimed that the state statute mandating release under certain circumstances created a liberty interest in eligibility for parole protected by the [Fourteenth Amendment](#). Plaintiffs sought damages as well as declaratory and injunctive relief. Although plaintiffs were later released, mootness of their individual claims for injunctive relief, their damage claims remained alive. Because the immunity of defendants was not settled, the Supreme Court reached the merits, holding that plaintiffs had a cognizable liberty interest in the processing of their parole applications. The Court remanded the case for further proceedings. See also [City of Richmond vs. J.A. Croson Company](#), 488 U.S. 469, 478 n.1 (1989). An inability to pay a damages judgment at present does not moot a claim. See [United States vs. Behrman](#), 235 F.3d 1049, 1053 (7th Cir. 2000). However, if the judgment seemingly could never be paid, a claim might be dismissed on prudential grounds. See, e.g., [Federal Deposit Insurance Corporation vs. Kooyomjian](#), 220 F.3d 10, 14-15 (1st Cir. 2000).

[4] [Political Parties Forum Coalition & 3 others v s Registrar of Political Parties & 8 others](#) [2016] eKLR

[5] [Oladipo vs. Oyelami](#) {1989} 5 NWLR (Pt. 120) 210; [Ukejianya vs. Uchendu](#) }1950} 13 WACA 45

[6] See [Plateau State vs. A.G.F.](#) {2006} 3 NWLR (Pt. 967) 346 at 419 paras. F-G wherein the Nigerian Supreme court defined an academic suit or petition the above terms

[7] [Osmeña III vs. Social Security System of the Philippines](#) G.R. No. 165272, 13 September 2007, 533 SCRA 313, citing [Province of Batangas vs. Romulo](#), G.R. No. 152774, 27 May 2004, 429 SCRA 736, 754; [Olanolan v. Comelec](#), 494 Phil. 749,759 (2005); [Paloma v. CA](#), 461 Phil. 269, 276-277 (2003),.

[8] [Mills vs. Green](#), 159 U.S. 651, 653 (1895)