REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. 441 OF 2018

DANIEL KAMINJA & 3 OTHERS

(SUING AS WESTLAND ENVIRONMENTAL CARETAKER GROUP)...APPLICANTS

VERSUS

THE COUNTY GOVERNMENT OF NAIROBI.....RESPONDENT

JUDGMENT

The parties

1. The applicants are small scale traders registered as a self-help group under the Ministry of Culture and Social Services in the name and style of Westland Environmental Caretaker Group. They carry on the business selling flowers, plants and pots at Lower Kabete Road/Peponi Road, in Nairobi.

2. The Respondent is the County Government of Nairobi established pursuant to Article 176 of the Constitution. Its mandate includes issuing business licenses and permits to persons intending to carry out business activities within the City of Nairobi.

Factual Matrix

3. The applicants' case is that at all material times they have been conducting the business of selling flowers, plants and pots on lower Kabete Road/Peponi Road in the County of Nairobi. They state that they have operated at the said venue since1984. They also state that the said premises is partially riparian and partially a road reserve.

4. In addition the applicants state that in 1986, thy formed and registered the said Self-Help Group and they have used it to coordinate the affairs of their premises, and, to obtain their business permits under the said name.

5. They maintain that they carried on the said business without interference until 28th May 2013 when they were served with a Removal Notice from the County Government, City Inspectorate Department requiring them to move from the said premises within 48 hours from the time of service of the Notice on grounds that their presence and or that of their structures/articles was undesirable. The applicants state that they successfully challenged the said Notice in Petition No. 280 of 2013 and pursuant to the court orders they applied for a permit for the year 2014, 2015, 2016, 2017 and 2018.

6. The applicants also state that on Monday 5th November 2018, at around 1pm, they were served with a Removal Notice by the Respondent requiring them to move from the said premises within 7 days of service of the Notice on grounds that the site was required for development. The applicants state that the 7 days is insufficient for them to find an alternative suitable location to move their businesses. Further, the applicants contend that the even though Respondent has a right to develop the property, the said right was exercised unfairly, and, the Respondent did not consider their rights having occupied and invested therein since 1984.

Legal foundation of the Constitution

7. The applicants' state that the said Notice is unlawful as it is was made in violation of their rights protected under the Constitution, statute law, common law and international law. Further, they state that the removal Notice violates their Article 47 rights, in particular, they were not accorded a fair process. In addition, the applicants state that they were not notified of the decision in advance nor were they afforded the opportunity to defend themselves.

8. Further, the applicants state that the Notice does not offer them sufficient details on the reasons informing the decision to allow them to contest the decision, hence, it offends Article 47(2) of the Constitution and section 6 of the Fair Administrative Action Act[1] (herein after referred to as the FAA Act).

9. The applicants also state that the said decision was issued in bad faith taking into consideration the decision in Pet. 280 of 2013 in which the court noted that the impugned Notice did not sufficiently detail the reasons and that the notice period was unreasonably short.

10. The applicants further state that the Respondent violated their right to legitimate expectation based on the fact that the Respondent issued them with a permit which was still valid. In addition, the applicants stated that the Notice if acted upon would violate their right to property guaranteed under Article 40 of the Constitution. In addition, the applicants state that the eviction would violate their economic and social rights protected under Article 43 of the Constitution, hence, the decision will negatively affect them and their families. Lastly, the applicants state that the Respondent is bound by the values in Article 10 of the Constitution and must observe the Bill of rights as provided under Article 20 of the Constitution.

Reliefs sought

11. The applicants pray for the following orders:-

> *a. A declaration that the Removal Notice is illegal and invalid because the manner in which it was conceptualized, developed and issued was illegal and in violation of the constitutional requirements provided in Articles 10, 19, 20, 21,26, 28, 40, 43 and 47.*
>
> *b. A declaration that the Removal Notice violates the applicants rights to fair administrative act (Article 47), their right to property (Article 40), dignity (Article 28), life (Article 26) and their economic and social rights (Article 43).*
>
> *c. An order of certiorari to remove to this honorable court to quash the Removal Notice dated 2nd November 2018 issued by the Respondent requiring the applicants to move from their present position within 7 days from the date of service of the notice for breach of constitutional and statutory provisions in relation to fair administrative actions by the government officials.*
>
> *d. An order of Mandamus compelling the Respondent to honour the terms stipulated in the Respondent in the single business permit issued to the applicant by the Respondent on 22nd January 2018.*

Applicants further Affidavit

12. The applicants filed the further Affidavit of Daniel Kaminja dated 25th February 2019 annexing the 2019 permits.

The Respondent's failure to file a Response

13. On 27th November 2018, in the presence of counsel for both parties, I directed the Respondent to file its response within 7 days from date of service of the substantive application and scheduled the case for mention on 27th February 2019. However, on the said date, no reply had been filed. I again granted the Respondent 14 days to file their Response and directed the parties to file submissions. However, the Respondent never filed any response, and on 24th April 2019, I again granted them 14 days to file their response and ordered that in default the case would proceed. Again, on 11th June 2019 when the matter came up in court next, no reply had been filed. I once again granted the Respondent 7 days to comply in default, the suit would proceed on 31st July 2019. Lastly, on 31st July 2019, the Respondents counsel did not attend court. I directed that the hearing proceeds the absence notwithstanding.

Applicant's Advocates Submissions

14. The applicants' counsel cited Article 47 of the Constitution and section 4 to 6 of the FAA Act and submitted that the Removal Notice is illegal and irregular because it violates the applicant's rights under the said provisions. Counsel cited *Geothermal Development Company Limited v Attorney General & 4 others*[2]which emphasized that service of Notice is a matter of procedural fairness and an important component of natural justice. Counsel argued that the failure to notify them of the intention to remove them violates their right to a fair administrative action. To buttress his argument, counsel cited *Republic v National Land Commission ex parte Krystalline Salt Limited*[3] and *Republic v National Land commission & another.*[4] Citing *Pastoli v Kabale v Kabale District Local Government Council & Others*[5] counsel argued that procedural impropriety is a ground for judicial review.

15. Additionally, counsel argued that having been issued with the license for 2018 and 2019, the applicants have a legitimate expectation that that they would not be removed. Reliance was placed on *Keroche Industries Limted v Kenya Revenue Authority & 5 Others*[6] and *Republic v Attorney General & Another ex parte Waswa & 2 Others*.[7] In addition, counsel relied on *Republic v Kenya Revenue Authority ex parte Shake Distributors Limited*[8] for the holding that the cornerstone of legitimate expectation is s promise made to a party by a public body that it will act or not act in a particular manner. In addition, counsel relied on *R (Bibi) v Newham London Borough Council*[9] which identified three basic questions when it comes to the doctrine of legitimate expectation, which are, what has the public authority, whether in practice of by promise, committed itself to, whether the authority has acted or proposes to act unlawfully in relation to its commitment and what should the court do. In addition, counsel placed reliance on *Kalpana H. Rawal v Judicial Service Commission & 4 Others*[10] & *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others*.[11]

Determination

16. I find it appropriate to address a pertinent question that emerges from the facts of this case. The applicants approached the court claiming that they held a valid Business Permit for the year 2018 issued by the Respondent. The said permit was to expire on 31st December 2018. However, on 5th November 2018, the Respondent served them with a Removal Notice requiring them to vacate the premises within 7 days from the said date. The said Notice triggered these proceedings in which they seek orders to have the notice declared illegal and invalid for violating their fundamental rights as particularized earlier.

17. They also seek to quash the said Notice and Mandamus to compel the Respondents to honour the terms of the Permit dated/ issued on 22nd January 2018. The impugned Notice is dated 5th November 2018. The terms referred to above are in the Permit dated 22nd January 2018 which lapsed on 31st December 2018.

18. In a further affidavit filed on 25th February 2019, the applicants annexed two Business Permits issued by the Respondent. The first one bears Business ID 1051177. It shows that it was issued pursuant to a court decree granted to the group. The second Business Permit also for the year 2029, bears Business ID 1430832. It is also issued for the year 2019 for the same premises and the same business.

19. Several issues are emerge from the above scenario. *First,* the applicants were being evicted in 2018. *Second,* the 2019 Permits referred to above were issued during the pendency of this suit. *Third,* the threat for eviction existed in 2018, and, despite the said Notice, the Respondents issued them with 2019 Permits. *Fourth,* the applicants now hold two valid permits for 2019 issued during the pendency of this suit. *Sixth*, there is nothing to show that the threat still persists especially after the issuance of the 2019 permit or even during the pendency of this suit. *Seventh,* the prayers of *Certiorari* and *Mandamus* are directed at the said Notice, while the declaration sought is confined to the 2018 permit.

20. 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. Interestingly, the applicants' counsel did not address this pertinent issue at all despite annexing 2019 permits. There was no attempt to demonstrate that the threat still persists. I find it appropriate to spare some ink and paper to address the doctrine of mootness since it is an important point of law which this court cannot ignore.

21. 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.

22. 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.[12] Put differently, the presence of a "collateral" injury is an exception to mootness.[13] 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.[14] Short of paying plaintiff the damages sought, a defendant can do little to moot a damage claim.

23. 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.

24. It is trite that 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. Time and again, it has been expressed that a court should not act in vain.[15]

25. 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. 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 of human nature and humanity.[16]

26. A case or issue is considered 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.[17]

27. The legal doctrine known as 'mootness' is well developed in constitutional law jurisprudence. Accordingly, a case is a moot one if it.[18]

> *"...seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy."*

28. Furthermore, a case will be moot-[19]

> *"...if the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision."*

29. Barron and Dienes put it succinctly when they observe that "a case or controversy requires present flesh and blood dispute that the courts can resolve."[20]Loots, a South African constitutional commentator, endorses these sentiments and points out that a case-[21]

> *"....is moot and therefore not justiciable if it no longer presents an existing or live controversy or the prejudice, or threat of prejudice, to the plaintiff no longer exists."*

30. However, a court will decide a case despite the argument of mootness if to do so would be in the public interest.[22]

31. Cases are determined on the basis of facts presented before the court and the evidence. The applicants moved to court challenging a Removal Notice dated 5th November 2018. The crux of the argument then was that they held a Business Permit valid for the year 2018. They challenged the manner in which the notice was issued. However, despite the Notice and the existence of this suit, the Respondents issued them with two 2019 Permits. There is no allegation that the threat of eviction was repeated or exists after the issuance of the 2019 license. There is no averment or evidence that the issuance of the 2019 license has not eliminated the threat. Save for the further affidavit which introduced the 2019 licenses, the pleadings were not amended to introduce averments that the issuance of the 2019 permits did not eliminate the threat. Differently put, the applicants did not amend their pleadings to show that the said development did not render this suit an academic or cosmetic exercise of no utilitarian value or benefit nor was it amended to show that the aim of the case has not been overtaken by events.[23]

32. 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 the present Judicial Review Application. 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.[24] On this ground alone, this case falls for dismissal. I find no need to address the case on merits.

33. The upshot is that I dismiss this Judicial Review application with no orders as to costs.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this 25th day of November, 2019.

John M. Mativo

Judge.

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[1] Act No. 4 of 2015.

[2] Petition No. 352 of 2012.

[3] {2015} e KLR.

[4] {2016} e KLR.

[5] {2008} 2 EA 300.

[6] {2007} e KLR.

[7] {2005} 1 KLR 280.

[8] HCMISC Application No. 359 of 2012.

[9] {2002} 1 WLR 237.

[10] {2015} e KLR.

[11] {2014} e KLR.

[12] 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).

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

[14] *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, mooting 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.l (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).

[15] *Political Parties Forum Coalition & 3 others v s Registrar of Political Parties & 8 others* [2016] eKLR

[16] 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

[17]*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).

[18]Diamond 1946 *U Pa L Rev* 125. See also Brilmayer 1979 *Harv L Rev* 297; Fountaine 1998 *Am U L Rev* 1053; Peter and John *Federal Courts.* For a recent critical discussion of the mootness doctrine see Hall 2008 works.bepress.com.

[19] Diamond 1946 *U Pa L Rev* 125.

[20] Barron and Dienes (eds) *Constitutional Law* 44.

[21] Loots "Standing, Ripeness and Mootness" 18.

[22] See S *v Manamela* 2000 5 BCLR 491 (CC) para 12. See also *Independent Electoral Commission v Langeberg Municipality* 2001 9 BCLR 883 (CC) para 11; *AAA Investments Pty (Ltd) v Micro Finance Regulatory Council* 2006 11 BCLR 1255 (CC) para 27.

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

[24] *Mills vs. Green, 159 U.S. 651, 653 (1895)*