REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 60 OF 2017

IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 12, 19, 20, 21, 22, 23, 24, 26, 27, 28, 33, 38, 45, 47, 51, 56, 73, 81, 83, 86, 174, 186, 232, 249, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ENFORCEMENT OF : THE ALLEGED CONTRAVENTION OF ARTICLES 1, 2, 10, 12, 19, 20, 27, 28, 33, 38, 45, 47, 51, 81, 174, 232 AND 249 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF SECTION 4 & 5 OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT, 2011

BETWEEN

SHADRACK KINYANJUI WAMBUI…….....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

KENYA PRISONS SERVICE.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

1. This petition brings 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.

2. 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.

3. 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.[1] Put differently, the presence of a “collateral” injury is an exception to mootness.[2] 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.[3] Short of paying plaintiff the damages sought, a defendant can do little to moot a damage claim.

4. 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.

5. **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.

6. The petitioners case is premised on a press release dated 21st February 2017, by the first Respondent in which it announced that it would commence the registration of prisoners as voters in compliance with the court decision rendered in Petition No. 574 of 2013, Kituo *Cha Sheria vs I.E.B.C & Another* **and also** indicated that the prisoners would only vote for the presidential elections only.

7. The petitioner avers that voting only for presidential elections and excluding prisoners from voting for other elective seats, namely, Members of County Assemblies, Members of Parliament and Governors is discriminatory and violates their constitutional rights to participate in elections.

8. However, during the pendency of this petition, on 2nd May 2017, the first Respondent published the Elections (Registration of Voters) Amendment) Regulations, 2017 (Legal Notice No. 73). The said Regulations amended Part VIII of the Elections (Registration of Voters) Regulations by inserting regulation **39E** which provided that a prisoner may only vote in a presidential election or a referendum, hence this petition premised on a press statement which had no force of law as opposed to the legal notice was overtaken by events.

9. I.E.B.C draws its mandate from the constitution, the Elections Act[4] and the Independent Electoral and Boundaries Commission Act.[5] Further, section 109 of the Elections Act[6] confers powers to the I.E.B.C to make regulations and pursuant to the said powers I.E.B.C made the Elections (Registration of Voters) (Amendments) Regulations, 2017. Legal Notice Number 73 of 2nd May 2017 introduced Regulation **39E** which provides that "A prisoner may only vote in a presidential election or a referendum."

10. The crux of the petitioners case as I understand it challenges the constitutionality of the said press release which restricted prisoners to voting for only the presidential candidates.

11. As admitted by the petitioner during the hearing of this petition, the said amendment seriously impacted on the petition in that it cured the controversy by legalizing the position or to use the petitioners words "sanitizing" the anomaly.

12. The effect is that, there is in place a gazette notice which legalizes the position. The petition before me does not challenge the constitutionality or otherwise of the said Legal Notice. The petitioner did not amend his petition to capture the new development but opted to proceed with the petition which to me was rendered an academic exercise.

13. A case becomes moot and academic when there is no more actual controversy between the parties or useful purpose that can be served in passing upon the merits.[7]

14. Evidently, the legal notice changed the position rendering this petition a mere academic exercise. 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. Time and again, it has been expressed that a court should not act in vain.[8]

15. 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. In the instant case, a consideration of the petition based on a press statement which was later followed by a legal notice which amended the provisions of the governing Regulations would become academic, cosmetic and of no utilitarian value or benefit as the aim of the petition has been overtaken by the amendments.[9]

16. 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.[10]

17. 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 would be entitled to**, and which would be negated by the dismissal of the petition. Courts generally decline jurisdiction over such cases or dismiss it on the ground 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. [11]

18. Applying the above time tasted and refined principles of law in cases of this nature to the instant case, it is obvious that there remains no unresolved justiciable controversy in the present petition.

19. 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.[12]

20. In view of my findings above, I find no justifiable grounds to proceed to determine this petition on merits.

21. The effect is that this petition is dismissed with no orders as to costs.

Orders accordingly

Signed, Dated at Nairobi this **31st** day of **July 2017**

John M. Mativo

Judge

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[1] In *Chafin v. 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 v. United States*, 506 U.S. 9, 12 (1992); *Firefighter's Local 1784 v. Stotts*, 467 U.S. 561, 571 (1984); *see also Tory v. 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 v. Linkline Communications*, 555 U.S. 438, 446 (2009).

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

[3] *Board of Pardons v. 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 v. 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 v. 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 v. Kooyomjian*, 220 F.3d 10, 14-15 (1st Cir. 2000).

[4] Act No. 24 of 2011

[5] Act No. 9 of 2011

[6] Supra

[7] Tantoy, Sr. v. Hon. Judge Abrogar, 497 Phil. 615 (2005).

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

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

[10] 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

[11] Osmeña III v. Social Security System of the Philippines G.R. No. 165272, 13 September 2007, 533 SCRA 313, citing *Province of Batangas v. 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).,

[12] *Mills v. Green, 159 U.S. 651, 653 (1895)*