REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 453 OF 2015

BETWEEN

WANJIRU GIKONYO…….…….....…….....1ST PETITIONER

PAUL KEMUNCHE MASESE……..…….....2ND PETITIONER

EDWIN MUTEMI KIAMA……..…….....……..3RD PETITIONER

AND

THE NATIONAL ASSEMBLY OF KENYA…….....1ST RESPONDENT

THE SENATE OF THE REPUBLIC OF KENYA…….....2ND RESPONDENT

CABINET SECRETARY OF THE NATIONAL TREASURY……...3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL…….....4TH RESPONDENT

AFFIRMATIVE ACTION

SOCIAL DEVELOPMENT FUND BOARD…….....…….....5TH RESPONDENT

JUDGMENT

Introduction

1. "*Who will guard the guards?*" Apparently, that is the wider question that was posed by the Petitioners to the court when they filed this Petition in October 2015 and prominently questioned the nexus between the legislature and the executive.
2. The origin of that specific question in the context of constitutional philosophy and democracy may be traced to John Locke (1632 -1704) and later Montesquieu (1689-1755). The two philosophers, as has been captured in various treatises, formulated the doctrine of separation of powers. Both advocated for the division of Government functions. As originally envisaged, the doctrine of separation of powers reflected a distrust of Government power and state institutions. There was always the need for checks and balances to maximize individual freedom in the face of power

exercised and guarded by various arms of the State. The question "who will guard the guards?" is therefore a monolith to the doctrine.

3. At the centre of this Petition was the issue of the role of members of Parliament in overseeing development and resultant expenditure by the executive- both national and devolved. There was also the question of division of revenue and functions between the national and county governments. Finally, there was the question of the legislative process and the effect of not having the public participate in subsidiary legislation or involving the Senate in such process. A corollary issue was whether Women representatives elected under Article 97(1)(b) of the Constitution hold distinctive seats in the National Assembly.

Background and the Petitioners' case

4. By way of a short background the events leading to this Petition may be stated as follows.
5. On 11th March 2015, the 3rd Respondent pursuant to Section 24 of the Public Finance Management Act 2012 by way of delegated legislation enacted the Public Finance Management (Affirmative Action Social Development Fund) Regulations, 2015 (" **the AASDF Regulations 2015**"). The AASDF Regulations 2015 created a fund known as the Affirmative Action Social Development Fund ("**the AASDF**"). The AASDF Regulations 2015 also established a national board and county committees for purposes of the AASDF. A Member of Parliament in the Women Representative was to be the county committee patron. The AASDF Regulations 2015 enjoined parliament to allocate the AASDF funds from time to time. The funds were to be utilized at county level and the main object was "*to complement the Constituency Development Fund with a special focus on the affirmative action groups*".
6. The Petitioners believed that the Respondents had behaved aberrantly. The Petitioners' belief was founded on the grounds that the AASDF Regulations 2015 assigned to the executive functions exclusively heaped on counties. Further, the Petitioners believed that the doctrine of separation of powers, which the Petitioner held to be part of our constitutionalism, would be violated by the AASDF Regulations 2015. The Petitioners also viewed it that the design and architecture of the AASDF Regulations 2015 equated the Constituency Development Fund Act which this court had declared unconstitutional in the case of **Institute of Social Accountability & Another -v- National Assembly & 4 Others, Nbi Petition No. 71 of 2013[2015]*e*KLR**.
7. The Petitioners also held the view that the AASDF Regulations 2015 ran afoul of established legislative constitutional requirements including, but not limited, to public participation under Articles 10 and 118 of the Constitution as well as approval by both houses of Parliament of all legislation concerning counties.

Brief litigation history

8. Quickly, the Petitioners on 22nd October 2015 moved to court and sought conservatory orders. The court granted the conservatory orders on 14 December 2015. Four days later the 1st Respondent moved the court seeking to review and vacate or vary the orders of 14 December 2015. On 21 January 2016 having heard the parties on the merits of the application for review and taking cognizance of what had transpired under the AASDF Regulations 2015 , the court partially varied the orders of 14 December 2015. The court also directed the parties to prepare the main Petition for trial, with a determination deadline of 21 April 2016.

The Hearing

9. After 21 January 2016, additional affidavits were filed. Submissions were also filed. Then finally the Petition was slated for hearing on 4 April 2016. The hearing proceeded for slightly over half a day through the medium of highlighting the submissions and the affidavit evidence on record. The parties extensively submitted on the unconstitutionality of the AASDF Regulations 2015.
10. The Petitioner attacked the substance of the AASDF Regulations 2015, whilst also attacking the process that led to its ultimate legislation. The Petitioner concluded that there was constitutional

invalidity and asked the court to allow the Petition in terms of the following prayers:

i. ***THAT a declaration be issued that the AASDF Regulations are unconstitutional because they offend the principles of rule of law, good governance, public participation, public finance, division and separation of powers.***
ii. ***THAT a declaration be issued that the numerous provisions of the Regulations that violate the Constitution cumulatively render all the Regulations untenable and therefore constitutionally invalid ab initio.***
iii. ***THAT a declaration be issued that any organ or body purportedly established by this Regulations is illegal as it is created without the authority of the law and in violation of the Constitution.***
iv. ***THAT a declaration be issued that the Cabinet Secretary Treasury acted in excess of his powers and in abuse of his office and with intent to bring into disrepute the administration of justice by publishing the AASDF Regulations in clear contravention of this court's findings in the (Institute of Social Accountability & Another Vs National Assembly & 4 Others, [2015]eKLR, Petition No. 71 of 2013.***
v. ***THAT an order be issued striking down the Regulations as unconstitutional.***
vi. ***THAT the costs of, and incidental to, this Petition be met personally by the Cabinet Secretary in charge of Treasury for his reckless and or deliberate abuse of his powers and office by publishing the AASDF Regulations contrary to the findings of this court's in Institute of Social Accountability & Another Vs National Assembly & 4 Others, [2015]eKLR, Petition No. 71 of 2013; or***
vii. ***THAT in the alternative, the costs of, and incidental to , this Petition be awarded to the Petitioner against the Respondents.***
viii. ***THAT this Honourable court be pleased to grant such further order or orders as may be just and appropriate.***

11. The AASDF Regulations referred to and thoroughly censured by the Petitioners were the AASDF Regulations 2015.
12. The Respondents contested the Petition. Through Mr. A. Njoroge appearing together with Ms. Thanje, the 1st Respondent urged that I uphold the impugned AASDF Regulations 2015. Their constitutional validity was beyond rebuke, so the court heard.
13. Then up popped counsel for the 3rd, 4th and 5th Respondents. Advocating for these Respondents were Mr. Thande Kuria and Ms. Jennifer Gitiri. Their first port of call was that the impugned AASDF Regulations 2015 had been revoked. The courts attention was then drawn to the Public Finance Management (National Government Affirmative Action Fund) Regulations 2016 ("**the NGAAF Regulations 2016**") which regulations had been gazetted some three days prior to the hearing date. Counsel first urged the court to take judicial notice of the NGAAF Regulations 2016. Thereafter counsel set sail and defended the constitutionality of the AASDF Regulations 2015.
14. Neither Mr.Suyianka Lempaa for the Petitioners nor any of the Respondents' counsel addressed the NGAAF Regulations 2016. They did not need to. It was not a matter in issue or controversy before the court.
15. The parties also referred to various provisions of the Constitution as well as decided local and foreign cases with a view to supporting their positions in the Petition.

Discussion and Determination

The Issues

16. At the conclusion of the hearing, I was able to identify the following three core issues.
17. First, whether the court had jurisdiction to determine the present Petition. Put differently is whether the court has a remit to determine 'moot questions'.
18. Second core issue to emerge was whether the legislative process of enactment of the AASDF Regulations 2015 was in violation of the Constitution. This issue was prompted by the contentions and submissions by the Petitioners that there was failure to involve the Senate in the legislative process of (subsidiary) legislation involving Counties and further that there was a lack of public

participation.

19. Finally and, of course flowing from the Petition were the related issues as to whether the substance of the regulations violated known Constitutional doctrines and specific provisions of the Constitution.
20. I must add that the first of the issues arose at the very tail end of the proceedings and has been posed by the court. Neither party raised it. The fact of revocation of the specifically impugned regulations prompted the court to it.
21. I intend to deal with that issue of 'mootness' first.

Remit, justiciability and mootness

22. The axis of this court's remit to determine the constitutional validity of any legislation is Article 165(3) of the Constitution. The Article provides that:

> ***3) Subject to clause (5), the High Court shall have-***
>
> ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
>
> ***(c) …***
>
> ***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-***
>
> ***(i) <u>the question whether any law is inconsistent with or in contravention of this constitution.</u>*** (Emphasis added)

23. For purposes of this Petition, Article 258 which donates standing to persons keen in defending the Constitution through the court process is also relevant. Article 258 (1) reads as follows:

> ***"Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention."***

24. The Petitioners' interest was clear: to defend the Constitution and prevent it from any violation by the Respondents. This led to the dispute being brought to court.
25. The citadel of the power to determine disputes through the exercise of judicial authority and the capacity to commence action for such determination is based however on the rather universal concept or principle of justiciability. This concept has found much favour in most jurisdictions. It also gathers much support from the engraved supplementary doctrines of ripeness, avoidance and mootness.
26. By justiciability it is meant a matter "proper to be examined in courts of justice" or "a question as may properly come before a tribunal for decision": see **Black's Law Dictionary 9th Ed,pp 943-944**.In other words, courts should only decide matters that require to be decided. Thus in **Ashwander –v- Tennessee Valley Authority [1936] 297 U.S 288,** the US Supreme Court stated that courts should only decide cases which invite "a real earnest and vital controversy".
27. Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.
28. Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much sought judicial time. The exception it must be noted exists where the court is allowed by law to offer advisory opinions. A good example is Article 163(6) of the Constitution on powers of the Supreme Court of Kenya to give advisory opinions at the request of the national

government on matters concerning county governments.

29. The justiciability dogma and all principles under it are part of our Constitutional law and jurisprudence. The court in **John Harun Mwau & 3 Others –v- AG & 2 others HCCP No. 65 of 2011** (unreported) stated as follows:

> ***"We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy."***

30. Later in **Hon. Martin Nyaga Wambora –v- Speaker of County Assembly of Embu and 5 Others HCCP No. 3 of 2014**, the court observed as follows:

> ***"It is clear from the above definition that whether a matter before a Court is justiciable or not depends on the facts and circumstances of each particular case but the Court must first satisfy itself that it has jurisdiction to entertain the matter before it can resolve the issue of justiciability.'***

31. In **Coalition for Reform and Democracy (CORD) & 2 Others -v- Republic of Kenya & Another HCCP 628 of 2014 [2015]eKLR,** the court cited the case of **Patrick Ouma Onyango & 12 Others –v- AG & 2 Others** Misc. Appl No. 677 of 2005 wherein the court had endorsed the doctrine of justiciability as stated by Lawrence H. Tribe in his treatise American Constitutional Law, 2nd Ed. Page 92 as follows:

> ***'In order for a claim to be justiciable as an article III matter, it must "present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted." In part, the extent to which there is a 'real and substantial controversy is determined under the doctrine of standing' by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also in part a feature of the controversy itself-an aspect of 'the appropriateness of the issues for judicial decision...and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of 'ripeness' which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contigencies and of 'mootness' which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the 'political question' doctrine, barring decision of certain disputes best suited to resolution by other governmental actors'.***

32. Finally, much earlier in **Jesse Kamau & 25 Others –v- Attorney General Misc. Application 890 of 2004** , the court dedicated a great part of the judgment to the doctrine of justiciability and rendered itself as follows :

> ***"B. THE POLITICAL QUESTION, JUSTICIABILITY, RIPENESS AND MOOTNESS***
>
> ***On Ripeness pp 80 - 81 Tribe says:"In some cases the constitutional ripeness of the issues presented depends more upon a specific contingency needed to***

establish a concrete controversy than upon the general development or underlying facts. For example litigants alleging that a government action has effected an unconstitutional "taking" without just compensation" are normally obliged to exhaust all avenues for obtaining compensation before the issue is deemed ripe"….Still even in situations where an allegedly injurious event is certain to occur, (a court) may delay resolution of constitutional question until a time closer to the actual occurrence of the disputed event when a better factual record might be available"Essentially, the complaints and the allegations or questions raised by the Applicants in the Originating Summons are anchored in Section 66 of the Constitution. It is this section which is being challenged and impugned. It is the Section to be declared discriminatory, unconstitutional, inconsistent with the Constitution, null and void and of no effect. It is the Section sought to be expunged… In the case of Anarita Karimi Njeru vs the Republic (No 1 [1979] KLR 154 the court's attention was drawn to a text and commentary on the Constitution of India where the author says:-"In the United States, it has been established that constitutional questions must be raised "reasonably" that is at the earliest practicable moment. As a result of this rule, a constitutional right may be forfeited in a criminal as well as civil case by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."
… Mr. Orengo also referred the court to the discussion of the doctrine of the political question and justiciability in American Constitutional Law by Laurence H. Tribe. The views expressed are both appropriate for consideration and are persuasive.Professor Tyler summarizes the constitutional view of the doctrine of the political question as grounded in the assumption that there are constitutional questions which are inherently non-justiciable and that these practical questions, it is said concern matters as to which departments of government, other than the courts or perhaps, the electorate as a whole must have the final say, that with respect to these matters, the judiciary does not define constitutional limits… On the question of Ripeness (of issues for adjudication) and the courts' competence to issue declaratory orders, Hon. Orengo submitted that the issue at hand must not only be ripe for determination but must also not be either academic or hypothetical. He referred us to the excerpts from the case of Blackburn vs Attorney – General and Justice Ringera's remarks in the Njoya case that one of "the most fundamental aspects of the court's jurisdiction is that we are not an academic forum and we do not act in vain does indeed resonate in line with authorities and legal texts." The court cannot be subjected to proceedings where the questions for determination are abstract and hypothetical.Stamp LJ in Blackburn vs Attorney General (supra) states at p.138 3 h J"It is the duty of this court in proper cases to interpret those laws when made; but it is no part of this court's function or duty to make declarations in general regarding the powers of Parliament, more particularly where the circumstances in which the court is asked to intervene are partly hypothetical".

In Matalinga and Others vs Attorney General [1972] E.A. 578 Simpson J held: Before a declaration can be granted there must be a real and not a theoretical question in which the person raising it must have a real interest and there must be someone with present interest in supporting it."In the Matalinga case, the Plaintiffs (representatives of an unincorporated association) had sued the Attorney General for a declaration that certain government employees must be treated equally on the grounds that they were being discriminated against, and for an order that the Director of Personnel review and rectify salary structures. The court considered several authorities and discussed the question whether there was a justiciable dispute in the case. It was said that even in a case where a rule gave the court a wide discretion, it cannot still make justiciable disputes which are not justiciable. It was alsocontended that the jurisdiction to give a

declaratory judgment must be exercised "sparingly" with great care and jealously and "with extreme caution." (Emphasis added)

33. Most recently in **Hon. Kanini Kega –v- Okoa Kenya Movement & 6 Others HCCP No. 427 of 2014** the court expressed itself as follows:

> "**[82]** ***Therefore whether or not an issue is justiciable will depend on the legal principles surrounding the particular act done as discernible from the legal instruments appurtenant to the said action. As was held in the above case, when the law proceeds to impose on the executive legally prescribed duties and responsibilities, the performance of which depends upon the enhancing or handling of public interest, the political officers of the executive must act consistent and according to the laws of the land and since the performance of certain duties and responsibilities is dependent upon individual rights and responsibilities, there is a duty to act consistently with and according to the law. If public officers fail to so act, and their failure harms the interests of the public and rights of individual citizens, their actions and omissions are subject to judicial review***."

34. The extensive quotations were deliberate. It is clear from a review of the above case law that there is now a distinct and coherent jurisprudence within our jurisdiction on the justiciability dogma. There is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise-givers. The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either.
35. It is however to be noted that the court retains the discretion to determine whether on the circumstances of any matter before it still ought to be determined.
36. In the present circumstances, the crisp question for determination is whether the court is obliged to determine the question as to the constitutional validity of the impugned AASDF Regulation 2015.
37. It is not in dispute that the AASDF Regulations 2015 have been revoked. Even though the Petitioners' counsel did not address the court on the impact of the NGAAF Regulations 2016 , enacted on 1st April 2016.The fact is that the AASDF Regulations 2015 stand revoked and are inapplicable. They are of no practical effect as of now. That would be the impact of the NGAAF Regulations 2016. Indeed, Regulation 29 of the new regulations stated as follows.

> ***"29. The Public Finance Management (Affirmative Action Social Development Fund) Regulations 2015 are hereby revoked".***

38. What was under constitutional challenge before this court was effectively terminated. Ideally, repealed or amended legislation should not be placed under challenge especially where the circumstances are such that any orders that the court makes are to have no practical effect. The court though has discretion whether or not to deal with the matter. The yardstick for such discretion is one of the interests of justice. As was stated by the Constitutional court of South Africa in the case of **President of the Ordinary Court Martial & 2 Others –v- The Freedom of Expression Institute & 3 Others [1999] 4 SA 682** :

> ***"…the Court has discretion to decide whether or not it should deal with the matter. <u>In this regard, the court should consider whether any order it may make will have any practical effect either on the parties or on others.</u>*** (Emphasis added)

39. While the main consideration in the exercise of discretion appears to be the ultimate effect of an order of constitutional invalidity, my view is that all relevant facts must be taken into consideration.
40. The totality of the circumstances ought to be taken into account. The court must also consider the

issue of retrospectivity and the question of what orders, if at all may need to be fashioned in respect of any matters already dealt with under the challenged legislation, especially where they led to a violation of any guaranteed rights and freedoms. Thirdly, the court ought to consider the stage at which the repeal takes place.

41. In the end, the court must endeavor to ensure that it avoids giving advisory opinions on abstract propositions of law where there ceases to exist any live controversy. At the same time, it ought to exercise its discretion to ensure that justice is done through practical oriented orders even where an issue sounds moot.
42. In the instant case, I must first point out that besides revoking and making the AASDF Regulations 2015 moribund, the NGAAF Regulations 2016 did not have any transitional provisions. The two sets of regulations are actually severed. An issue of retrospectivity would thus not arise. Additionally, this court had already on 21st January 2016 considered the effect of action undertaken under the AASDF Regulation 2015. In the absence of transitional provision, the NGAAF Regulations 2016 were also not made relevant to the revoked AASDF Regulations 2015.The two are completely severed.
43. Secondly, I have read both sets of Regulations. The NGAAF Regulations 2016 appear quite distinct from the AASDF Regulations 2015. From the citation through the interpretation provisions, the substantive regulations and the miscellaneous provisions to the schedule, there is some difference. Some of the points, which the Petitioners used in challenging the AASDF Regulations, have been rectified in accordance with the Petitioners' contentions. Some have simply been panel-beaten. That was pretty telling.
44. Neither of the parties addressed the court on the subsequent NGAAF Regulations 2016. The arguments were focused on the AASDF Regulations 2015 and it would even be inappropriate, in view of the distinctions for the court to start drawing conclusions. The constitutionality of the NGAAF Regulations 2016, in other words, is yet to be questioned and I can make no pronouncement on the same for now.
45. Before, I conclude it would perhaps be appropriate to point out that affirmative action programs require members of disadvantaged groups to be offered preferential treatment. Women Representatives may be deemed to represent disadvantaged groups. It is for that reason that special seats were reserved for them in Parliament with the aim of amending inequity. The extent of their agenda, in my view, was to do more than merely participating in legislation and oversight under Article 95 of the Constitution. Programs involving them ought to be seen in that light and appropriately contextualized, especially where the program is intended to achieve equality or to protect and advance disadvantaged groups.

Conclusion

46. Accordingly, I conclude that it is not in the interest of justice to pronounce on the constitutional validity of the revoked AASDF Regulations 2015 or the NGAAF Regulations 2016, for that matter. Further, in my view, any declaratory orders would be of no practical effect on the parties or others, in view of the new regulations which must be presumed constitutional unless proven otherwise. The AASDF Regulations are dead for all purposes, including the court's purpose. The substantive issues between the parties have thus become moot and cannot be decided upon.
47. What remains now is a question of who bears the costs.

Costs

48. Award of costs is always in the discretion of the court. The primary consideration of the award of costs in constitutional litigation should however be whether the award promotes access to the court to help advance constitutional justice: see **Rule 26** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**.
49. The Petitioners are private citizens. They have previously enjoyed a measure of success in this court as well as in this particular Petition. The instant Petition was launched in October 2015. The court together with the parties went through the motions and imposed a deadline for the resolution of the dispute. Responses were filed. All the parties prepared and got ready for trial. Voluminous submissions were filed. Oral arguments were made lasting some hours. Then the 3rd Respondent

popped up with the NGAAF Regulations 2016 and all the issues founded above suddenly became abstract and academic.

50. There is a temptation to infer that the 3rd Respondent wanted to derail the Petition. There is even a stronger temptation to conclude that the 3rd Respondent figured out that the impugned AASDF Regulations 2015 had constitutional deficiencies. In the latter eventuality, the 3rd Respondent was under a duty to ensure that any constitutional deficiencies and inconsistencies were addressed and amended without delay. He acted, perhaps. But not after some delay.
51. In the circumstances, the Petitioners are entitled to the costs of this Petition. I am satisfied that the Respondents ought to pay costs.

Disposal

52. The issues reserved cannot be determined save for the issue of jurisdiction. The Petition is dismissed and will stand dismissed pursuant to the doctrine of mootness.
53. The Petitioners are however awarded the costs of the Petition to be paid by the Respondents.

Dated, signed and delivered at Nairobi this 19th day April, 2016

J.L.ONGUTO

JUDGE