Katiba Institute v Parliament of the Republic of Kenya & another (Petition E280 of 2022) [2025] KEHC 4609 (KLR) (Constitutional and Human Rights) (10 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4609 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E280 OF 2022

LN MUGAMBI, J

APRIL 10, 2025

BETWEEN

KATIBA INSTITUTE ..... PETITIONER

AND

PARLIAMENT OF THE REPUBLIC OF KENYA ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

Introduction

1. The petition dated 8th June 2022 was amended on 5th July 2023. This petition challenges the constitutionality of Clause 72(1) of the *Huduma Bill, 2021* on the premise that it violates the principles of the rule of law, separation of power, judicial authority, good governance, transparency and accountability.

2. The petitioner states that this Clause provides that: 'Despite section 71, any act or thing done under any of the repealed Acts shall be deemed to have been validly done under this Act and more specifically in relation to the issuance of any legal identity document and the mass enrolment of resident individuals into the NIIMS conducted pursuant to section under 9A of the *Registration of Persons Act*, shall be deemed to have been under done this Act'.

3. It is asserted that this Clause seeks in a retrospective and illegal manner to revive actions which the Courts have declared unconstitutional in the past.

4. In rejoinder, the 1st respondent filed a Notice of preliminary objection dated 29th August 2022 opposing the petition. The objection raises the following grounds:

i. The term of the 12th Parliament lapsed on 9th August 2022 before consideration of the *Huduma Bill 2021* had been concluded.

ii. Under National Assembly Standing Order 141 (4), a Bill the consideration of which has not been concluded, at the end of the term of a Parliament, shall lapse.

iii. In the premises, the petition is moot.

1st Respondents' Submissions

5. In support of its objection, the 1st respondent's Advocate Mr. Mbarak Awadh Ahmed filed submissions dated 31st August 2023.

6. He revealed the term of the 12th Parliament ceased on 9th August, 2022 and it is Parliament that Huduma Bill, 2021had been introduced. At the expiry the 12th Parliament term, the consideration of the Bill had been concluded.

7. Citing Standing Order 141 (4) of the National Assembly, Counsel submitted that the Bill died a natural death and no longer exist rendering this Petition moot. The Standing order in question states:

> 'A Bill the consideration of which has not been concluded at the end of the term of a Parliament shall lapse.'

8. Since there is no live controversy between parties the suit and a decision of the Court will be of no practical effect, Counsel urged the Court to strike out the Petition.

9. Additionally, that the doctrine of mootness enquires whether events subsequent to the filing of a suit would have eliminated the controversy between the parties as held in *Kenya Railways Corporation & 2 others v Okoiti & 3 others* [2023] KESC 38 (KLR).

10. Counsel additionally argued that even if the impugned Bill was still a live matter as camouflaged through the amendment to the petition, this Court would still not have jurisdiction as the matter will still in the legislative stage hence not ripe for determination. Reliance was placed in *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 Others* [2016] eKLR where the Court observed that:

> " The court ought not 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."

11. Like dependence was placed in *Borowski v Canada (Attorney General)* [1989] 1 SCR 342.

12. Mr. Mbarak urged the Court to find it has no jurisdiction in the circumstances.

13. On costs, Mr. Mbarak pointed out the petitioner's insistence to proceed with this suit thereby unnecessarily prolonging this litigation and increasing costs as the ground for insisting on payment of costs. He relied on *RedHill Heights Investments Limited v Suzanne Achieng Butler & 4 others* [2018] eKLR where the Court of Appeal held that:

> " There is no uncertainty in law on jurisdiction in land matters and the decision of this Court would not advance the law any further. The insistence by the appellant that the appeal should be heard and the prosecution of the appeal in the changed circumstances has only increased the costs of litigation which the appellant should justly pay.

In the premises, the appeal being moot is dismissed with costs to the respondents."

2nd Respondent's Submissions

14. In support of the 1st respondent's preliminary objection, the 2nd respondent through Chief State Counsel, Emmanuel Bitta filed submissions dated 5th February 2024.

15. Counsel submitted that the petition was non-justiciable on account of the doctrine of mootness. Reliance was placed in *Wanjiku Gikonyo* (supra) where it was held that:

> " 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.
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> 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".
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> 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.
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> 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."

Petitioner's Submissions

16. In rejoinder, the petitioner through Ochiel J Dudley, filed submissions dated 6th November 2023.

17. Counsel opposing the respondents' arguments submitted that this Court has jurisdiction to determine this petition. Counsel submitted that this is supported by the Supreme Court opine *in the Matter of the Speaker of the Senate & another* [2013] eKLR where it was held that:

> " While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the *Constitution*. It cannot operate besides or outside the four corners of the *Constitution*. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.

> However, where a question arises as to the interpretation of the *Constitution*, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the *Constitution* which is the supreme law of the land."

18. Counsel submitted that the instant is exceptional and warrants this Court's intervention on account that anything done outside the confines of the *Constitution* and the law should attract the attention of the Court as held in *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* [2020] eKLR.

19. Counsel further submitted that this matter is not moot because a case becomes moot only when it is impossible for a Court to grant any effectual relief whatsoever to the successful party. As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot as held in *Knox v Service Employees International Union Local 1000*, (2012) 567 U.S. 298, 307.

20. In this regard, Counsel submitted that the amended petition raises other pertinent issues such as whether the National Assembly can retroactively amend a law to defeat court orders.

21. Counsel further argued that there are expectations to the doctrine of mootness such as where the public interest demands the Court's action and where there is repetitive conduct which evades judicial review.

22. Likewise, Counsel emphasized that the voluntary cessation of conduct does not render a matter moot. In this regard, Counsel stressed that the respondents had resumed the conduct complained of by bringing up the Maisha Namba project which retroactively defeats the existing court orders in the Huduma Namba project. Taking this into consideration, Counsel submitted that, the voluntary cessation of unlawful conduct should not render the instant case moot.

Analysis and Determination

23. The only single issue for determination in this Petition is:

Whether the instant Petition is moot

24. There is no contest that the matter raised is a pure point of law. It assails the jurisdiction of the Court on account of the doctrine of mootness based on an uncontested factual assertion. Clearly therefore the fundamental characteristics of raising a preliminary objection as enunciated by the Court in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 69 and later underscored by the Supreme Court in *Joho & another v Shahbal & 2 others* [2014] KESC 34 (KLR) have been met. The Supreme Court elaborated the requisite elements of a preliminary objection as follows:

> "(31) To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors* (1969) EA 696:
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> > "a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that

all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

25. The major borne of contention is that the Respondents and the Petitioners take rival positions is on whether the instant Petition is moot. The doctrine of mootness is not a new concept as there are many authorities on the doctrine. In *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020] KECA 589 (KLR) the Court of Appeal citing the *Black's Law Dictionary* explained:

> " 64. In *Black's Law Dictionary*, 8th edition, a "moot case" is defined as "a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights", and as a verb, as meaning "to render a question as of no practical significance."

26. In *Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] KEHC 2059 (KLR) the Court held:

> " 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.
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> 27. The legal doctrine known as 'mootness' is well developed in constitutional law jurisprudence. Accordingly, a case is a moot one if it.
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> "...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."
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> 28. Furthermore, a case will be moot-
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> "...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."
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> 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."Loots, a South African constitutional commentator, endorses these sentiments and points out that a case-
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> "....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."

27. Further, the Court of Appeal in *National Assembly of Kenya & another v Institute for Social Accountability & 8 others* [2017] KECA 170 (KLR) elaborated as follows:

> "(14) The mootness doctrine is entrenched in the common law. The Black's Law Dictionary, Ninth Edition, defines a moot case as:
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> "A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights."
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> In an article entitled "*Federal Jurisdiction to Decide Moot Cases*" published in the University of Pennsylvania Law Review [1946] Vol. 94 – No. 2, the author, Sidney A. Diamond explains the essence of the doctrine thus:
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> "Common – law courts have long recognized the strict requirement that permits only cases presenting judicial controversies to be decided. This is a jurisdictional limitation. 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, the case is moot and the court is without power to render a decision."
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> [14.1] In the United States of America, it is a constitutional requirement that federal judicial power extends to "cases" and to "controversies" [section 2(1) of Article 111 of the American Constitution]. Neither our Constitution nor our laws explicitly prohibits the courts from determining abstract, hypothetical or contingent cases or appeals. If follows that the common law is the exclusive source of the mootness doctrine in our jurisdiction. The doctrine is based on judicial policy whose main functions are to protect the functional competence of the courts to make law by ensuring adequate adversity of the parties and judicial economy – that is, rationing scarce judicial resources amongst competing claimants.
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> [14.2] Authorities show that mootness is a complex doctrine which should be applied with caution and not mechanistically in every factual situation and that there is no sharp demarcation between moot and live controversies. The mootness doctrine and the relevant factors in the application of mootness doctrine as an aid to judicial economy were considered in the Canadian case of *Borowski v The Attorney General of Canada* [1989] 1 SCR 342. In the furtherance of judicial economy, a court will sustain a suit or appeal and find against mootness where factual situation has disappeared but functional competence of the court remains, if inter alia, the probability of recurrence is high, the temporary cessation or abandonment of the conduct is capable of repetition yet evasive of judicial review; continued uncertainty in law will have a harmful effect on the society, and, court's determination of the questions of law for future guidance of the parties is desirable; public interest is served by judicial decision and, recurrence may result in parallel litigation of the same question at an increased cost of judicial resources.

[14.3] The Supreme Court of the Philippines-Manilla in *Greco Antonious Bedo B Belgila and four others v Honourable Executive Secretary Paquito N. Ochoa JR and two others* – GR No. 208566 consolidated with G-R No. 208493 & 209251 after a finding against mootness continued:

"Even on assumption of mootness, jurisprudence, nevertheless, dictates that "the moot and academic principle" is not a magic formula that can automatically dissuade the court in resolving a case. The court will decide cases, otherwise moot, if, first, there is a grave violation of the *Constitution*; second, the exceptional character of the situation and paramount public interest is involved, third, when the constitutional issue raised requires formulation of the controlling principles to guide the bench, the bar, and the public; and fourth, the case is capable of repetition yet evading review."

[14.4] From the above analysis, it is clear that the mootness doctrine, is not an abstract doctrine. Rather, it is a functional doctrine founded mainly on principles of judicial economy and functional competence of the courts and the integrity of judicial system. In the application of the doctrine to the wide ranging and varying factual situations, the court will inevitably consider the extent to which the doctrine advances the underlying principles, the certainty and development of the law particularly the *Constitution* Law and the public interest."

28. Notwithstanding the wide Constitutional jurisdiction granted to the High Court under Article 165(3)(d); it is manifest from the foregoing authorities the principle of justiciability is critical consideration to a Court's assumption of jurisdiction.

29. This matter revolves around *Huduma Bill, 2022* that was being processed by the 1st Respondent. The 1st respondent argues that as per Standing Order 141 (4) of the National Assembly, this Bill lapsed with the expiry of the 12th Parliament's term. In addition, it is further contended that this Court would still not have had jurisdiction even if this did not happen on account of the doctrine of ripeness.

30. The petitioner on the other hand argued that the matter is not moot since it raises serious issues of public interest and also for the reason of the 1st respondent's conduct is capable of repetition and would evade judicial review. It was argued also that voluntary cessation of conduct does not render a matter moot.

31. Two fundamental issues are manifest; one; the impugned clause is contained in a Bill that that was never enacted into law and two, the Bill lapsed by operation of Parliamentary Standing orders upon the expiry of the term of the 12th Parliament.

32. Starting with the latter; there is no contest that *Huduma Bill* which is the subject of this Petition died a natural death alongside the expiry of the 12th Parliament's term. As such, what is being challenged before this Court is a Bill that no longer exists and which no one knows when or if, Parliament will ever breath life back into it. This Petition is therefore a hopeless waste of effort on a fictional controversy. As it stands, the Petition offends the doctrine of mootness.

33. I thus uphold the preliminary objection and strike out this Petition. I need not consider any other issue. As this is public interest litigation, I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF APRIL, 2025.

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L N MUGAMBI

JUDGE