Toili & 2 others v Speaker, National Assembly & 2 others (Constitutional Petition E548 of 2022) [2025] KEHC 9913 (KLR) (Constitutional and Human Rights) (10 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9913 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E548 OF 2022

LN MUGAMBI, J

JULY 10, 2025

BETWEEN

MARGARET TOILI ..... 1ST PETITIONER

EDDAH MARETE ..... 2ND PETITIONER

AGNES NDONJI ..... 3RD PETITIONER

AND

SPEAKER, NATIONAL ASSEMBLY ..... 1ST RESPONDENT

SPEAKER, SENATE ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

RULING

Introduction

1. By a Notice of Motion application dated July 28, 2023 and further refiled on March 7, 2024, the 1st and 2nd Respondents seek Orders that:

    i. Spent.

    ii. This Petition be consolidated with Petitions No. E291 of 2020; Leina Konchellah & Another Vs. The Chief Justice, The Attorney General, Speaker of the National Assembly and Speaker of the Senate, No. E300 of 2020; The National Assembly & The Senate Vs. The Chief Justice & The Honourable Attorney General, No. E302 of 2020: Third Way Alliance Vs. The Speaker of the National Assembly, The Speaker of the National Assembly &Another, No. E305 of 2020; The Attorney General Vs. The Chief Justice, Speaker of the National Assembly & Speaker of the Senate, No. E314 of 2020; Anthony Tom Oluoch Vs. The Hon Attorney General &

Hon Justice David Kenani Maraga & 2 Others, No. E317 of 2020: Edwin Kimatu Saluny Vs. Office of the *Attorney General, Speaker of the National Assembly & 2 Others, No. E337 of 2020*; Centre for Rights Education and Awareness & Community Advocacy and Awareness Trust Vs. The Attorney General, Speaker of the Senate & Another, No.401 of 2017; Federation of Women Lawyers in *Kenya Vs. The Speaker of National Assembly & 3 Others and IR Application No. £1108 of 2020*; Adrian Kamotho Njenga Vs. The Chief Justice, The Attorney General, Parliament of Kenya and The Speaker of the National Assembly.

iii. The costs of this Application be in the cause.

1st and 2nd Respondents' Case

2. The gravamen of this application as deponed by the 1st Respondent's Clerk, Samwel Njoroge, is the consolidation of the instant suit with the aforementioned Petitions. This is premised on the ground that the Petitions raise similar questions of fact and law for determination and also comparable reliefs.

3. These matters stem from the advisory opinion dated 21st September 2020 by Hon. Justice David Maraga (Rtd) to the then President Hon. Uhuru Kenyatta, whom he advised to dissolve Parliament.

4. This was due to Parliament's failure to enact legislation on the two-thirds gender rule in line with Article 27(3) as read with Articles Article 81(b) and 100 of the *Constitution* which led to issuance of four Court orders on the matter.

5. As a result of the said the Advisory opinion, these Petitions were filed.

6. The Respondents insist that all the Petitions raise similar issues as the instant Petition namely:

    i. They seek for implementation of the two - third gender rule in accordance Article 27(3), 81(b) and 100 of the *Constitution*.

    ii. They seek for dissolution of Parliament for failure to implement the two -third gender rule in accordance Article 27(3), 81(b) and 100 of the *Constitution*.

    iii. The seek for adoption of Hon. Chief Justice David K. Maraga (Retired) Advice dated 21st September 2020 to the 4th President of Kenya to dissolve parliament.

    iv. They arise out of similar transactions.

    v. They seek similar reliefs.

    vi. They have common questions of law and facts.

7. It is on this premise that these Respondents seek consolidation of the suits to avert conflicting decisions on the same subject matter. The Respondents further urge that the Petitions be consolidated to save on the judicial time and avert multiplicity of suits.

Petitioners Case

8. The Petitioners in reply to the application filed their Grounds of Opposition dated 7th November 2023 on the basis that:

    i. The 1st and 2nd Respondents' grounds to consolidate additional petitions No. E291 of 2020, No. E300 of 2020, No. E302 of 2020, No. E305 of 2020, No. E314 of 2020, No. E317 of 2020, No. E337 of 2020, No. E401 of 2017 & IR

Application No. E1108 of 2020 does not have the intended purpose for this case.

ii. The Petitions requested to be consolidated where filed during the 12th Parliamentary Session which already lapsed.

iii. Petition E291 of 2020 was closed on 5th May 2021 through a ruling that was delivered By Hon. Justice Anthony Ndungu thus not available for consolidation.

iv. Petition E401 of 2017 was concluded on 17th March 2021 through a Judgement delivered by Hon. Justice E.C. Mwita.

v. In the 12th Parliament session, the 1st Petitioner in that case was Petition No.1 of 2019 By Margaret Toili dated 12th April 2019 who is also a Petitioner in this case.

vi. On the 12th Parliament CJ David K. Maraga gave a directive to the Retired President H.E Uhuru Muigai Kenyatta to Dissolve the 12th Parliament, which the 4th President of the Republic of Kenya didn't do so but they continued enjoying the Taxpayers money on their salaries without following the *Constitution* and the Law that CJ David K. Maraga advised them to do.

vii. On the 13th Parliament the same arm of government being in place, they took over the parliamentary session without adhering to the two third gender rule under the 5th President H.E. Dr. William Samoei Ruto of the Republic of Kenya.

viii. The 5th President of the Republic of Kenya H.E Dr. William Samoei Ruto was the Deputy President of the Republic of Kenya in the 12th Parliament when CJ David K. Maraga gave the directive for the 12th Parliament to be dissolved.

ix. The matter in question here is the thirteenth parliament (13th) Parliament well aware that the twelve (12th) Parliament had been dissolved by not adhering to the two third gender rule still took over office with the same illegalities.

x. It will be unfair for the 1st and 2nd Respondents to bring in Petitions that challenged the Twelve (12th) Parliament to be consolidated with a Petition challenging the Thirteen (13th) Parliament.

xi. Dwelling on the past Petitions is what has led to the dragging of the implementation of the two third gender rule and this must stop once this Petition No. E548 OF 2022 has been heard and determined which will supersede all those petitions.

xii. It is our prayers (the Petitioners') that the 1st and 2nd Respondents' ground to consolidate the Petitions be struck out in the first instance and the Court be pleased to grant the Petitioners the reliefs as sought in the Petition.

3rd Respondent's Case

9. This party's response and submissions to the instant Notice of Motion are not in the Court file or Court Online Platform (CTS).

1st and 2nd Respondents' Submissions

10. The 1st and 2nd Respondents through Ahmednasir Abdullahi Advocates LLP filed submissions dated 5th May 2025 where Counsel highlighted the single issue for determination as: whether Petitions No. E291 of 2020, No. E300 of 2020, No. 302 of 2020, No. 305 of 2020, No. 314 of 2020, No. 317 of 2020, No. E337 of 2020, No. 401 of 2017, JR Application No.E1108 of 2020 and the current Petition have common question of facts and law.

11. According to Counsel these Petitions are similar in that they are primarily address the alleged violation of Article 26(6), 27(8) and 81 (b) of the *Constitution* on the two –thirds gender rule. Counsel maintained that this is the common thread that runs throughout all the Petitions as all arise from the same transaction. On this basis, Counsel submitted that it would be prudent for this Court to consolidate these Petitions.

12. Reliance was placed in Ogogoh v State Corporations Advisory Committee & 2 others; Public Service Commission & another (Interested Parties) [2024) KEHC 3442 (KLR) where it was held that:

> " The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation a/justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed."

13. Comparable reliance was placed in Augustine Kinyua Ita & Another v Republic (2022) eKLR and Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex Parte Law Society of Kenya [2020] eKLR.

14. Counsel argued that no prejudice would be occasioned to the Petitioners if these matters are consolidated since the proceedings are stayed pending hearing and determination of Civil Appeal No.339 of 2021-The National Assembly and The Senate vs The Chief Justice of the Republic of Kenya & 2 other.

15. Counsel furthermore urged this Court to consider the overriding objective as espoused under Rule 3 (5) of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rule which directs that: the Court shall handle all matters presented before it to achieve the-

    a. just determination of the proceedings;

    b. efficient use of the available and administrative resources;

    c. timely disposal of proceedings at a cost affordable by the respective parties; and

    (d) use of appropriate technology.

1st Petitioner's Submissions

16. The 1st Petitioner on behalf of the rest filed undated submissions in opposition to the consolidation application. The issues for determination were identified as whether the consolidation application is moot in view of the Petitions that have since lapsed, whether the lapsed Petitions can be re-opened or

relied upon in the manner suggested by the Respondents and whether the late filing of the Petition is an abuse of the Court process.

17. On the onset, the 1st Petitioner pointed out that the instant Petition challenges the constitutionality of the 13th Parliament's in view of the lack of compliance with the two-thirds gender rule. On this basis, Counsel submitted that the instant application is misguided and legally untenable as was filed in light of Petitions challenging the 12th Parliament which has since been dissolved. Moreover, it was noted that these suits are no longer pending as have since been determined rendering this application moot and incapable of consolidation. The Petitioner stressed that a matter is moot when it no longer presents a live controversy such that any decision will have no practical effect.

18. Furthermore, the 1st Petitioner argued that consolidation at this late stage would prejudice the Petitioners by causing unjustified delay and confusion. This is because the Petitioners would also have to argue issues that have since been determined such as, whether the 12th Parliament failed in upholding the two-thirds gender principle, thus an attempt by the Respondents to re-litigate determined points of law.

19. The 1st Petitioner further argued that the sought consolidation is an affront to the constitutional values of effective resolution of constitutional disputes as espoused under Article 159(2) (b) of the *Constitution*. Relying in Council of Legal Education v Tusasirwe & 13 others (Civil Appeal No.242 of 2017), the 1st Petitioner noted that Court orders are not to be issued in vain.

20. In this matter, the 1st Petitioner argued that the lack of compliance with the two –thirds gender rule is a matter that is capable of being raised in every Parliament in relation to its compliance. Considering this, the 1st Petitioner urged that the application should be dismissed.

21. On the final issue, the 1st Petitioner submitted that the manner in which the Respondents have conducted themselves in these proceedings is a clear indication of abuse of the Court process. According to the 1st Petitioner, the Respondents waited until the last minute to file this application yet existence of the past Petitions was in their knowledge all along. As such, the 1st Petitioner argued that if the Respondents had deemed consolidation necessary the same would have been done in the beginning not in the last minute.

22. Equally, the 1st Petitioner reasoned that the Respondents are inviting this Court to determine matters that have already been determined by other Courts which offends the principle of finality. In addition, it was contended that these were matters that could have been appealed however the Respondents failed to do so in those suits. Bearing this in mind, the 1st Petitioner questions the Respondents intention terming it as an aim at frustrating the course of justice.

Analysis and Determination

23. It is my considered view that the single issue for determination is:

> Whether the instant Petition should be consolidated with Petitions No. E291 of 2020; Leina Konchellah & Another Vs. The Chief Justice, The Attorney General, Speaker of the National Assembly and Speaker of the Senate, No. E300 of 2020; The National Assembly & The Senate Vs. The Chief Justice & The Honourable Attorney General, No. E302 of 2020: Third Way Alliance Vs. The Speaker of the National Assembly, The Speaker of the National Assembly & Another, No. E305 of 2020; The Attorney General Vs. The Chief Justice, Speaker of the National Assembly & Speaker of the Senate, No. E314 of 2020; Anthony Tom Oluoch Vs. The Hon Attorney General & Hon Justice David Kenani Maraga & 2 Others, No. E317 of 2020: Edwin Kimatu Saluny Vs. Office of the *Attorney General,*

Speaker of the National Assembly & 2 Others, No. E337 of 2020; Centre for Rights Education and Awareness & Community Advocacy and Awareness Trust Vs. The Attorney General, Speaker of the Senate & Another, No. 401 of 2017; Federation of Women Lawyers in *Kenya Vs. The Speaker of National Assembly & 3 Others and IR Application No. E1108 of 2020*; Adrian Kamotho Njenga Vs. The Chief Justice, The Attorney General, Parliament of Kenya and The Speaker of the National Assembly.

24. the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides for consolidation under Rule 17 which states:

> Consolidation.
>
> The Court may on its own motion or on application by any party consolidate several petitions on such terms as it may deem just.

25. In Nyati Security Guards & Services Ltd vs Municipal Council of Mombasa (Civil Suit No. 992 of 1994) which was cited with approval in Lakhamshi Khimji Shah & another v Ajay Shantilal Shah & 2 others [2010] KEHC 3192 (KLR) the Court explained what consolidation entails stating thus:

> "Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action."
>
> The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where: -
>
> some common question of law or fact arises in both or all of them; or
>
> the rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or
>
> for some other reason it is desirable to make an order for consolidating them.
>
> The circumstances in which suits can be consolidated are broadly similar to those in which parties may be joined in one action. Accordingly, actions relating to the same subject matter between the same plaintiff and the same defendant, or between the same plaintiff and the same defendant, or between the same plaintiff and different defendants or between different plaintiffs and the same defendants may be consolidated.
>
> There are however situations where consolidation is undesirable like where in two action a plaintiff in one is a defendant in the other unless the claim in one is to be treated as a counterclaim in the other. The other situation where consolidation is undesirable is where the plaintiffs in two or more actions are represented by different advocates. In such situation the hearing will be longer and the purpose of saving time will be defeated."

26. In Stumberg and another v Potgieter, (1970) EA 323 cited with approval by the Court of Appeal in Joseph Mzungu Nyoka v Vros Produce Limited & 525 others [2015] KECA 902 (KLR); the Court elaborating the issue of consolidation stated:

> "The ratio decidendi of Stumberg & Another vs Potgieter (supra), is that consolidation of suits is appropriate where there are common questions of law or facts cutting across the suits intended to be consolidated, and the common questions are of sufficient importance to justify the suits being disposed of at the same time. This is in line with the overriding

objectives of the *Civil Procedure Act* and the Rules made thereunder as stated in section 1A of the *Civil Procedure Act*, that is, to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. As noted by the learned Judge consolidation of suits is provided under Order 11 Rule 3(h) of the Civil Procedure Rules 2010 as a case management strategy. This supports the position taken by the learned Judge that the principle enunciated in Stumberg & Another v. Potgieter (supra) is good law. However, an order for consolidation presumes that the matters that are being consolidated are matters that are still pending and that there are common questions or issues which are yet to be determined. Thus, it is desirable that consolidation be made at the earliest opportunity."

27. The essence of consolidation was also discussed in David Ojwang Okebe & 11 others v South Nyanza Sugar Company Limited & 2 Others [2009] KECA 441 (KLR) as follows:

> "...The main object of consolidation is to save costs and time by avoiding a multiplicity of proceedings covering largely the same ground. Thus, where it appears to the court that there are common questions of law or fact; that the right to relief is in respect of the same transaction or series of transactions; or that for some other reason, it was desirable to make an order for consolidation of one or more cases, then the court will do so... it is instructive that all the parties have been represented by the same counsel, respectively, since the dispute arose."

28. The threshold for consolidation was discussed by the Supreme Court in Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] KESC 29 (KLR) as follows:

> "(43) The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed."

29. For consolidation to be considered by the Court, it must be demonstrated that the matters that are proposed for consolidation raise common questions of law or fact or are part of the same transaction. This ensures that there are no multiple trials on the same and is also a case management strategy which ensures that Court's time is utilized well and also serves to avoid a situation where different courts could come up with different decisions on similar issues which could be embarrassing to the administration of justice.

30. A perusal of the instant Petition reveals that it is brought against the Respondents for the failure to implement the two-thirds gender rule given the results of August 2022 General Elections hence have violated Article 81(b) of the *Constitution* and again, it is against the Advisory Opinion of the Supreme Court.

31. As a result, the Petitioners seek the following reliefs:

    i. A declaration that a mandatory order that the current senate be dissolved for not having adhered to the 2/3 gender rule.

ii. A mandatory order that the current parliament be dissolved for not having adhered to the 2/3 gender rule.

iii. A declaration that upon dissolution of the current parliament and current senate, the Registrar of Political Parties do direct all Political Parties presenting members for nominations or elective positions to adhere to the 2/3 gender rule for achievement.

iv. A mandatory Order the current Parliament be dissolved.

v. Damages for violation of the Petitioner's rights.

vi. Any other relief that the Court deems fit.

32. A study of the other Petitions referenced to also reveals that the dominant issue in the said Petitions is Parliament's failure to implement the two-thirds gender rule despite the persistent call to do so in line with the *Constitution*. The other Petitions were filed against the previous Parliament on the strength of the directive issued to the former President by the former Chief Justice.

33. It is thus crystal clear that the underlying questions of law in the collective whole of all these suits is common save for the fact upon which the current Petition and the other Petitions are based which is differentiated by time. The other Petitions were urging the dissolution of the last Parliament whose term came to an end August 2022 while the instant Petition targets the dissolution of the present Parliament.

34. The Petitioners thus insisted that because the other Petitions were targeting the dissolution of the 12th Parliament's due to its failure to implement the two-thirds gender Rule, while the present Petition challenges the current Parliament's failure to comply the same rule; the two cannot be blended because the term of the other Parliament expired and thus those Petitions became moot unlike the present one, which is a live controversy.

35. This is a justiciability question which this Court must answer to be able to decide whether to allow or refuse the consolidation.

36. The Petitioners argued that the other Petitions have since been determined. The Respondent stated the other Petitions have been abeyance due to a pending Court of Appeal ruling where the decision of the Bench to uphold the empanelment of the Bench was challenged before the Court of Appeal. The position by the Respondent is in fact correct on this though as of now the said ruling has since been delivered overturning the decision of the previous Bench appointed by the Deputy Chief Justice as being contrary to Article 165 (4) of the *Constitution* meaning that the other matters are still very live before the High Court.

37. On the question of mootness, this principle was explained by the Court in Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi [2019] eKLR as follows:

> " 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.

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

> " ...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-

> " ...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-

> " ....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."

38. Equally, the Court of Appeal in National Assembly of Kenya & another v Institute for Social Accountability & 6 others [2017] eKLR guided citing with approval decisions of the Supreme Court of Canada and Philippines observed:

> " ...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."

39. In my view, there is an enduring legal question that characterizes all these petitions and this is the failure by Parliament to comply with the two-thirds gender rule. This question, unless resolved will keep on recurring with every Parliament that comes up after every general election hence it cannot plausibly be argued that it is matter limited to the present Parliament. It equally a fundamental constitutional question that has occupied the public sphere for a long time now and there is need for an interpretive solution to be provided to guide the country hence it cannot be argued that it lapsed when the last Parliament ended its term. It is an undeniable constitutional issue that not only needs to be resolved in relation to the present Parliament but every other Parliament to guide the nation and forestall repeated litigation on the same constitutional question. The previous petitions cannot therefore be said to be moot in relation to the present petition.

40. I am conscious of my limitations in so far as making a determination concerning the consolidation of this matter with others that are already before a Bench because the decision of a single Judge is not binding on the Bench. However, nothing prevents this Court from forwarding this matter to the Honourable the Chief Justice for empanelment of a Bench to hear and determine it pursuant to Article 165 (4) but with very humble recommendation to the Honourable the Chief Justice to consider placing the instant Petition before the same Bench that is handling the other related consolidated Petitions to consider this matter as well. This in my view is what best serves the interests of justice in the circumstances of this case. It is so ordered.

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

.....

L N MUGAMBI

JUDGE