Agoro & another v Governor, Mombasa County & 2 others; Attorney General (Interested Party) (Petition E018 of 2024) [2024] KEHC 8336 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8336 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION E018 OF 2024

OA SEWE, J

JULY 12, 2024

IN THE MATTER OF ARTICLES 1, 2, 3(1), 10, 19(3)(C), 20, 22, 23, 24, 48, 50(1), 95, 110, 159, 165, 186, 201, 202, 203, 205, 217, 225, 226, 228, 323, 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE MUGUKA AND MIRAA REGULATIONS OF 2022

AND

IN THE MATTER OF AGRICULTURE AND FOOD AUTHORITY ACT NO. 13 OF 2013

AND

2.

IN THE MATTER OF VIOLATION OF THE DIVISION OF FUNCTIONS AS PROVIDED FOR UNDER THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION

BETWEEN

PETER ODHIAMBO AGORO ..... 1ST PETITIONER

MICHAEL MUTEMBEI MAKARINA ..... 2ND PETITIONER

AND

THE GOVERNOR, MOMBASA COUNTY ..... 1ST RESPONDENT

GOVERNOR, KILIFI COUNTY ..... 2ND RESPONDENT

GOVERNOR, TAITA TAVETA COUNTY ..... 3RD RESPONDENT

AND

ATTORNEY GENERAL ..... INTERESTED PARTY

RULING

1. The Notice of Motion dated 24th May 2024 was filed by the two petitioners pursuant to Articles 10, 22, 23 and 159 of the *Constitution*,Order 51 Rule 1 of the *Civil Procedure Rules* and Rules 3 and 19 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* for the following orders:

   (a) Spent

   (b) That the Court be pleased to issue conservatory orders suspending the Mombasa County Government Executive Order No 1 of 2024, Kilifi County Government Executive Order No 1 of 2024 and Taita Taveta County Executive Order No 1 of 2024 that ban the entry, transportation, trade and consumption of Muguka pending the hearing and final determination of the Petition.

   (c) That a declaration be issued declaring the Mombasa County Government Executive Order No 1 of 2024, Kilifi County Government Executive Order No 1 of 2024 and Taita Taveta County Executive Order No 1 of 2024 an illegality, irregularity, unconstitutional, null and void ab initio.

   (d) That the Mombasa County Government Executive Order No 1 of 2024, Kilifi County Government Executive Order No 1 of 2024 and Taita Taveta County Executive Order No 1 of 2024 be declared unconstitutional.

   (e) That an injunctive order be issued restraining the effect and/or implementation of the Mombasa County Government Executive Order No 1 of 2024, Kilifi County Government Executive Order No 1 of 2024 and Taita Taveta County Executive Order No 1 of 2024.

   (f) That the Court do make any such other or further orders as it may deem just and expedient in the circumstances.

   (g) The costs of the application be provided for.

2. The application was premised on the grounds that, on the 23rd May 2024, the 1st respondent issued Executive Order No 1 of 2024, effectively banning the entry, transportation, trade and consumption of Muguka in the County of Mombasa. The 2nd and 3rd respondents followed suit with similar orders in respect of Kilifi and Taita Taveta Counties. The petitioner contends that the 1st, 2nd and 3rd respondents issued their respective orders without conducting public participation beforehand as is mandated by the *Constitution*. He consequently posited that the Executive Orders are illegal, null and void as the responsibility to ban the sale or use of Muguka is that of Parliament.

3. The application was opposed by the 1st respondent; to which end a Replying Affidavit sworn on 30th May 2024 by the County Attorney, Mr. Jimmy Waliaula was filed herein. The County Attorney adverted to the legal mandate of the County Executive Committee and averred that the Governor of Mombasa County cannot validly be sued in his personal capacity as a Governor. The deponent further contended that the interim orders sought, if granted, would occasion great and irreversible harm to the residents of Mombasa County. Hence, he urged for the dismissal of the application dated 24th May 2024.

4. The Court is aware and takes judicial notice that a series of suits were filed at the High Court of Mombasa and elsewhere following the issuance by the respondents of the impugned Executive Orders. In one such matter, the High Court at Embu issued conservatory orders in respect of the same Executive Orders. Since those orders are still subsisting, it would be absurd for this Court to issue similar orders as urged by the petitioner. Indeed, it is apparent that the instant application is moot.

5. According to *Black's Law Dictionary*, Tenth Edition, at page 1161, 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." Thus, I echo the expressions of Hon. Mativo, J. (as he then was) in *Daniel Kaminja & 3 others (suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] eKLR, that:

> 23. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.
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> 24. It is trite that as a general principle, the rights and liabilities of parties to any judicial proceedings pending before court are determined in accordance with the law as it was at the time when the suit was instituted and by applying the facts to the law and circumstances. Time and again, it has been expressed that a court should not act in vain. [15]
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> 25. No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity. [16]
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> 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.

6. In the premises, the application dated 24th May 2024 is bereft of merit and is hereby dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 12TH DAY OF JULY 2024

OLGA SEWE

JUDGE