



Omwando v Principal Secretary, Ministry of Health & 6 others; Kingwara & 2 others (Interested Parties) (Constitutional Petition E037 of 2022) [2024] KEHC 8505 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8505 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E037 OF 2022**

**OA SEWE, J
JULY 12, 2024**

BETWEEN

JOSEPHAT KAZEH OMWANDO PETITIONER

AND

PRINCIPAL SECRETARY, MINISTRY OF HEALTH 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF HEALTH 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

HEAD, NATIONAL LABORATORY SERVICES 4TH RESPONDENT

**HEAD, NATIONAL AIDS & STI'S CONTROL PROGRAMME ... 5TH
RESPONDENT**

**DIRECTOR, MEDICAL SERVICES PREVENTIVE & PROMOTIVE
HEALTH 6TH RESPONDENT**

HEAD, MALARIA CONTROL PROGRAMME 7TH RESPONDENT

AND

LEONARD KINGWARA INTERESTED PARTY

NELSON OTWOMA INTERESTED PARTY

GAMMA ZENITH KENYA LTD INTERESTED PARTY

RULING

1. Before the Court for determination is the Notice of Motion dated 24th August 2023. It was brought by the Petitioner pursuant to Article 165 of *the Constitution*, Sections 1A, 1B and 3A of the *Civil*



Procedure Act, Chapter 21 of the Laws of Kenya, and Order 51 Rules 1 and 15 of the Civil Procedure Rules, 2010, for orders that;

- (a) Spent
 - (b) the Court be pleased to issue further orders that limit the Court Order No. 1 issued in its ruling dated 21st August 2023.
 - (c) Spent
 - (d) the Court be pleased to issue conservatory orders against the respondents by themselves, their agents or servants and or offices or whomsoever is acting on their behalf from procuring and distributing the approved Trinscreen testing kits by Trinity Biotech Manufacturing Limited from the recently concluded National HIV testing algorithm Review for implementation of the 3-test National HIV Algorithm pending the hearing and determination of the Petition.
 - (e) Spent
 - (f) The Court be pleased to issue conservatory orders against the respondents by themselves, their agents or servants and or officers or whomsoever is acting on their behalf from implementing the 3-test National HIV Algorithm pending the hearing and final determination of the Petition.
 - (g) That the costs of the application be awarded to the petitioner.
 - (h) Any other order that the Court may deem fit to grant.
2. The application was supported by the petitioner's affidavits, sworn on 24th August 2023 and 1st September 2023. In essence, the petitioner was aggrieved that by its ruling dated 21st August 2024, the Court vacated the conservatory orders issued herein on the 26th April 2023; and that thereafter, the Ministry of Health rolled out a circular for transition from the 2-test to 3-test algorithm for HIV testing in Kenya. The petitioner expressed concern that, among the approved testing kits to be adopted in the 3-test algorithm is the Trinscreen kit manufactured by Trinity Biotech Manufacturing Ltd, which has a history of producing defective kits. Hence, it was his assertion that, unless the Court intervenes there shall be grave consequences to millions of Kenyans who have depended on the current National HIV Algorithm in the prevention and treatment of HIV/AIDs.
 3. The application was opposed by the respondents and the interested parties. Written submissions were thereafter invited, which were highlighted on 18th September 2023. Mr. Mukonyi for the petitioner pointed out that the respondents were guilty of material non-disclosure by stating that the variation was necessary to enable the Ministry of Health secure global funding for HIV/AIDs. He submitted that, upon obtaining the orders, the respondents proceeded to implement the transition from 2-step to 3-step Algorithm; which is the crux of the Petition. Counsel submitted that the essence of the Petition is a fight for the lives of millions of Kenyans and urged the Court to reinstate the conservatory orders issued earlier on 26th April 2023.
 4. Ms. Waswa learned counsel for the respondents opposed the application and reiterated their stance that the vacation of the conservatory orders was intended to enable the respondents apply for funding; and therefore no mischief was afoot. She relied on the Replying Affidavit sworn by the Principal Secretary, Mr. Kimutai, to confirm that the proposal for funding was indeed submitted and funds secured for the roll out of the HIV/AIDS programmes for the near future. She pointed out that the orders were warranted, because without funds it would have been the innocent Kenyans living with HIV who would suffer. Counsel accordingly prayed for the dismissal of the application dated 24th August 2024.



5. On behalf of the 2nd interested party, Ms. Kamende opposed the application. Her argument was that the application appears to comprise an entirely new cause of action, entailing a commercial angle, against an entity that is yet to be enjoined to this Petition. She pointed out that, in any event one of the interested parties had already filed a commercial suit against the party mentioned in the petitioner's application. The issue of contempt, she submitted, is an entirely different matter in respect of which there is a pending application. Accordingly, Ms. Kamende prayed for the dismissal of the application with costs. Mr. Muniyithya, counsel for the 3rd interested party, adopted the submissions made by the respondents and the 2nd interested party and similarly prayed for the dismissal of the application.
6. I have given careful consideration to the application dated 24th August 2023. I have likewise perused and considered the responses thereto as well as the written submissions filed by the parties. It is manifest from the petitioner's Further Affidavit and written submissions that the application dated 24th August 2024 has since been overtaken by events. At paragraph 4 of the Further Affidavit, the petitioner deposed that the transition from 2-test to 3-test algorithm had already been rolled out. He annexed a circular to that effect, dated 22nd August 2023 as Annexure J K O – 1 to his Further Affidavit. In the premises, the issues raised in the application dated 24th August 2024 are now moot and require no merit consideration.
7. 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.
 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]
 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]
 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.



8. In the premises, the application dated 24th August 2023 is for dismissal. The same is hereby dismissed with no order as to costs.

9. It is so ordered.

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

OLGA SEWE

JUDGE

