



**Mohamud & 5 others v Equalization Fund Advisory Board & 4 others;
Controller of Budget (Interested Party) (Constitutional Petition
4 of 2023) [2024] KEHC 12916 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12916 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CONSTITUTIONAL PETITION 4 OF 2023
JN ONYIEGO, J
OCTOBER 24, 2024**

BETWEEN

**SAHAL MUGOW MOHAMUD 1ST PETITIONER
RASHID BILLOW ADAN 2ND PETITIONER
MAHFUDA HAJJI 3RD PETITIONER
MAHAT MOHAMMED 4TH PETITIONER
MAHAMED IBRAHIM HUSSEIN 5TH PETITIONER
AYUB ABDI OSMAN 6TH PETITIONER**

AND

**EQUALIZATION FUND ADVISORY BOARD 1ST RESPONDENT
NATIONAL ASSEMBLY 2ND RESPONDENT
NATIONAL SENATE 3RD RESPONDENT
COMMISSION ON REVENUE ALLOCATION 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT**

AND

THE CONTROLLER OF BUDGET INTERESTED PARTY

RULING

1. Through a petition dated 26th May 2023, the petitioners herein moved to this court seeking the following orders;



- a. A declaration that the *Equalization fund appropriation Bill (senate Bill No.3 of 2023)* as is currently constituted is unconstitutional, null and void to the extent that there was no public participation in wajir county.
 - b. An order directing the respondent to carry out a robust public participation in wajir county before resubmitting the *equalization fund bill (senate bill No.3 of 2023)* to the national assembly.
 - c. Costs of the petition to be borne by the respondent herein.
2. In response to the petition, the 2nd respondent filed a preliminary objection dated 28-07-23 together with a replying affidavit sworn by Njoroge Samuel Clerk National Assembly arguing that; the petition has become moot the same having been overtaken by events as the subject matter of the suit was no longer in existence; that there was no appropriation bill pending before the 2nd respondent.
 3. Subsequently, the petitioners sought leave to amend the petition. Vide its ruling dated 8th March 2024, leave was granted culminating to the filing of an amended petition dated 15th May 2024 seeking orders as hereunder;
 - a. A declaration that the Equalization fund appropriation Act of 2023 as is currently constituted is unconstitutional, null and void to the extent that there was no public participation in wajir county.
 - b. An order directing the 1st respondent to carry out a robust public participation in wajir county before resubmitting the next equalization fund to the national assembly.
 - c. A declaration that the *equalization fund appropriation Act 2023* is unconstitutional, null and void in as far as allocation made for Wajir county is concerned.
 - d. Any other relief as the court may deem fit.
 - e. Costs of the petition to be borne by the respondent herein.
 4. Once again, the 2nd respondent filed a replying affidavit and a notice of preliminary objection dated 12th June 2024 reiterating that the petition was moot hence spent as the subject matter has since extinguished.
 5. When the matter came up for directions, the court directed that the Preliminary objection be heard first. The court went further to direct parties to file submissions to dispose of the matter. The 2nd respondent filed their submissions dated 19th June 2024 while the petitioners failed to file any response nor submissions. When the matter came up for hearing, the 3rd respondent indicated that they were in support of the preliminary objection. Basically, the preliminary objection was not opposed nor challenged by any of the parties the petitioners included.
 6. In submission, the 2nd respondent contended that the *2023 appropriation Act* is spent and that there cannot be any public participation on the same. That it will be an academic exercise to engage the court on a suit whose purpose has since lapsed. Counsel referred the court to various decisions on the effect of mootness inter alia; *Attorney General & three others v David Ndi & 73 others; prof. Rosalind Dixon & 7 others* (Amicus Curiae) (SC Petition 12,11,& 13 of 2021(consolidated) (2021)KESCA8(KLR) where Lenaola SCJ stated that the doctrine of mootness requires that an actual controversy must be extant at all stages of review and not merely at the time the impugned decision is taken or the review application is made.



7. I have considered the preliminary objection herein which is not opposed. I have also considered submissions by the 2nd respondent. It is trite that, failure by a respondent to respond to or oppose an application in this case the P.O. does not automatically guarantee the success of that application or P.O. The principle is that such application must be considered on merit. See *Gideon Sitelu Konchellab v Julius Lekakeny Ole Sunkuli & 2 others* (2018)e KLR where the SC held that an application does not succeed automatically simply because it is not opposed.
8. In the celebrated case of *Mukisa Biscuit manufacturers LTD vs West end Distributors LTD* (1969) EA 696 the court held that a P.O. consists a pure point of law which has been pleaded and if upheld will dispose of the matter in limine or bring the matter to finality.
9. The gist of the P.O. herein is the claim that the petition has become moot on account that the subject matter has since extinguished. In the supreme court case of *Dande & 3 others v Inspector General, National Police Service & 5 others* (petition 6(E007),4(E005)&8(E010) of 2022(consolidated) (2023)KESCA 40 (KLR)(16 June 2023)(judgment) the court held that; ...the doctrine of mootness requires that controversy must exist throughout judicial proceedings including at the appellate level. The court went further to state that, an appeal or an issue is moot when a decision will not have the effect of resolving a live controversy affecting or potentially affecting the rights of parties.
10. Similarly, in the case of *Institute of Social for Accountability & another v National Assembly & 3 others* (petition 1 of 2018)(2022)KESCA 39(KLR)(8 August 2022)(judgment) the SC stated as follows;

“ a matter is moot when it has no practical significance or when the decision will not have the effect of resolving the controversy affecting the rights of the parties before it”
11. In the instant case, the petitioners are arguing that the people of Wajir were not involved in public participation in respect to the appropriation Act leading to distribution of the equalization fund. Secondly, that the Act was unconstitutional. Thirdly, an order to issue that the people of Wajir be involved in a robust public participation exercise before the next equalization appropriation bill is presented before the national assembly.
12. There is no doubt that the financial year 2023 is long gone hence this court cannot make reverse orders for the people of Wajir to participate before enactment. Secondly, the Act was passed and the funds allocated spent. In any event, the Act affected the rest of the country who are not complaining hence this court can not declare an Act as unconstitutional when it is going to affect innocent people elsewhere. Besides, the Act is no longer in force the distribution of funds having been exhausted vide the 2023 financial year. I do agree with the 2nd respondent that the substrum of the petition is long gone.
13. The question is, are the prayers sought relevant at this stage? In my view, they are not achievable and even if issued they will not be of any consequence. They are not practical in implementation. They are therefore moot and to continue with this petition will be an exercise in futility hence an academic exercise. Accordingly, the P.O. is upheld and the petition herein struck out. Being a public interest litigation, I will not order for any costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF OCTOBER 2024.

J. N. ONYIEGO

JUDGE

