

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
PETITION NO. E173 OF 2019

**EDWIN H.
DANDE**
PETITIONER

-VERSUS-

THE CAPITAL MARKETS AUTHORITY
RESPONDENT

AND

CYTONN ASSET MANAGERS LIMITED **1ST INTERESTED**
PARTY

CYTONN UNIT TRUST FUNDS **2ND**
INTERESTED PARTY

RULING

1. The Petitioner, Edwin H. Dande, together with the Interested Parties, Cytonn Asset Managers Limited and Cytonn Unit Trust Funds, lodged this Petition on 30th December 2019, challenging the directive issued by the Respondent, Capital Markets Authority (CMA), through a letter dated 20th December 2019. The directive required that unless a new trustee was secured by 31st December 2019, Cytonn Asset Managers Limited would be compelled to suspend onboarding new clients and unitholders with effect from 1st January 2020 pursuant to section 11(3) (cc) of the Capital Markets Act, Cap 485A.
2. The Petition contended that the directive was malicious, unlawful, and unconstitutional, as it was premised on an erroneous or non-existent

provision of law. They argued that the directive violated their rights under Articles 27, 28, 40, 47, and 50 of the Constitution, and sought declaratory relief, interpretation of the relevant provisions of the Capital Markets (Collective Investment Schemes) Regulations, 2001, compensation, and costs.

3. In particular, the Petition challenges the constitutionality of **Regulation 26(1)**, which restricted eligibility of trustees to banks and financial institutions, and **Regulation 29(1)**, which governed the resignation and replacement of trustees. The Petitioners asserted that these provisions were discriminatory and created a vacuum in the governance of collective investment schemes, thereby infringing constitutional rights.
4. While the Petition was pending, the Respondent promulgated the **Capital Markets (Collective Investment Schemes) Regulations, 2023**, through Legal Notice No. 173 of 27th October 2023, repealing the 2001 Regulations. In view of this development, the Respondent raised a preliminary objection to the Petition, contending that the Petition had been overtaken by events and was therefore moot.
5. The Preliminary Objection was canvassed through written submissions. The Respondent, in support of the objection, filed its submissions dated 13th June 2024, whilst the Petitioner and Interested Parties filed their joint submissions dated 19th June 2025.

Respondent's Submissions

6. In support of the preliminary objection, the Respondent, Capital Markets Authority (CMA), urged the Court to find that the Petition dated 30th December 2019 is moot and should be dismissed with costs. The Respondent submitted that the Petition, in its entirety, challenged the

constitutionality of various provisions of the Capital Markets (Collective Investment Schemes) Regulations, 2001 (“CIS Regulations, 2001”), which have since been repealed and replaced by the Capital Markets (Collective Investment Schemes) Regulations, 2023 (“CIS Regulations, 2023”).

7. Citing, among others, the decision of the Supreme Court of Kenya in *Dande & 3 others v Inspector General, National Police Service & 5 others* [2023] KESC 40 (KLR), the Respondent asserted that the doctrine of mootness prevents courts from expending judicial resources on disputes that have ceased to exist.
8. It was argued that the impugned Regulations 26(1) and 29(1) of the CIS Regulations, 2001 have been expressly repealed. Regulation 26(1), which limited trusteeship to banks and financial institutions, has been replaced by Regulation 32 of the CIS Regulations, 2023, which now permits any duly incorporated company meeting prescribed criteria to act as trustee. Likewise, Regulation 29(1), which governed resignation of trustees, has been replaced by Regulations 46, 47, and 48 of the CIS Regulations, 2023, which provide detailed procedures for resignation, removal, replacement, and interim measures, thereby curing the alleged legal vacuum.
9. The Respondent further submitted that the issue of the directive dated 20th December 2019 was conclusively addressed by this Court in its ruling of 14th October 2020, wherein the Court held that the directive was not illegal.
10. The Respondent maintained that in view of the aforesaid changes in law and the court’s decision of 14th October 2020, this is not one of the matters where the Court has the discretion to hear the matter despite mootness, since there remains no live controversy for

adjudication, and any further determination would amount to an academic exercise.

11. It was therefore the Respondent's case that the Petition filed herein be dismissed with costs.

Petitioner and Interested Parties' Submissions on the PO

12. The Petitioner and the Interested Parties, on their part, argue that the Petition is not moot. Citing **Institute for Social Accountability v. National Assembly [2022]**, they argue a matter is only moot when it has "no practical significance". They claim that because they seek compensation for past violations, the case retains practical significance.
13. It was further the Petitioners' submissions that even if the court were to find the matter moot, then the Court should exercise its discretion to hear the matter because the same falls within the "public interest exception" as espoused by the Court of Appeal in in the Council of Legal Education v Tusasirwe & 13 others [2025] KECA 459 (KLR) since the law on these issues is not settled and is of "critical import to the operation of government.
14. The Petitioner asserts the Respondent's directive of 20th December 2019 (suspending onboarding of new clients) was malicious, based on non-existent law, and violated constitutional rights under Articles 27, 28, 40, 47, and 50. According to the Petitioners, they have continued to have injuries as a result of the 2019 directive, necessitating a judicial remedy that the new 2023 Regulations cannot provide.

15. Accordingly, they urged the court to dismiss the Respondent's preliminary objection with costs, and that the Petition be set down for hearing on merit.

Analysis and Determination

16. Having duly considered the pleadings, the rival submissions of the learned Counsel and the authorities cited, I find that the sole issue requiring this Court's determination is whether the Petition dated 30th December 2019 has been rendered moot by the repeal of the CIS Regulations, 2001.
17. The doctrine of mootness is well settled. In Dande & 3 others v Inspector General, National Police Service & 5 others [2023] KESC 40 (KLR). The Supreme Court held that 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. The Court stated as follows: -

"The doctrine of mootness requires that controversy must exist throughout judicial proceedings including at the appellate level. 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. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The doctrine of mootness is therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law and that courts should avoid deciding on matters that are abstract, academic, or hypothetical.

18. Similarly, the Supreme Court, referring to the decision of the Court of Appeal in **Institute for Social Accountability v National Assembly & 3 Others [2022] KESC 39 (KLR)**, emphasized that a matter is moot when it has no practical significance or effect on the rights of the parties.
19. The doctrine is anchored on the principle that courts should not expend resources on disputes that have ceased to exist. See **Council of Legal Education v Tusasirwe & 13 others [2025] KECA 459 (KLR)** where the Court of Appeal stated that
- “The doctrine of mootness ensures that a court is not called upon to determine a dispute that has ceased to exist between the parties. It is anchored on the principle that the court’s time and resources should only be deployed to determine live or active disputes, not disputes that have dissipated, ceased to exist, or have been reduced to academic, hypothetical or theoretical pursuits.”
20. The jurisprudence, however, recognizes that mootness is not an absolute bar. Courts retain discretion to determine technically moot matters where constitutional questions of critical importance remain unsettled, or where guidance is required for future governance.
21. The Court of Appeal in Ole Pere & another v District Land Adjudication and Settlement Officer, Narok South & 24 others; Pere & another (Interested Parties) [2025] KECA 113 (KLR), quoting with approval the decision of the constitutional court of South African in **Normandien Farms (Pty) Limited vs. South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others [2020] ZACC 5**, stated as follows:

“(47) Mootness is when a matter 'no longer presents an existing or live controversy'. The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are 'abstract, academic or hypothetical'.

(48) This Court has held that it is axiomatic that 'mootness is not an absolute bar to the justiciability of an issue [and that this] Court may entertain an appeal, even if moot, where the interests of justice so require'. This Court 'has discretionary power to entertain even admittedly moot issues.’”

22. Applying the above principles to the present case, it is common ground that Regulations 26(1) and 29(1) of the Capital Markets (Collective Investment Schemes) Regulations, 2001, were subsequent to the filing of the Petition, repealed by CIS Regulations, 2023. This, in my view, renders prayers (b), (c), and (d) of the Petition, which sought interpretation of Regulation 29(1) and a declaration of unconstitutionality of Regulation 26(1), to have been overtaken by events and are therefore moot.
23. However, the directive of 20th December 2019 remains a live controversy. The Petition alleges infringement of rights under Articles 27, 28, 40, 47, and 50. The repeal of the regulations does not extinguish the alleged violation of rights occasioned by the directive. Further, the Petitioners continue to seek declarations, compensation, and costs, which are remedies that only this Court can grant.
24. Accordingly, I find no merit in the Respondent’s preliminary objection and therefore dismiss the same with costs.
25. It is so ordered.

SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS

15TH JANUARY 2026

A handwritten signature in blue ink, appearing to be 'Moses', written over a light-colored rectangular background.

ADO MOSES

JUDGE

In the presence of: -

C/A - Moses

Ms. Odongo.....Respondent/Capital Markets Authority.

Ogada..... for the Petitioners & Interested Parties.

ORIGINAL FILE