Shah & 22 Others & 22 others v Municipal Council of Nakuru & 3 others (Civil Appeal 5 of 2020) [2025] KECA 566 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KECA 566 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 5 OF 2020

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

MARCH 28, 2025

BETWEEN

NALINKUMAR MEGHJI SHAH & 22 OTHERS & 22 OTHERS & 22 OTHERS & 22 OTHERS & 22 OTHERS ..... APPELLANT

AND

THE MUNICIPAL COUNCIL OF NAKURU ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

THE MINISTER FOR LOCAL GOVERNMENT ..... 3RD RESPONDENT

PETRO OIL KENYA LIMITED ..... 4TH RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nakuru (M. Odero, J.) dated 1st August 2017inPetition No. 17 of 2011)

JUDGMENT

1. The facts which triggered the litigation before the High Court which yielded the judgement rendered on 1st August 2017, the subject of this appeal, are rather straight forward, uncontested or common ground. Briefly, Section 3 of the repealed *Valuation for Rating Act* provided that:

> Every local authority shall from time to time, but at least once in every ten years or such longer period as the Cabinet Secretary may approve,cause a valuation to be made of every ratable property within the area of the local authority in respect of which a rate on the value of land is, or is to be imposed, and the values to be entered in a valuation roll.

2. Pursuant to the above provision, in 1992, the 1st respondent prepared a Valuation Roll which was to remain in force up to 2022. At a Council meeting held on 4th and 24th May 2005, it was resolved that an advertisement for valuers be done to prepare a new Draft Valuation Roll. The 1st respondent also

extended the period of application for the Old Valuation Roll to such a date when the updated roll would be completed.

3. By Gazette Notice Nos. 2241 and 2245 of 2006 published on 31st March 2006, the 2nd respondent approved the methodology of the site value and set the 31st December 2004 to be the effective date. The valuers were approved by the 2nd respondent vide Legal Notice No. 8190 of 13th October 2006 for purposes of preparing the Draft Valuation Roll. Subsequently, the Draft Valuation Roll was approved by the Municipal Council at its meeting held on 28th September 2007 and, the same was later gazetted under Gazette Notice No. 10214 of 19th October 2007 by the Town Clerk inviting objections, if any.

4. However, the Valuation Roll, 2005 was challenged in court in Reliable Concrete Works Ltd v Municipal Council of Nakuru & 2 Others [2009] eKLR. The Petition in the said case was premised on Sections 75, 77 (9) and 84 (1) of the retired Constitution. The petitioner prayed for a declaration that the Valuation Court established by the Municipal Council of Nakuru for purposes of determining objections to the increment of rates within the Council was not an independent and impartial tribunal within the meaning of Section 77 (9) of *the Constitution*, and was therefore unconstitutional; a declaration that Section 12 of the *Valuation for Rating Act*, in so far as it authorized the Council to appoint the Valuation Court, violated Section 77 (9) of *the Constitution* and is therefore, to that extent, unconstitutional; a declaration that the Council's appointment and composition of the Valuation Court and its proceedings resulting in the Valuation Roll issued vide Gazette Notice No. 10214 of 19th October, 2007 did not meet the constitutional and administrative law test of legality, rationality, proportionality and reasonableness and the same are null and void. In the ensuing judgement delivered on 23rd October 2009, Maraga, J. (as he then was) (herein after the Maraga, J. decision), ordered as follows:

> "As I have pointed out objections to valuations for rating are essentially determinations of rights and obligations of the rating authorities on the one hand and the ratepayers on the other. By authorizing the rating authority, in this case the Municipal Council of Nakuru, to appoint members of the Valuation Court who, as I have said, may include its own members, to determine rate disputes to which it is a party, I find and hold that Section 12 of the *Valuation for Rating Act* violates the independence and impartiality aspect of Section 77(9) of *the Constitution*. It is therefore to that extent unconstitutional and I accordingly declare it null and void. That being my view, I need not go into the other issues raised in these applications.
>
> For these reasons I allow this petition and grant the petitioner the declaration that by authorizing the local authorities to appoint valuation courts to resolve disputes on rates to which the local authorities are parties, Section 12(1) of the *Valuation for Rating Act* undermines the ratepayers' rights under Sections 75 and 77(9) of *the Constitution* and is therefore unconstitutional and null and void. Consequently, the Valuation Court appointed by the Municipal Council of Nakuru to determine rate disputes between the council and the applicants is illegal and is hereby prohibited from carrying on any further proceedings.
>
> As I pointed out at the beginning of the ruling I know that this decision does not only affect the Municipal Council of Nakuru but all the other local authorities in the country. But the law cannot be bent. It is high time the local authorities were required to strictly comply with the law. It is my hope that the Minister for Local Government will immediately liaise with the Attorney General to amend Section 12 of the *Valuation for Rating Act* to conform with Section 77 (9) of *the Constitution* by setting up an independent machinery of establishing

valuation courts. The Applicants shall have the costs of these applications but I do not certify for two counsel." (Emphasis added).

5. The appellants' case is that the resultant effect of the above decision was that during the intervening period ratepayers had no forum to ventilate their objections to the rates levied on them by their respective Municipal Councils because the courts had been declared unconstitutional. The Municipal Councils nonetheless proceeded to levy the rates to ratepayers despite the inaction of the 2nd and 3rd respondent to regularise the Act to conform with the said judgment. Consequently, it was the appellants' case that they were denied the opportunity to be heard on any issues they had on the rates levied on them which was an infringement of their constitutionally guaranteed rights.

6. Against the above backdrop, the appellants filed constitutional petition number 17 of 2011 at the Nakuru High Court on 23rd June 2011 seeking: (a) a declaration that the failure to amend Section 12 of the *Valuation for Rating Act* to conform with *the Constitution* by setting up an independent machinery of establishing valuation courts since the abolition of the previously existing valuation court by Maraga, J. in the Reliable Concrete Works Limited Case is a violation of their rights under Articles 10, 20, 21, 22, 27, 47, 48 and 50 of *the Constitution*; a declaration that being subjected to a valuation roll in respect of which rate payers had no forum to ventilate their objection is a violation of their constitutional rights as enshrined in Articles 10, 20, 21, 22, 27, 47, 48 and 50 of *the Constitution*; and a declaration that they are entitled to the right to fair administrative action which includes the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, the right to access to justice and the right to a fair hearing which encompasses the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.

7. The 1st respondent filed a replying affidavit sworn on 6th September 2016 by Mr. Joseph Motari, its County Secretary. The other respondents do not seem to have filed any response. In a nutshell, the deponent challenged the 1st appellant's authority to swear the affidavit dated 23rd June, 2011 on behalf of the other petitioners and averred that the petitioners had included as exhibits rate demands to rateable owners who were not parties to the suit.

8. Mr. Motari averred that they had adopted the methodology set out in Section 4 (1) (b) of the *Rating Act* and stated that under Sections 9, 18, and 28 of the *Valuation for Rating Act*, a draft valuation roll becomes enforceable once it is approved by a full council meeting and that any person aggrieved following the amendment of the valuation roll after the determination of an objection may be compensated with interest. He also averred that the appellants' complaints could be addressed under the provisions of the *Valuation for Rating Act*, and, in any event, they had the option of moving to the High Court for redress if they were aggrieved by the decision of the Valuation Court.

9. After considering the parties pleading and submission, in the impugned judgment delivered on 1st August, 2017, the subject of this appeal, Odero, J. dismissed the respondent's contestation that the petitioner had no authority to act on behalf of the other petitioners, found that the authority to act had been properly exhibited. Further, the learned judge found that the draft valuation roll, 2005 was complete after it was adopted by the local authority in its meeting held on 28th September 2007 and that the enforcement of the draft roll did not need to await certification that all objections to the draft had been heard and determined. Therefore, the appellants' argument that they were not supposed to pay the rates thereunder until their objections had been determined had no basis, because they were entitled to compensation in the event their objections succeeded and the rates amended by way of reduction.

10. Regarding the challenge on the methodology used in preparing the Valuation Roll, alleged lack of public participation and alleged absence of the basis for the rates increment, the learned judge found

that the same had not been raised at the onset and no prayer was sought to set aside the valuation roll. In addition, the learned judge found that the question of limitation of time was only raised in the submissions and it did not form part of the pleadings. However, the learned judge reiterated that the parties remained at liberty to ventilate the issues raised first before the Valuation Court and seek appropriate orders before it and if that court declines to hear that matter on account of expiry of time, then and only then can the appellants approach the High Court.

11. Aggrieved by the said verdict, the appellants appealed to this Court vide memorandum of appeal dated 30th January 2020, essentially faulting the trial judge for: (a) failing to appreciate the nature and form of Constitutional violations raised in the suit; (b) failing to appreciate that the issue for determination was whether the appellants' right to a fair administrative

action as provided under Article 47 of *the Constitution* was violated by the absence of an appeal process and forum provided for under the Valuation of *Rating Act*, and, (c) failing to appreciate that in the absence of an appeal process and forum, their right to a fair administrative process was violated. The appellants prayed for orders: (a) that the judgment delivered on 1st August 2017 be set aside and substituted with an order allowing the petition as prayed.

12. During the virtual hearing of this appeal on 5th February 2020, learned counsel Mr. Chacha Odera appeared for the appellants, learned counsel Mr. Mbeche represented the 1st respondent, while Mr. Sanjeev Khagram appeared for the 4th respondent. There was no representation for the Attorney General (the 3rd respondent) nor did he file submissions. All the other parties filed written submissions.

13. Before the commencement of the hearing of this appeal, this Court posed two questions to the parties. One, whether this appeal had been overtaken by events rendering it moot considering that the Maraga, J. decision declaring Section 12 of the *Valuation for Rating Act* unconstitutional was overturned by this Court in Municipal Council Of Nakuru v Reliable Concrete Works Limited [2014] KECA 300 (KLR) on 23rd October 2014, long before the institution of this appeal on 30th January 2020. Two, whether the subsequent repeal of the *Valuation for Rating Act* and its replacement with the National *Rating Act* had resolved the controversy between the parties.

14. Responding to the above queries, Mr. Odera maintained that despite the Court of Appeal judgment overturning the Maraga, J. decision and the subsequent repeal of the *Valuation for Rating Act*, the period within which one should lodge an objection was limited by statute and the appellants were subjected to payment of rates through a process that was not taken to its conclusion to the detriment of the appellants.

15. On his part, Mr. Khagram maintained that this appeal is not an academic exercise since as the law stood then, rate payers were entitled to object, and that they were never heard by the rating Court and therefore, a finding that this appeal is moot is tantamount to cordoning an illegal process because the 1st respondent failed to set up Rating Courts to deal with objections raised by the appellants. He argued that if this Court fails to revisit the issues raised by the appellants, then the Court will be violating the rights of the rate payers in Nakuru who were left without any judicial recourse and cited this Court's decision in M. Mwenesi v Shirley Luckhurst & Ano. [2000] eKLR in support of the proposition that a Court of justice has no jurisdiction to do injustice and where injustice on a party to a judicial proceeding is apparent, a court of law is under a duty to exercise its inherent power to prevent injustice.

16. On his part, Mr. Mbeche maintained that the declaration of the unconstitutionality of Section 12 of the *Valuation for Rating Act* did not leave a vacuum because Section 13 of the *Valuation for Rating Act* provided for the establishment of a dispute forum.

17. First, we will address the question whether the Maraga, J. decision resolved the dispute raised in this case effectively rendering the issues urged in this appeal moot or purely academic or hypothetical. The primary role of the courts is, and always has been, to resolve existing disputes between the parties where the courts' decision will have immediate and practical consequences for at least one of the parties.

18. A case 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. This means that in such instances, there is no actual substantial relief which a litigant is entitled to, and which would be negated by the dismissal of the case. Generally, courts decline jurisdiction over such cases, 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. (See Osmena III v Social Security System of the Philippines G.R. No. 165272, 13 September 2007,533 SCRA 313).

19. A court of law should not act in vain. Courts loathe making pronouncements on academic or hypothetical issues because such a decision does not serve any practical or useful purpose. The Supreme Court in Institute for Social Accountability & Ano. v National Assembly & 3 Others [supra] stated the following regarding the doctrine of mootness:

> "...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. If a decision of a court will have no such practical effect on the rights of the parties, a court will decline to decide on the case. Accordingly, there has to be a live controversy between the parties at all stages of the case when a court is rendering its decision. If after the commencement of the proceedings, events occur changing the facts or the law which deprive the parties of the pursued outcome or relief then, the matter becomes moot."

20. Similarly, in Dande & 3 Others v Inspector General, National Police Service & 5 Others [2023] KESC 40 (KLR) the Supreme Court stated:

> "The instances in which a dispute is rendered moot were also discussed by the Supreme Court of Canada in Borowski v Canada (Attorney General) [1989] 1 SCR 342, where it stated that a repeal of a by-law being challenged; an undertaking to pay damages regardless of the outcome of an appeal; non- applicability of a statute to the party challenging the legislation; or the end of a strike for which a prohibitory injunction was obtained were some of the circumstances that render an appeal moot. The court further opined that determining whether an appeal is moot or not requires a two-step analysis. A court is first required to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case." (Emphasis added).

21. In National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs, 2000 (2) SA 1 (CC) para 21, the Constitutional Court of South Africa stated:

> "A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."

22. The question now narrows to whether the reversal of the Maraga, J. decision by the Court of Appeal rendered the appellants' claim moot. The appellants' case as disclosed in their petition which yielded

the judgment the subject of this appeal was that following the Maraga, J. decision, no steps were taken by the respondents to amend Section 12 of the *Valuation for Rating Act* to conform with *the constitution* by setting up an independent machinery of establishing valuation courts, yet the 1st respondent continued to levy rates in accordance with the Valuation Roll in respect of which the rate payers had no forum to ventilate their objection. At the risk of repeating the contents of paragraph *7* of this judgment, it is important as we search for answers to the issue at hand, to examine the reliefs which were sought by the petitioners in their petition before the High Court.

23. In their petition, the appellants prayed for an order that the failure to amend Section 12 of the *Valuation for Rating Act* to conform with *the Constitution* by setting up an independent machinery of establishing valuation courts since the abolition of the previously existing valuation court by Maraga, J. is a violation of their rights under various Articles of *the Constitution*. This prayer, just like the averments in their petition and the other prayers sought in the petition directly arose from the alleged failure to amend Section 12 of the Act to accord with the Maraga, J. decision.

24. Notably, the Maraga, J. decision was delivered on 30th June 2009. The appellants' Petition before the High Court was filed on 23rd June 2011, while the judgment appealed against was delivered on 1st August 2017. The Maraga, J. decision was overturned by the Court of Appeal by a judgment delivered on 23rd October 2014. This appeal was filed on 30th January 2020, almost 6 years after the delivery of the Court of Appeal decision. Once a Court decision is overturned in its entirety by a higher court as happened in this case, such a decision ceases to exist. This means that the issues litigated upon and determined in the overturned judgment by operation of the law reverted to the position prior to the institution of the suit. It follows that the impugned Section 12 was back in force, courtesy of the Court of Appeal decision.

25. Therefore, by the time this appeal was filed, the dispute had effectively been resolved in favour of the 1st respondent by the Court of Appeal, therefore, this appeal was dead on arrival because the issues in question were no longer justiciable because they no longer presented an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law. On this ground alone, this appeal is for dismissal.

26. The next question is whether the failure by the 1s, 2nd and 3rd respondents to set up rating Courts violated the rights of rate payers in Nakuru and as such they are entitled to a redress for the said violation regardless of the overturning of the Maraga, J's decision and/or the repeal of the *Valuation for Rating Act*. We do not think so. The appellants' case was premised on the Maraga, J. decision which had declared Section 12 of the *Valuation for Rating Act* unconstitutional. The pleadings say so in clear terms just like the reliefs sought. The overturning of the Maraga, J. decision cut the ground upon which the appellants claim was premised. The Court of Appeal found the said Section to be constitutional and faulted the Maraga, J. decision. There claims premised on the said decision collapsed the moment the judgment was overturned by the Court of Appeal. While overturning the said decision, this Court stated:

> "37. ..We are of the view that Section 77 (9) of the former Constitution was not meant to operate in a vacuum or to establish a legal lacuna in the procedure for dealing with objections to the valuation roll. We take judicial notice that the valuation court as established in Section 12 of the *Valuation for Rating Act* is the only body with the power to hear and determine objections by any rate payer arising from the valuation roll. The learned judge by declaring the valuation court and Section 12 of the *Valuation for Rating Act* to be unconstitutional created a vacuum and legal lacuna in the

framework for handling objections relating to rateable property. It is our view that in public interest, there ought not be an institutional lacuna or vacuum in dealing with objections arising from the valuation roll. It is our considered view that Section 77 (9) of *the Constitution* was not envisaged to operate in a manner that creates legal vacuity in the management of public affairs. The contest to the constitutionality of the valuation court is based on the perceived lack of independence in its composition and manner of appointment and remuneration. It is our view that the manner of appointment and remuneration of members of the valuation court should not per se be a ground for determining absence of independence and impartiality. We concur with the recommendation by the trial court that Parliament can take legislative measures, by way of amending or repealing existing legislation, or enacting new legislation to ensure that appointment and membership to the valuation court is made independent of the local authority. Such amendments can target the existing procedures for appointment of members of the valuation court if they are considered not independent enough; or even the body itself in terms of its composition. Such legislative interventions should not engender a vacuum in considering and determining objections to the valuation roll.

39. ...we find that Section 12 of the *Valuation for Rating Act* and the Valuation Court are not .... unconstitutional. It is our view that the trial court erred in failing to appreciate that the manner of appointment and remuneration of members of the valuation court should not per se be a ground for determining absence of independence and impartiality; the Judge erred in failing to appreciate that combination of these and the fortitude and fecundity of the men and women who are members of the valuation court are factors to be considered. In addition, the trial court erred in not taking into account that *the Constitution* neither operates in a vacuum nor creates a vacuum and it is a matter of public interest that there ought not be an institutional lacuna or vacuity in the legal framework for dealing with public affairs; and in the instant case, there should be no vacuum in the legal framework for handling objections arising from the valuation roll. The trial court further erred in failing to take into account that the respondent did not tender a reasonable factual basis for its apprehension that the valuation court would lack independence, be biased and be partial. For these reasons, we hereby set aside the Ruling dated and delivered on 30th June, 2009, and also set aside all consequential orders arising therefrom. We award costs of this appeal, and of the proceedings in the High Court to the appellant."

27. It is also important to reiterate that by the time the learned judge of the High Court delivered the impugned judgment on 1st August 2017, the Maraga, J. decision had already been overturned by this Court in its judgment delivered on 23rd October 2014. It appears that the parties did not bring the trial courts attention to the Court of Appeal decision. Therefore, the appellants' contestation that their objections were not heard and determined because they did not have a forum to ventilate their claim cannot stand for two reasons. First, the High Court decision was largely an academic exercise because the Maraga, J. decision upon which the petitioners founded their case was no longer good law, courtesy of the Court of Appeal decision.

28. Second, the *Valuation for Rating Act* was repealed on 24th December 2024 by the National *Rating Act*. Section 59 of the National *Rating Act* stipulates:

> 59. Savings and transition
>
> 1. Any existing valuation rolls prepared before commencement of this Act shall be deemed to have been prepared under this Act.
>
> 2. Where existing valuation rolls do not conform with the provisions of this Act, the county government shall within twenty-four months of the commencement of this Act bring them into conformity.
>
> 3. Any written law by the national and county government relating to valuation and rating in force immediately before the commencement of this Act shall have effect, subject to such modifications as may be necessary to give effect to this Act, and where the provisions of such law are in conflict with any provisions of this Act, the provisions of this Act shall prevail.

29. The above provision warrants no explanation. We have said enough to show that this appeal is for dismissal. In any event, the setting aside of the Maraga, J. decision rendered all the prayers/reliefs sought in the petition dated 23rd June 2011 otiose. Therefore, the issues pursued in this appeal no longer present any justiciable controversy. In the circumstances, this appeal is hereby dismissed with costs to the first respondent.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF MARCH, 2025.

M. WARSAME

JUDGE OF APPEAL

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J. MATIVO

JUDGE OF APPEAL

.....

M. GACHOKA CIArb, FCIArb.

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR.