Republic v Independent Electoral & Boundaries Commission; Mwangi (Exparte) (Judicial Review E004 of 2022) [2025] KEHC 4282 (KLR) (26 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4282 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

JUDICIAL REVIEW E004 OF 2022

DKN MAGARE, J

MARCH 26, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION ..... RESPONDENT

AND

IRUNGU MWANGI ..... EXPARTE

JUDGMENT

1. This is a Judgment from the Notice of Motion Application dated 28.5.2022 that sought the following reliefs:

    i. An Order of certiorari to quash the requirement of the Respondent that persons nominated to the office of the Deputy Governor to present Resignation/ Clearance Letter

    ii. An Order of prohibition prohibiting the Respondent from proceeding with or implementing the requirement that persons nominated to the office of the Deputy Governor to present Resignation/Clearance Letter

    iii. An order of mandamus compelling the Respondent to clear the nomination of persons so nominated into the office of the Deputy Governor without requirement of presentation of Resignation/ Clearance Letter

    iv. Costs

2. The Application was opposed on the grounds that the Section 43(5) of the *Elections Act*, 2011 was constitutional and so the requirement for resignation was proper.

3. This court, Muya J, vide the Ruling dated 3.6.2022 stated as follows:

   i. I have had the occasion to peruse the above-cited Petition, which, in the main, seeks conservatory orders to stay the requirement by the Respondent to forward running mates/ Deputy Governors who are bound by the provisions of Section 43 (5) of the *Elections Act*.

   ii. I, also, have perused the ruling by my brother Mrima J. in which he declined to grant conservatory orders of stay in the Moses Kiarie Kuria case (Supra).

   iii. Whereas, it is common ground that the parties in the two cases are not the same and that one is in the form of a Petition whereas the other one is in the form of a Judicial Review, I am satisfied that the substratum is the same.

   iv. They both are anchored on the applicability of Section 43 (5) of the *Elections Act* on a running mate/Deputy Governor. Though this court is not bound by the findings of a court with equal or similar Jurisdiction, I am of the considered view, and in line with good practice that this Judicial Review application ought to be placed before Mrima J. who is seized with a similar matter, for consideration of consolidating both. This will ensure that there will be no issuance of conflicting orders/findings

   v. I accordingly, order that this file be placed before Mrima J. in Nairobi for consolidation with E 200 of 2022.

4. This court notes that the stated Petition was Kuria *v Independent Electoral & Boundaries Commission & another (Petition E200 of 2022*) [2022] KEHC 532 (KLR) (Constitutional and Human Rights) was filed together with an interim Application seeking conservatory orders pending the hearing and determination of the Petition. In declining to find a prima facie case, the court Mrima J, stated as follows:

> This Court is aware of the Court of Appeal decision in Civil Appeal No 139 of 2017: County Government of Embu & another v Eric Cheruiyot & 15 others (now consolidated with Civil Appeal No 119 of 2017: Public Service Commission & 3 others v Eric Cheruiyot & 17 Others) (2022) eKLR where the constitutionality and applicability of the impugned provision to pubic officers was extensively dealt with.
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> 34. A reading of the said decision confirms the position that the issues raised by the Petitioner herein were duly considered and settled. The finding of the Court of Appeal in that matter remain binding on this Court

5. It is unknown whether this Judicial Review was placed before the High Court in Nairobi and Directions given as to consolidation with Kuria v Independent Electoral & Boundaries Commission (supra), or otherwise.

6. Be that as it may, this Application is simple and straightforward. It belabors settled matters of constitutional interpretation and application. The Respondent's interest could as well have been largely overtaken by the events, but as the Application is before the court, the court has the duty to render a decision on it.

7. This court is aware of the ramifications of the above finding on this Judicial Review Application. The Court of Appeal's decision is binding on this court, and the position has not changed that Section 43(5) of the *Elections Act*, 2011, is proper law in line with *the constitution*. Effectively, the requirement for resignation is a lawful requirement under our law.

Submissions

8. The Applicant submitted heavily that the nominees' resignation or clearance letter requirement was unconstitutional. He cited several authorities including Council of Civil Service Unions v Minister of Civil Service (1984) e KLR. The Applicant's further submission was that the decision to sneak the requirement of resignation was irrational and unreasonable, such that it should be reversed by judicial review.

9. The Respondent on the other hand submitted that the requirement was not unconstitutional.

Analysis

10. This court must determine whether the Judicial Review Application is merited. The Application advances the argument that the requirement that a public officer should resign from office at least six months before the date of the election if he or she has to contest in an elective position was not anchored on *the constitution*. Section 43(5) of the *Elections Act*, 2011 provides as follows:

> 43.(5) A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of the election."

11. Based on the above analogy, the Applicant sought certiorari, prohibition and mandamus orders. The principles for Judicial Review reliefs were set out in a land mark case of Republic Vs *Kenya National Examination Council Ex parte Gathenji and others Civil Appeal No.266 of 1996*, where the Court of Appeal stated inter alia:

> 'an order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision-making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal.''

12. An order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. In Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170, the Court of Appeal held as follows:

> " ... an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings ... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

13. The principles guiding the Application of mandamus were encapsulated in the keynote case of the Court of Appeal. An order of mandamus compels the performance of a public duty that is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. The Court of Appeal in Republic vs. *Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996* stated as follows:

> " The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

14. Clearly, in the fulfillment of which some other person has an interest, the court has jurisdiction to grant mandamus to compel the fulfillment. This jurisdiction, however, is not a carte blanche. It cannot be granted where *the constitution* or statute has expressly permitted a public officer to act in the manner stipulated by law. In Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 where Goudie, J held, inter alia, as follows:

> " Mandamus is a prerogative order issued in certain cases to compel the performance of a duty...Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment...Whereas mandamus may be refused where there is another appropriate remedy, there is no discretion to withhold mandamus if no other remedy remains. When there is no specific remedy, the court will grant a mandamus that justice may be done...In mandamus cases it is recognised that when statutory duty is cast upon a Crown servant in his official

capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it.

15. As demonstrated above, the Application herein raised issues that are now settled. The court of appeal in Public Service Commission & 4 others v Cheruiyot & 20 others (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 (KLR) (8 February 2022) (Judgment) stated as follows:

> For a person to be eligible for election into public office in a general election, the person that sought to be elected must not have been a state officer or other public officer save for the categories of persons to whom the exclusion applied. By enacting section 43(5) and (6) of the *Elections Act*, 2011, Parliament sought to give full effect to the provisions of articles 137, 99, 180, and 193 of *the Constitution*.
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> The provisions of sections 43(5) were not hollow. The impartiality of public servants was a cardinal value enshrined in article 232(1)(a) of *the Constitution* which provided that the public servant and service had to be responsive, prompt, impartial and equitable in the provision of services. How could a public servant espouse those principles if he was allowed to remain in office until the election date? Suppose a Judge who intended to run for an elective post was allowed to sit on the bench and preside over election-related cases until the election date, where was his impartiality? Similarly, how could a Commissioner of the Independent Election and Boundaries Commission serving his last year in office and with the ambition to run for elective office, be allowed to remain in office and oversee an election in which he was a candidate? The absurdity of both situations merely served to show the justifiability of the need for public servants to leave public office within a reasonable time before the election in which they would be candidates.
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> The requirements for neutrality and impartiality of public officers were also provided for in other relevant statutes and regulatory frameworks related to the conduct of public officers. In particular section 23(2) and (3) of the *Leadership and Integrity Act*, 2012 provided that an appointed State officer or public officer was not to engage in any political activity that could compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections. Section 12(1) of the *Political Parties Act* No. 11 of 2011 on the other hand barred public officers from being eligible to be a founding member of a political party, being eligible to hold office in a political party, engaging in political activity that could compromise or be seen to compromise the political neutrality of the person's office, publicly indicate support for or opposition to any political party or candidate in an election. Clause 24 of the Public Service Code of Conduct and Ethics, 2016 provided, inter alia, that a public officer was to remain politically neutral during his term of employment.
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> It was necessary for public officers desirous of running for elective posts to resign in good time. The provisions of sections 43(5) and (6) of the *Elections Act* also sought to promote the principle of good governance and the value of the integrity contemplated under articles 10 (2)(c) of *the Constitution*.
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> A general election had very strict timelines which political parties, the IEBC, aspirants and other stakeholders had to adhere to in order to have free and fair election. One of the events that preceded a general election was the nomination of candidates by political parties pursuant to the provisions of section 13 of the *Elections Act*, 2011. It was only after the nomination process had taken place that the IEBC could proceed to print the necessary ballot papers which contained information on the candidates vying for a particular seat

in a particular electoral area. The resignation of public officers at least six months before the general election therefore ensured that the IEBC had sufficient time to undertake its processes and that the calendar of the general election was not disturbed or interrupted unnecessarily.

The political and or labour rights of the state or public officers that sought to join elective politics were not absolute rights that could be limited pursuant to the provisions of article 25 of *the Constitution*. Those rights could be limited by application of relevant laws provided that the limitation was reasonable and justifiable in an open and democratic society based on, inter alia, human dignity, equality, and freedom. The limitation of the right to equal treatment as set out in section 43(5) and (6) of the *Elections Act*, 2011 did not discriminate against state and/or public officers seeking to join elective politics and was reasonable and justifiable.

16. The last aspect is whether there is an active matter to be determined. The questions herein were raised during the last general elections. The court of Appeal guided on the correct position. The issues raised became academic and of no effect. The issues raised herein are, therefore, moot. in the case of Natural World Mombasa Safaris Ltd v Karuri (Civil Appeal E045 of 2022) [2022] KEHC 9979 (KLR) (Civ) (7 July 2022) (Ruling), JN Mulwa, J observed as follows:

> The Court of Appeal in Okiya Omtatah Okoiti & 2 others vs Attorney General & 4 others [2020] at paragraph 65, while citing the case of Daniel Kaminja & 3 others (suing as Westland Environment Caretaker Group) vs County Government of Nairobi [2019] e KLR, Mativo J stated that:"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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> 16. And that:
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> > "No court of law will knowingly act in vain ... a Suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if the judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.
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> 17. The doctrine of mootness was further discussed in the case National Assembly of Kenya & another vs Institute of Social Accountability & 6 others [2017] e KLR when the court rendered that:"...it is clear that the mootness doctrine is not an abstract doctrine. Rather, it is a functional doctrine founded mainly on principles of Judicial economy and functional competence of the courts and the integrity of the Judicial System... the court will inevitably consider the extent to which the doctrine advances the underlying principles, the certainty and development of the law particularly *the constitution* law and public interest."

17. In the case of National Assembly & another v Okoiti & 55 others (Civil Appeal E003 of 2023 &. E016, E021, E049, E064 & E080 of 2024 (Consolidated)) [2024] KECA 876 (KLR) (31 July 2024)

(Judgmen, the Court of Appeal [K Murgor, Jm Mativo & K M'inoti, JJA] observed as follows in regard to the doctrine of mootness:

> Time and again, it has been expressed that a court of law should not act in vain. The general attitude of courts of law is that they loathe making pronouncements on academic or hypothetical issues as it does not serve any practical or useful purpose. The Supreme Court in Institute for Social Accountability & another vs. 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."
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> 115. Similarly, in Dande & 3 others vs. 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."

18. The orders sought by the Applicant cannot be granted. even if the court were to discuss them, there is only one way the case will end, in view of the lack of practical application of the result.

19. The orders sought are contrary to the law. It has not been demonstrated how the administrative process that the Applicant underwent was marred with procedural irregularities, illegality, unreasonableness, irrationality, absence of jurisdiction or such like faults that are normally subject to judicial review remedies sought herein by way of correction. As the requirement for resignation by serving public officers who aspire to contest in elections 6 months before the election is a lawful one, the Application can only fail. I dismiss it.

20. On costs, determining costs payable to the successful party is a judiciously exercised discretion of the Court, accommodating the special circumstances of the case while being guided by ends of justice. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the

> preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

21. Being a question that is now moot, each party shall bear their own costs.

Determination

12. The upshot of the foregoing is as follows:

    i. The Application dated 8.6.2022 lacks merit and is dismissed.

    ii. Each party to bear own costs.

DELIVERED, DATED AND AT NYERI ON THIS 26TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for the parties

Court Assistant - Michael