



Owino v Inspector General of the National Police Service & another; Ayacko & 4 others (Interested Parties) (Petition E264 of 2023) [2025] KEHC 7120 (KLR) (Constitutional and Human Rights) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7120 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E264 OF 2023

LN MUGAMBI, J

MAY 29, 2025

BETWEEN

JACJOHN OWINO PETITIONER

AND

INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

HE OCHILO MBOGO GEORGE AYACKO INTERESTED PARTY

HE GLADYS ATIENO WANGA INTERESTED PARTY

HE JAMES AGGREY ORENGO INTERESTED PARTY

HE PROF ANYANG' NYONG'O INTERESTED PARTY

HE SIMBA PAUL ARATI INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition dated 21st July 2023, is supported by the Petitioner’s affidavit in support of even date.
2. The Petitioner brings this Petition against the Respondents for alleged withdrawal of the interested parties’ police security arbitrarily and unlawfully.
3. Accordingly, the petitioner seeks the following reliefs:



- i. A declaration that the action of the 1st Respondent to withdraw the police security detail of the 1st, 2nd, 3rd, 4th and 5th Interested Parties is unconstitutional, illegal and void *ab initio*.
- ii. Writs of mandamus be issued directed at the 1st Respondent compelling him to unconditionally reinstate the 1st, 2nd, 3rd, 4th and 5th Interested Parties' police security detail.
- iii. An order of prohibition barring the 1st Respondent from arbitrarily withdrawing the security of the 1st, 2nd, 3rd, 4th and 5th Interested Parties without following the proper procedure.
- iv. Costs of the petition.

Petitioner's Case

4. The petitioner a public rights defender avers that on 18th July 2023 the interested parties' police security was withdrawn capriciously by the 1st respondent without notice or issuance of reasons. He adds that to date no reasons have been supplied concerning this action.
5. He asserts that county governors are ordinarily provided with police security by the 1st respondent. As such, in withdrawing the interested parties' police security, it is asserted that the 1st respondent discriminated against them. It is deponed that it was on the basis of their social and political affiliation thus in violation of Article 27 of the Constitution and their legitimate expectation.
6. The petitioner informs further that this action was taken against the interested parties for being members of the Orange Democratic Movement party (ODM) and also being vocal in speaking against the government's unconstitutional excesses and bad governance practices.
7. He contends thus that the 1st respondent's action violated Article 47 of the Constitution that guarantees a fair administrative action. On this premise, he argues that the 1st respondent's action was not justified neither founded in law hence unconstitutional.

1st Respondents' Case

8. In response, the 1st respondent through a Commissioner of Police, Peter Mwanzo Nyaga, filed a replying affidavit sworn on 29th November 2023.
9. He avers that National Police Service Act does not impose a specific duty on the 1st respondent to provide protective security to VIPs and other officers including the interested parties.
10. That said, he informs that the government in 2016, developed the Policy on the Provision of Protective Security to VIPs and other State Officer which governs this issue. He notes that the Policy under Part 5.3 XII provides for conditions under which provision of protective security for such persons can be withdrawn.
11. Consequently, he asserts that this privilege is not absolute and so can be withdrawn where a party breaches these guidelines.
12. He additionally asserts that the petition is misconceived and without any legal basis. He notes that the petition does not satisfy the threshold set out for constitutional petitions in the Anarita Karimi Njeru v Republic (1979) eKLR. This is because the petitioner has not outlined any constitutional provision deemed to have been breached and demonstrated how these provisions were violated.
13. On the other hand, he states that the petitioner has failed to adduce evidence to support his claim and how the Respondents acted in contravention of the law. In conclusion, he posits that the petition is actuated by selfish interests and devoid of merit.



2nd Respondent's Case

14. The 2nd Respondent in reaction to the Petition filed grounds of opposition dated 13th September 2023 on the basis that:
 - i. The petition and the application are misconceived and without any basis in law as do not meet the threshold of the principles as provided in the case of the [*Anarita Karimi Njeru v Republic*](#).
 - ii. The petitioner's case is misconceived, actuated with rumours, speculations, hearsay unfound fears with no factual evidence of the interested parties whose rights are alleged to have been violated.
 - iii. The petitioner apart from his wild allegations has not any way tendered any material evidence in support of the petition.
 - iv. The petition is overtaken by events hence an abuse of the court process.
 - v. It is improper for deponents supporting the petition to ignore the solemn admonition of the provisions of order 19 rule 3 of the [*civil procedure rules*](#) as well as rule 10 of [*Mutungu rules*](#) by not supporting the petition with any factual evidence but rather hearsay and speculations.

1st Interested Party's Case

15. The 1st interested party through, the County secretary, Dr. Oscar Olima filed a Replying Affidavit sworn on 11th October 2023.
16. He depones that in a correspondence dated 17th August 2017, the Principal Secretary, State Department of Devolution notified the county secretaries as communicated by the 1st respondent, that the National Security Advisory Council (NSAC) had approved a Policy on Protective Security to State Officers. As a result, the 1st interested party and other interested parties were issued with body guards to provide them security.
17. He depones that the 1st interested party's police security was withdrawn by the 1st respondent on 18th July 2023 without issuance of any reason or justification. In his view, this withdrawal was discriminative, malicious, unreasonable and done in bad faith and consequently, exposed the 1st interested party to security threats.
18. Furthermore, he asserts that being that the Policy was issued by the NSAC, the 1st respondent had no authority to issue any directive recalling police security for the interested parties or other governors.
19. Be that as it may, he adds that even where such an administrative action is justified the same ought to be done in a lawful, reasonable and procedurally fair. In this case however, he maintains that no reasonable cause was issued in withdrawal of the security detail as such unlawfully done.

2nd Interested Party

20. In like manner, the 2nd interested Party filed its replying affidavit by the County Attorney, Fred Oregu sworn on 4th October 2023.
21. He stresses that withdrawal of the interested parties' police security was not only unlawful but also done capriciously in breach of the [*Constitution*](#) and the [*Fair Administrative Actions Act*](#).



22. Counsel in addition avers that the 1st respondent's act was discriminatory yet the interested parties are entitled to the police security by virtue of the Policy. Consequently, it is contended that the 1st respondent has no power to recall the 2nd interested party's police security.
23. Furthermore, it was pointed out that the 1st respondent had not provided any evidence to prove that the 2nd interested party had breached the Policy. On this basis the 1st respondent's actions are adjudged to be malicious and done in bad faith.

3rd, 4th and 5th Interested Parties Case

24. The Court could not find the 3rd, 4th and 5th Interested parties' responses to the petition or submissions are not in the Court file or the Court Online Platform (CTS).

Petitioner's Submissions

25. On 14th October 2024, Owino and McDowell Advocates for the petitioner filed submissions where the issues for argument were identified as: whether the petitioner has *locus standi* to institute this Petition; whether the 1st respondent's action to withdraw the interested parties' security was a proper and lawful fair administrative action; whether the actions of the 1st respondent are discriminatory; and whether there exists a legitimate expectation for the interested parties to have security as other Governors.
26. On the first issue, Counsel relying on Article 3(1), 22 and 258 of the Constitution submitted that the petitioner has the necessary locus standi to file this suit. This is because the petition raises infringement of the interested parties' rights and the 1st respondent's alleged abuse of authority.
27. Reliance was placed in Randu Nzai Ruwa & 2 others v. Secretary, the Independent Electoral and Boundaries Commission & 9 others [2016] eKLR where the Court of Appeal held that:

“The Constitution today gives standing to any member of the public who is not a mere busy-body or a meddlesome interloper, and who acts in good faith to institute proceedings challenging any violations under the Bill of Rights.”
28. Turning to the second issue, Counsel submitted that the 1st respondent's action was arbitrary thus in direct violation of Article 47 and 50 (2)(a) of the Constitution. Counsel noted that Article 47 emphasizes that the interested parties ought to have been given reasons for withdrawal of their police security. Reliance was placed in Alice Muthoni Wabome v. Inspector General of Police & Another [2020] eKLR.
29. It was further submitted in the third issue that the 1st respondent had contravened Article 27(4) and (5) of the Constitution by unfairly targeting the interested parties by virtue of their political affiliation. It is noted that while their police security was withdrawn the other governors enjoyed police protection from the National Police Service.
30. Counsel moving to the other point stressed that the 1st respondent's actions had also breached the interested parties legitimate expectation in that being governors they were entitled to be provided with bodyguards from the National Police Service. It was noted that no breach of the Policy had been established by the 1st respondent. To buttress this point reliance was placed in Kenya Revenue Authority & 2 Others v. Darosa Investments Limited [2018]eKLR where it was held that:

“Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority



will, in the future, continue to act in a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, result from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue. This is of particular importance if an individual has acted on the representation to his or her detriment".

Respondents' Submissions

31. In support of their case, Principal State Counsel, Rodgers Sekwe, filed submissions dated 1st July 2024 and underscored the issue for determination as: whether the police withdrawal violated the interested parties' rights under Article 27 and 47(1) of the Constitution.
32. Counsel first submitted that the petition does not meet the legal principles established in the Anarita Karimi case (*supra*) and that the petitioner's allegations are not supported by any evidence. In the matter it was held as follows:

"If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed."
33. Counsel submitted that the Policy on the Provision of Protective Security to VIPs and other State Officer provides under Part 5.3 XII that police security can be withdrawn under a number of circumstances being: those who have been convicted of a criminal offence; those who have committed offences under Section 103 of the National Police Service Act; those who commit a breach of peace; those who will abuse the privilege of being accorded VIP protection and a VIP who relocates to another county. Accordingly, Counsel submitted that it was evident that the privilege for additional security was not absolute.
34. On violation of Article 47 of the Constitution, Counsel submitted that no evidence had been adduced in support of the interested parties' rights infringement in this regard.
35. Counsel further asserted that the petition was moot and hence ought to be dismissed. Reliance was placed in Institute for Social Accountability & another v National Assembly & 3 Others [2022] KESC 39 (KLR) where the Supreme Court held that:

"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."
36. Like dependence was placed in Nairobi Petition No. 6 (E007) of 2022 Edwin Harold Dande & 3 others v the Directorate of Public Prosecution & 5 others, Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR and Institute for Social Accountability & another v National Assembly & 3 Others [2022] KESC 39 (KLR).



1st Interested Party's Submissions

37. The 1st interested party through Nelson Jura and Company Advocates filed submissions dated 5th July 2024 and outlined the issues for discussion as: whether the withdrawal of police security infringed the 1st interested party's rights under Articles 27 and 47 of the Constitution and whether the doctrine of mootness is applicable to this suit.
38. Reiterating the 1st interested party's averments, Counsel submitted that the 1st Respondent's conduct was discriminatory and in violation of a fair administrative action. Counsel stressed that Article 245 (4) (c) of the Constitution allows the 1st Respondent to issue directives on any issue concerning a member of the National Police Service. Taking this into consideration, Counsel impugned the manner in which the 1st respondent withdrew the police security as it was done in breach of these constitutional dictates.
39. Reliance was placed in Kenya Revenue Authority V Export Trading Company Limited [2022] KESC 31 (KLR) where it was held that:
- “the question of legality or the lawfulness of an act lies at the core of article 47(1). In examining article 47(1) of the Constitution, the starting point is a presumption that the person exercising the administrative power has the legal authority to exercise that authority. Once satisfied as to the lawfulness of the power exercised, is when the court will delve into inquiring whether in the carrying out of that administrative action, there was violation of article 47(1). This is the test of legality. So that the question of the unlawfulness or otherwise to act is at the onset of the inquiry. Where the act done was ultra vires the mandate of the administrative entity, the act is void *ab initio* and the inquiry stops there as there is an outright violation of the Constitution.”
40. Counsel in addition argued that withdrawal of the police security breached the 1st interested party's legitimate expectation as it is a customary practice in Kenya. Counsel relied in the case of Kenya Revenue Authority(*supra*) where it was held that:
- “... legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfill. For an expectation to be legitimate therefore, it must be founded upon a promise or practice by a public authority that is expected to fulfill the expectation. We then went on to find the emerging principles on legitimate expectation to be that;
- a. There must be an express, clear and unambiguous promise given by a public authority;
 - b. The expectation itself must be reasonable;
 - c. The representation must be one which it was competent and lawful for the decision-maker to make; and
 - d. There cannot be a legitimate expectation against clear provisions of the law or the Constitution.”
41. On the final issue, Counsel submitted that the doctrine of mootness is not applicable to the factual and legal aspects of this suit. He stressed that there was need for this Court to make an unequivocal pronouncement over the issue in relation to the 1st Respondent's constitutional powers on assignment of police security to state officers.



42. As such, Counsel pointed out that this Court's determination will not only address the present issue but also inform the 1st Respondent on the need to carry out his mandate within the confines of the law.
43. Reliance was placed in *Kansagra v. Kansagra & another* (2024) KEHC 3488 (KLR) where it was held that:

"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."

2nd Interested Party's Submissions

44. In like manner, Wiberforce Akello and Company Advocates on the 2nd interested party's behalf filed submissions dated 4th May 2024 and underlined the issues for discussion as: whether the 2nd interested party was accorded a fair hearing before their security was withdrawn by the 1st respondent; whether there is an infringement on the 2nd interested party's rights under *Fair Administrative Action Act* and under Article 47(1) of the *Constitution* and whether there exists a legitimate expectation for the 2nd Interested Party to have security as other Governors.
45. On the first issue, Counsel answered in the affirmative. Counsel stressed that the 2nd interested party like other persons is entitled to his right to a fair administrative action yet was not issued with reasons why his police security was withdrawn. Reliance was placed in *Alice Muthoni Wabome*(*supra*) where it was held that:

"The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it."

46. Like dependence was placed in *Githiga & 5 others v Kiru Tea Factory Company Ltd* (2023] KESC 41 (KLR).
47. Counsel turning to the second issue stressed that the 1st respondent's action of withdrawing the police security was not only discriminatory but also unreasonable and unjustifiable in an open and democratic society. This is because the 1st respondent did not issue any reason or justification for the action taken. As such it is argued that the withdrawal of the police security was not done procedurally and in a reasonable manner hence unlawful. Reliance was placed in *Judicial Service Commission v. Mbalu Mutava & another* (2015) eKLR where the Court of Appeal opined as follows:

"Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right



to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law."

48. Comparable reliance was placed in *Kenya Human Rights Commission & another v. Non-Governmental Organisation co-ordination Board & another* (2018) eKLR, and *Hassan Ali Joho v Inspector-General of Police & 3 others* [2017] eKLR.
49. Furthermore, Counsel submitted that the 1st respondent had no power to issue any directive recalling police security assigned to the 2nd interested party and other officers without adhering to the dictates of the *Constitution*. It was stressed that the 2nd interested party and the other parties were entitled to the police security by virtue of the Policy.
50. On the third issue, Counsel submitted that the 1st respondent had not supplied any evidence that the 2nd interested party had breached the Policy. Consequently, in absence of such a breach Counsel asserted that the 2nd interested party had a legitimate expectation that she would be issued with police security as all the other governors.
51. To buttress this point, reliance was placed in *Commission of Kenya & 5 Others v Royal Medial Services & 5 Others*, SC Petition Nos. 14, 14A, 14B & 14C of 2014 (2014) eKLR where the Supreme Court issue the guiding principles of legitimate expectation as follows:

"The emerging principles may be succinctly set out as follows:

- a. There must be an express, clear and unambiguous promise given by a public authority;
- b. The expectation itself must be reasonable;
- c. The representation must be one which it must competent and lawful for the decision-maker to make; and
- d. There cannot be a legitimate expectation against clear provisions of the law or the *Constitution*."

Analysis and Determination

52. Having perused the pleadings and submissions of the parties herein, it is my considered view that the issues that arise for determination are as follows:
 - i. Whether the Petitioner has locus standi to file this suit.
 - ii. Whether the Petition offends the doctrine of mootness.
 - iii. Whether the Interested Parties rights under Articles 27 and 47 of the *Constitution* were violated by the 1st Respondent.
 - iv. Whether the Petitioner and Interested Parties are entitled to the relief sought.



Whether the Petitioner has locus standi to file this suit.

53. ‘Locus standi’ is a latin phrase that denotes to the right to institute legal proceedings in Court. The term was judiciary considered in *Daykio Plantations Limited v National Bank of Kenya Limited & 2 others* [2019] KEELC 48 (KLR) where the Court stated:

“...In the case of *Law Society of Kenya v Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the Court held that; -

“Locus Standi signifies a right to be heard; A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.

54. The *Constitution* has extended the ambit of who can bring a Constitutional Petition where rights and fundamental freedoms in the Bill of Rights have been violated or are threatened with violation.

55. Article 22 states:

22.

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - a. a person acting on behalf of another person who cannot act on their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members

56. Further there is also Article 258 which provides:

Enforcement of the *Constitution*.

258.

1. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention. 118 Constitution of Kenya
2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or



- d. an association acting in the interest of one or more of its members.

57. The Court of Appeal in the case of *Attorney General & Anor v Randu Nzai Ruwa & 2 others* (2016) KECA 418 KLR explained the expanded *locus standi* that is constitutional sanctioned as follows:

“Articles 22, 258 and 260 of the *Constitution* are cited to make the point that historical common law restrictions on the standing have been overhauled by the *Constitution of Kenya*, 2010....

The three Articles give an enlarged view of locus standi to the effect that every “person” including persons acting in the public interest, can move a court of law contesting infringements of any provision in the Bill of Rights or the *Constitution*.”

Each of the first two Articles starts with the phrase “Every person has the right to institute court proceedings.” They also provide that that person may either bring the proceedings as an individual in his/her own interest. He/she can, in addition bring proceedings in many other capacities, on behalf of persons who cannot act in their own name, or as a member of or in the interest of a group or class of persons, or, like in the above cited Supreme Court case of *Mumo Matemo (supra)*, acting in the public interest or, finally an association acting in the interest of one or more of its members can also institute court proceedings for the enforcement of the Bill of Rights.”

58. Over and above the enlarged scope of who can sue for constitutional infringements, Article 3(1) of the *Constitution* states that

“Every person has an obligation to respect, uphold and defend the *Constitution*.”

59. My view is that the Petitioner has legal standing to institute a constitutional petition to determine the constitutionality of any action and is not impeded by lack of direct interest in the matter. The contention that the Petitioner has no locus standi is untenable.

Whether the Petition offends the doctrine of mootness

60. The Respondent argued that this Petition has been overtaken by events and is not justiciable based on the doctrine of mootness. The doctrine which was explained by the Court of Appeal in *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020] KECA 589 (KLR) as follows:

“64. In *Black’s Law Dictionary*, 8th edition, 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”, and as a verb, as meaning “to render a question as of no practical significance.”



61. In yet another case, the Court of Appeal in *National Assembly of Kenya & another v Institute for Social Accountability & 8 others* [2017] KECA 170 (KLR) held thus:

“(14) The mootness doctrine is entrenched in the common law. The *Black’s Law Dictionary*, Ninth Edition, defines a moot case 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.”

In an article entitled “*Federal Jurisdiction to Decide Moot Cases*” published in the *University of Pennsylvania Law Review* [1946] Vol. 94 – No. 2, the author, Sidney A. Diamond explains the essence of the doctrine thus:

“Common – law courts have long recognized the strict requirement that permits only cases presenting judicial controversies to be decided. This is a jurisdictional limitation. If the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, the case is moot and the court is without power to render a decision.”

[14.1] In the United States of America, it is a constitutional requirement that federal judicial power extends to “cases” and to “controversies” [section 2(1) of Article 111 of the American Constitution]. Neither our Constitution nor our laws explicitly prohibits the courts from determining abstract, hypothetical or contingent cases or appeals. It follows that the common law is the exclusive source of the mootness doctrine in our jurisdiction. The doctrine is based on judicial policy whose main functions are to protect the functional competence of the courts to make law by ensuring adequate adversity of the parties and judicial economy – that is, rationing scarce judicial resources amongst competing claimants.

[14.2] Authorities show that mootness is a complex doctrine which should be applied with caution and not mechanically in every factual situation and that there is no sharp demarcation between moot and live controversies. The mootness doctrine and the relevant factors in the application of mootness doctrine as an aid to judicial economy were considered in the Canadian case of *Borowski v The Attorney General of Canada* [1989] 1 SCR 342. In the furtherance of judicial economy, a court will sustain a suit or appeal and find against mootness where factual situation has disappeared but functional competence of the court remains, if inter alia, the probability of recurrence is high, the temporary cessation or abandonment of the conduct is capable of repetition yet evasive of judicial review; continued uncertainty in law will have a harmful effect on the society, and, court’s determination of the questions of law for future guidance of the parties is desirable; public interest is served by judicial decision and, recurrence may result in parallel litigation of the same question at an increased cost of judicial resources.



[14.3] The Supreme Court of the Philippines-Manilla in *Greco Antonious Bedo B Belgila and four others v Honourable Executive Secretary Paquito N. Ochoa JR and two others* – GR No. 208566 consolidated with G-R No. 208493 & 209251 after a finding against mootness continued:

“Even on assumption of mootness, jurisprudence, nevertheless, dictates that “the moot and academic principle” is not a magic formula that can automatically dissuade the court in resolving a case. The court will decide cases, otherwise moot, if, first, there is a grave violation of the Constitution; second, the exceptional character of the situation and paramount public interest is involved, third, when the constitutional issue raised requires formulation of the controlling principles to guide the bench, the bar, and the public; and fourth, the case is capable of repetition yet evading review.”

[14.4] From the above analysis, 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 judicial system. In the application of the doctrine to the wide ranging and varying factual situations, 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 the public interest.”

62. The Constitutional jurisdiction of the High Court under Article 165(3) d (ii) notwithstanding; it is clear from reading these authorities the principle of justiciability can limit the assumption of Court’s jurisdiction.
63. The question thus becomes, does the doctrine apply in the present case?
64. The Petitioner alleges that the 1st, 2nd, 3rd, 4th and 5th Interested Parties who are duly elected Governors of Migori, Homa Bay, Kisumu and Siaya Counties had their police security detail arbitrarily withdrawn by the 1st Respondent on Tuesday of 18th July, 2023 without notice.
65. The 1st Interested Party through Dr. Oscar Olima who is the County Secretary of the County Government of Migori swore an affidavit on 11th October, 2023 confirming that vide official communication by the Principal Secretary, State Department of Devolution to all County Secretaries dated 17th August, 2017 an advisory was conveyed from the Inspector General of Police on the policy by the National Security Advisory Council (NSAC) on provision of protective security to State Officers that included Governors. Nevertheless, he had personal knowledge of the fact on 18th July, 2023; the police security attached to the 1st Interested Party, the Governor of Migori County was withdrawn by the 1st Respondent without notice.
66. The County Attorney of Homa Bay County, Fred Orego on behalf of the 2nd Interested Party swore as much in the affidavit sworn on 4th October, 2023.
67. This is the factual position that informs this Petition. Although the Respondents contended that the matter is moot, they did not tell the Court how the dispute disappeared such that it no longer a live controversy, for instance, has they been a fundamental policy shift that has rendered the communique of 16th July 2017 on provision of personal protection to Interested Parties no longer tenable? Or, are the



interested parties no longer State officers? It is not clear to this Court what occurrence the Respondent is relying on in making this submission on mootness.

68. The Petitioner and 1st and 2nd interested parties did not effectively respond to this submission either. They did not present facts to this Court that conclusively would enable to make a determination on the issue. They did not counter the said submissions by asserting that the facts remain the same as they were then and now, or seek the leave of the Court to put a supplementary affidavit to put the record straight on the actual state of affairs at the moment. The parties left the Court in a limbo on the question of mootness.
69. This Court however believes that although it cannot make a conclusive finding on whether the Petition is moot or not, this is a matter that goes beyond the personal circumstances of the interested parties and thus the Court will have to make a decision in public interest. The Court of Appeal in *National Assembly of Kenya & another v Institute for Social Accountability & 8 others* [2017] KECA 170 citing with approval the Supreme Court of Canada in *Borowski v The Attorney General of Canada* [1989] 1 SCR 342 held:

“in furtherance of judicial economy, a court will sustain a suit or appeal and find against mootness where factual situation has disappeared but functional competence of the court remains, if inter alia, the probability of recurrence is high, the temporary cessation or abandonment of the conduct is capable of repetition yet evasive of judicial review; continued uncertainty in law will have a harmful effect on the society, and, court’s determination of the questions of law for future guidance of the parties is desirable; public interest is served by judicial decision and, recurrence may result in parallel litigation of the same question at an increased cost of judicial resources.

70. This position was also upheld by the South African Constitutional Court, *President of the Ordinary Court Martial and Others v Freedom of Expression Institute and Others* (CCT5/99) [1999] ZACC 10; 1999 (4) SA 682; 1999 (11) BCLR 1219 (24 August 1999) where it was observed thus:

“[m]ootness is particularly likely to be a bar to relief where the constitutional issue is not merely moot as between the parties but is also moot relative to society at large, and no considerations of compelling public interest require the court to reach a conclusion.”

71. A matter involving withdrawal of the security of State officers’ assigned pursuant to a government policy requires very serious interrogation.

Whether the Interested Parties rights under Articles 27 and 47 of the Constitution were violated by the 1st Respondent.

72. I must now consider whether the Petitioner has proved discharged the burden of proof on the key issues raised in this Petition. The *Evidence Act*, Cap 80 provides:

107. Burden of proof

- a. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- b. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden



The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

73. In *Alice Wanjiru Rubiu v Messiac Assembly of Yahweh* [2021] KEHC 13098 (KLR) the Court explained the difference between the legal and evidential burden of proof as follows:

“22. I also refer to the *Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

74. In like manner, the Court in *Edward Akong’o Oyugi & 2 others v Attorney General* [2019] KEHC 10211 (KLR) held that:

“73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd v Smith & Associates Far East Ltd*[38] :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the *Constitution* and inevitably result in improper use of judicial



authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

75. The 1st Respondent, through the affidavit of Peter Mwanzo Nyaga, a Commissioner of Police with the Kenya Police Service sworn on 24th November, 2023 admits that in the year 2016; the Government developed a policy on provision of security to serving, retired VIPs and other State officers including County Governors (Interested Parties) as per annexure PNN 1. He nevertheless underscores the National Police Service Act, which stipulates the functions of the Kenya Police Service and Administration Police Service does not impose a specific duty to provide protective security to VIPs who include the interested parties.
76. He says the provision of protective security to VIPs and other State officers is subject to a number of conditions governing VIP protection where the person benefiting is required to desist from committing breach of peace, abuse of privilege of being accorded VIP protection, conviction of a criminal offence, should not commit an offence under Section 103 of National Police Service Act or relocate to another country. He thus stated that the privilege is not absolute and can be denied if it is determined the interested parties breached the policy.
77. He then accuses the Petitioner of mourning more than the bereaved as apart from lamentations and allegations in the Petition, no material evidence has been provided to back the claim.
78. On the claim that the Petitioner lacks of evidence of the withdrawal of security of the Interested Parties, that may be true for 3rd, 4th and 5th Interested Parties, but it is not a correct assessment in reference to the 1st and 2nd Interested Parties.
79. The 1st and 2nd Interested Party through the County Secretary and the County Attorney respectively, both recipients of the official communique from Government notifying on provision of the protective security to the Interested Parties, swore affidavits confirming that the 1st and 2nd Interested Parties security detail was unexpectedly withdrawn on 18th July, 2023.
80. The 1st Respondent does not controvert this fact but provides a general explanation asserting that protective security to the interested parties and other VIPs is a privilege subject to some conditions which if breached can lead to withdrawal of the security. He does not pin-point if any of the specified conditions in the ‘Policy on the Provision of Protective Security to VIPs and Other State Officers’ was contravened by the 1st and 2nd Interested Parties to justify the sudden withdrawal of their security detail as attested in the affidavits sworn on their behalf by their County Secretary and County Attorney respectively.
81. Under Article 47 of the Constitution, every person has a right to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. This was underscored in the case of Mutimba Creser Masayi Joseph v Masinde Muliro University of Science and Technology [2020] KEHC 7950 (KLR) as hereunder:

“ 31. The Court of Appeal, in *Judicial Service Commission v. Mbalu Mutava & another* [2015] eKLR, stated as follows, with regard to Article 47:

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other



administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability....

34. The court in *Kenyan Human Rights Commission & another v. Non-Governmental Organization Co-ordination Board & another* (2018) eKLR, stated:

“40. ... Administrative actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness. Accordingly, a party, a hearing before taking action against him is no longer discretionary. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation...”

82. Article 20 provides that the Bill of Rights applies to all law and binds all State organs and all persons. In carrying out their duties the respondents were thus bound by Article 47 of the *Constitution* which among others, bound them to make decisions that are reasonable, and procedurally fair.

83. I have closely examined the policy in question; ‘Policy on the Provision of Protective Security to VIPs and other State Officers’ and although the 1st Respondent appears to downplay the necessity of providing protective security by simply describing it as a privilege, by such the rationale provided in the policy is emphatic that it is thus very a critical requirement. It states at clause 3.0 as follows:

“The rationale for provision of security services to serving, retired VIPs and other officers is based on the following considerations:

- 3.1 Arising from the nature of their duties and high profile public (*sic*), they are increasingly at risk of threats. This is due to the nature of the sensitive information and cases they handle in the course of their duties

- 3.3 The absence of private security organizations that are specialized in the provision of protective security services to VIPs in Kenya.

In view of the above, the onus is on the Government to provide such security services. The policy will therefore guide the provision of protective security services, the number of officers, their training and duration of their service. This is expected to be proactive and preventive measure to ensure that no insecurity incident occur to serving, retired VIPs or State Officers”

84. In the list of officers entitled to security protection at Clause 4.0 (k) are ‘Governors and Deputy Governors of a County’ where the Interested Parties fall. There are specific deployment requirements



on number of security personnel, which I need not discuss here as I consider this to sensitive security information.

“Under clause 5.3 xii; the Policy specifies that VIP protection will not be accorded to the following:

- a. Those who have been convicted of a criminal offence
- b. Those who have committed offences under Section 103 of the [National Police Service Act](#) (2011).
- c. Those who commit breach of peace.
- d. Those who will abuse the privilege of being accorded VIP protection.
- e. A VIP who relocates to another country.”

85. The existence of this policy and the rationale behind it underscores one fundamental thing, the provision of protective security by the State to the officers identified in the policy is based on justified need caused by exposure arising from the nature of their public duties hence is not a mere privilege being extended to them as purported by 1st respondent, it because of additional risk due to the official duties related to their functions. This is therefore not a benefit that should be given and withdrawn at the casual whims of the 1st respondent for it leaves the officer exceedingly exposed. Further, the policy acknowledges the deficiency in the private sector in regard to provision of protective security leaving the State officer with no other viable option.

86. It follows therefore that withdrawal of protective security that has to be procedurally and fairly done where the person by ensuring that the person who loses the benefit is given adequate notice about the intention to withdraw the protective security and reasons for the same mirroring those identified in the Policy clause 5.3 (xii). In fact, Article 47 (2) provides that ‘if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.’

87. The 1st Respondent’s Policy that in force does in fact reinforce the right to administrative action under Article 47; hence there should be no room for unpredictable and arbitrary withdrawals of protective security without sufficient reasons. That security is provided based on merited need that part has been assessed and acknowledged by the policy hence its withdrawal must abide by the due process. It must not be whimsical. The 1st Respondent cannot hide behind the fact that provision of protected security services is not in the Statute yet it is in its own policy document. An organizations policy is binding on it and the 1st Respondent must fully comply with the terms of its own policy unless they are shown to be against legislation or the [Constitution](#) which is not the case here.

88. I thus find that the 1st respondents action of withdrawing the protective security of the 1st and 2nd Interested Party without notice or reasons for the decision not only contravened its own policy which contemplates that there will be reasons for withdrawal as specified in clause 5.3 (xii) but also, the action was unreasonable and un procedurally contrary to Article 47 (1) of the [Constitution](#).

89. As was held in [Alice Muthoni Wabome v. Inspector General of Police & Another](#) [2020] eKLR

“...She was not informed of any reason why her security was being withdrawn. I further find even, if the Inspector General of Police, had the powers to withdraw the security of the petitioner, he ought to have informed the petitioner of the charges and given her a fair hearing. I find that it was unfair, unprocedural, unlawful and an abuse of power by the



1st Respondent to have withdrawn the Petitioner’s security, contrary to the provisions, set out under the Policy on Provision of protective security to VIPs and other state officers; under Part 5.3 xii. The Respondents cannot therefore be allowed to selectively withdraw Petitioner’s Security for ulterior motives contrary to criteria set, when, it is clear that there is uncontroverted fact that the Petitioner has not been charged with any offence and she is not under any known or disclosed investigations for any offence...”

Whether the Petitioner and Interested Parties are entitled to the relief sought.

90. In *Charles Muturi Macharia & 6 Others v Standard-Group & 4 Others* (SC) Petition No.13 (E015) of 2022; the Supreme Court held that the list of remedies under Article 23 (3) is not exhaustive and most importantly, whether or not to grant a judicial relief is an exercise of Court’s discretion which must be exercised judiciously. It stated:

“...As a launching pad, it is acknowledged that the list of six remedies in Article 23(3) is not closed; that the court can grant any other appropriate relief not included in the list; that whether or not to grant a constitutional relief is an act of judicial discretion which must be exercised upon known legal principles and not arbitrarily, whimsically or capriciously...”

91. In the present case, the Court observed that it may not be aware of the actual state of affairs at the moment in regard to the return of the 1st and 2nd Interested Parties security detail as the Petitioner did not counter the issue with facts when the Respondent informed the Court that the matter was no longer a live controversy. The Court may thus not want to issue orders in vain.

92. Nevertheless, the reason why the Court decided to proceed with the case is to ensure disputes of this nature do not recur and thus the matter deserved further consideration on public interest basis. Consequently, the Court would thus be considering the remedy of declaration whose purpose is as was stated in *Bitange Ndemo v Director of Public Prosecutions & 4 others* [2016] eKLR; where the Court held:

“A declaration is a formal statement by the court pronouncing upon the existence or non-existence of a legal constitutional state of affairs. It declares what the legal position is and what are the rights of the parties. It does not contain an order which can be enforced against the respondents, as it only declares what is the legal position. It is not a coercive remedy and can be carefully couched or tailored so as not to interfere with the activities of public authorities more than is necessary to ensure that those public authorities comply with the law.”

93. In the light of the above, I grant the following relief:

- a. A declaration is hereby issued that provision of protected security detail to persons performing public duties is based on merited assessment that arises from the nature of the public duties and any withdrawal or removal of security without prior written notice, an opportunity to be heard and written reasons for the decision being given to the affected person (s) violates Article 47(1) & (2) of the *Constitution* and the applicable policy hence unconstitutional, unlawful, null and void.
- b. I make no orders as to costs considering that this is public interest litigation.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF MAY, 2025.

L N MUGAMBI



JUDGE

