



**Mugane v Cabinet Secretary, Ministry of Youth Affairs, the Arts and Sports & another;
Kenya Copyright Board (Interested Party) (Constitutional Petition E082 of 2023)
[2024] KEHC 2781 (KLR) (Constitutional and Human Rights) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2781 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E082 OF 2023**

**LN MUGAMBI, J
MARCH 20, 2024**

BETWEEN

CHARLES MUGANE PETITIONER

AND

**CABINET SECRETARY, MINISTRY OF YOUTH AFFAIRS, THE ARTS AND
SPORTS 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

AND

KENYA COPYRIGHT BOARD INTERESTED PARTY

RULING

1. By an oral application made on 12th June 2023, the petitioner sought to amend petition dated 23rd March 2023. The basis of this application was the revocation of the impugned Gazette Notice No.1649 through Gazette Notice No.7509 dated 7th June 2023.
2. The petition sought the following orders:
 - i. A declaration that the establishment of the Sports Technical Committee and the Creatives Technical Committee is an attempt to usurp the mandates of existing statutory bodies being Sports Kenya, Kenya Sports Academy and Kenya Copyright Board.
 - ii. A declaration that the purported establishment and the consequent appointments of the Chair Persons and members of the Sports Technical Committee and the Creative’s Technical Committee vide Gazette Notice No.1649 (Vol.CXXV -No.32) dated 10th February 2023 did



not meet the laid down substantive and procedure; constitutional requirements applicable in the public service and is therefore unconstitutional, unlawful, irregular, null and void for being in contravention of Articles 10,27,73(2) and 232 of the Constitution.

- iii. An order quashing Gazette Notice No.1649 (Vol.CXXV -No.32) dated 10th February 2023 vide which the Cabinet Secretary for the Ministry of Youth Affairs, the Arts and Sports purported to establish and therefore appoint the Chairpersons and members of the Sports Technical Committee and the Creatives Technical Committee.
 - iv. Costs of this petition be borne by the 1st respondent herein.
 - v. Such other orders this Court shall deem fit pursuant to Articles 23(3) of the Constitution.
3. Miss Wamuyu for the 2nd respondent averred that since the impugned Gazette Notice had been revoked, there was no longer any controversy for this Court to determine. She argued that determination of the petition would be an academic exercise and so the petition should be withdrawn. In her view, allowing the amendment is tantamount to adopting a new petition which would be prejudicial to the respondents.
4. The petitioner in reply contended that the 1st respondent had revoked the Gazette Notice on the same day Talanta Hela Council and its Technical Committees was launched. He asserts that it's not clear which superseded the other between its launch and the revocation. He further made known that he sought to amend the petition to ventilate on the Council's budget with the appointment of 24 months. Essentially being that the Technical Committees have been annulled, he questioned the basis for the Council.

Petitioner's Submissions

5. The petitioner in his submissions dated 26th June 2023 seeks to amend the prayers therein as follows:
- i. A declaration that the establishment of the Creatives Technical Committee Talanta Hela Council and its Technical Committees being; The Sports Technical Committee and the Creatives Technical Committee is an attempt to usurp the mandates of existing statutory bodies being the Sports Kenya, the Kenya Sports Academy and the Kenya Copyright Board.
 - ii. A declaration that the purported establishment and the consequent appointments of the Chair Persons and Members of the Sports Technical Committee and the Creatives Technical Committee vide Gazette Notice No. 1649 (Vol. CXXV-No. 32) dated 10th February 2023 did not meet the laid down substantive and procedural constitutional requirements applicable in the public service; and is therefore unconstitutional, unlawful, irregular, null and void for being in contravention of Articles 10, 27, 73(2) and 232 of the Constitution.
 - iii. A declaration that the establishment of the Talanta Hela Council and its Technical Committees being; The Sports Technical Committee and the Creatives Technical Committee are unconstitutional, unlawful, irregular, null and void for being in contravention with the Constitution of Kenya, 2010.
 - iv. A declaration that the purported appointments of the Chair Persons and Members of the Talanta Hela Council and its Technical Committees being; The Sports Technical Committee and the Creatives Technical Committee did not meet the laid down substantive and procedural constitutional requirements applicable in the public service; and is therefore unconstitutional, unlawful, irregular, null and void for being in contravention of Articles 10, 27, 73(2) and 232 of the Constitution.



- v. An Order quashing Gazette Notice No. 1649 (Vol. CXXV-No. 32) dated 10th February 2023, vide which the Cabinet Secretary for the Ministry of Youth Affairs, The Arts & Sports purported to establish and therefore appoint the Chairpersons and Members of the Sports Technical Committee and the Creatives Technical Committee. mandatory Order does issue compelling the 1st Respondent to disband the Talanta Hela Council and its Technical Committees being; The Sports Technical Committee and the Creatives Technical Committee for being unconstitutional, unlawful, irregular, null and void in contravention of the Constitution.
 - vi. Costs of this petition be borne by the 1st respondent herein.
 - vii. Such other orders this Honourable Court shall deem fit pursuant to Article 23(3) of the Constitution.
6. According to the petitioner the 1st respondent circumvented this Court's Order issued on 22nd May 2023 which suspended the impugned Gazette Notice. He avers that nonetheless the 1st respondent mischievously on 9th June 2023 went ahead to launch the Talanta Hela Council and its Technical Committees at State House.
 7. In support the petitioner relied in Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR where the Court of Appeal held that:

“Powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”
 8. Like dependence was placed in Institute For Social Accountability & another v Parliament of Kenya & 3 others [2014] eKLR and James Marienga Obonyo & 2 others v Suna West National Government Constituency Development Fund Committee & another [2021] eKLR.
 9. The petitioner asserted that the key contention in his petition was the constitutionality of the establishment of the Talanta Hela Council, its Technical Committees and the illegal appointments of the chairs and members. He stressed that it is clear that the 1st respondent actions were geared toward defeating justice while evading accountability. He added that the application had been filed without delay and that no prejudice would be occasioned on the respondents if the application is allowed.

1st Respondent's Submissions

10. Through its submissions dated 6th July 2023, State Counsel Ruth Wamuyu submitted that the basis of the petition was the impugned Gazette Notice No. 1649. According to Counsel, the sought amendment to the petition introduces a new and inconsistent cause of action contrary to the principles of amendment of the pleadings as held in Elijah Kipngeno Arap Bii (*supra*).



11. This is since the key issue was put to rest by Gazette notice 7509 which revoked the impugned Gazette Notice. In effect it was stated that the petition had been rendered moot. Reliance was placed in *Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] eKLR 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.....”

12. She further contended that although the petitioner averred that Talanta Hela Council and its Technical Committees exists illegally, the same had not been proved by the petitioner. To this end, Counsel submitted that amendment of a moot petition would be tantamount to an abuse of the court process as explained in the case of *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 [2009] e KLR 229.

Interested Party’s Submissions

13. The interested party through its Counsel A. Nyabwengi filed submissions and a list of authorities dated 3rd July 2023. It was submitted that the premise of this petition was the establishment of Talanta Hela Council and its Technical Committees. Being that the same had been revoked, Counsel stated that the subject matter of the petition had been rendered moot.
14. Reliance was placed in *Nornael Okello G,oganyo vs Independent Electoral Commission Selection Panel & 2 others; Independent Electoral and Boundaries Commission & 6 others (Interested Parties)* [2022]eKLR where it was held that:

“Mootness is a facet of justiciability that ensures there exists a real controversy throughout all stages of judicial proceedings.”

15. Analogous reliance was placed in *Elijah Kipngeno Arap Bii* (*supra*).
16. Counsel further attacked the petitioner’s allegation that Talanta Hela Council and its Technical Committees was unlawfully in existence in view of the purported State House ceremony. Counsel in this regard disclosed that what had been launched at Statehouse was the Talanta Hela Flagship Initiative and the Talanta Hela App which is distinct from the issue in the instant petition.
17. It was as well argued that the petitioner had not adduced evidence to support his claim that the impugned Council and its Committees are in existence. For this reason, Counsel submitted that the application had not met the threshold for amendment of pleadings and so should be dismissed together with the petition.

Analysis and Determination

There are two issues for determination, namely:

- i. Whether the petitioner should be granted leave to file the amended Petition



- ii. Whether the amended Petition would be Justiciable in view of Gazette notice Number 7509 of 7th June, 2023
18. The law on the amendment of constitutional petitions is set out under Rule 18 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013 as follows:
‘A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.’
19. The aforementioned rule divulges that an amendment is not spontaneous. The Court must examine the factors of each case to ascertain whether the set principles have been adhered to and in its discretion proceed to make a pronouncement in the matter.
20. The three-judge bench in addressing the question of amendment of pleadings and factors to be considered noted as follows in [Institute For Social Accountability & Another](#)(*supra*):
- “ 18. The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.
19. Rule 18 of the Rules clearly stipulates that the court may permit an amendment at any stage of the proceedings. The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”
21. Additionally, the Court of Appeal while citing the principles to be considered in the case of [Elijah Kipngeno Arap Bii](#)(*supra*) reiterated their position in their earlier decision. They opined as follows:
- “The law on amendment of pleading.....was summarized by this Court, quoting from *Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition*, in the case of *Joseph Ochieng & 2 others v First National Bank of Chicago, Civil Appeal No. 149 of 1991* as follows:-
- “The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”



22. Likewise, the Court of Appeal in *Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago* [1995]eKLR issued the following guidance in considering whether an amendment should be allowed:

“I would myself adopt as sound reasoning what Lord Griffiths said in the case of *Ketteman v Hansel Properties Limited* [1988] 1 ALL ER 3S at page 62:

“Furthermore whatever may have been the rule of conducts a hundred years ago to-day it is not the practice invariably to allow a defence which is wholly different from that pleaded to be raised by amendment at the end of trial even on terms that an adjournment is granted and that the defendant pays all costs thrown away that is a clear difference between allowing amendment to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.

There can be no doubt that what Lord Griffiths said stands in Kenya to-day.

I also agree with what Lord Griffiths said in the *Ketteman Case* (supra) at page 62:

“Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion...”

23. Turning to the averments by the parties, the petitioner asserts that the amendment is intended to bring to book the 1st respondent for its actions in relation to the illegal establishment of Talanta Hela Council and its Technical Committees following revocation of the impugned Gazette Notice No.1649 which had initially established it. The petitioner was unyielding that the real issue in the dispute was the 1st respondent’s attempt to usurp the mandate of the already existing statutory bodies hence not a new cause action as alleged.
24. The respondents and interested party on the other hand contend that the subject petition is moot as the issue that was sought to be determined was put to rest by Gazette Notice No.7509 that revoked the establishment of the Talanta Hela Council and its Technical Committees. Therefore, that the controversy had been resolved. On the other hand, the parties submitted that despite the petitioner asserting that the Council and its Committees had been re- established illegally, this allegation was unsupported by evidence.
25. A scrutiny of the proposed amendments shows that the amendments substantially seek amend the reliefs/prayers to the effect that the establishment of the Talanta Hela Council and its Technical Committees and appointment of its Chair Persons and Members is unconstitutional, unlawful, irregular, null and void for being in contravention with the *Constitution*. The body of the Petition is however left intact yet its foundation is the Kenya Gazette Notice number 1649 Vol. CXXV- No. 32 dated 10th February, 2023. At paragraph 12 Petition where the Petitioner pleads the facts relied upon he states:

“12. Vide Kenya Gazette issue dated 10th February 2023 Vol. CXXV No. 32 under Gazette No. Number 1649, the 1st Respondent notified for general information of the public the purported establishment and appointment of the ‘Talanta Council and its technical Committees’ namely the Sports Technical Committee and the Creatives Technical Committee”

26. Looking at the proposed amendments, they do not materially depart from the dispute originally framed by the Petitioner whose complaint was the alleged illegal establishment of the Talanta Hela



Council and its Technical Committees through the gazette notice number 1649 of 10th February, 2023 and cannot therefore be said to introduce a fresh or different cause action which is inconsistent with what was there before, neither can one say they are intended to cause undue delay or prejudice to the respondents if they were to be allowed. Had there been no other issue, I would have allowed the same. Nevertheless, Court needs to consider the utility of allowing these amendments in view the new developments that were directed at gazette notice number 1649 of 10th February, 2023 which basically gave rise to this Petition.

ii. Whether the amended Petition would be Justiciable in view of Gazette notice Number 7509 of 7th June, 2023

27. Through Gazette Number 7509 of 7th June, 2023; the 1st Respondent published a notice to the general public that changed substantially the narrative upon which this Petition was hinged. The said gazette notice stated:

“...IT IS notified for the information of the general public that the Cabinet Secretary for Youth Affairs, Sports and the Arts has revoked Gazette Notice Number 1649 of 2023...”

28. Consequently, before exercising its discretion to allow the proposed amendments, the Court must be certain that controversy is still alive or that the said amendments if allowed will resuscitate the case otherwise it would be pointless to waste precious judicial time on an already a lost cause. The Court must therefore consider if the controversy can still be litigated (justiciable) in view of new developments for it would be futile to allow the amendments of a petition that is already moot.

29. ‘Mootness’ is legal doctrine that describes a situation where the dispute is no longer there. The Court of Appeal in *Okiya Omtatab Okoiti and 2 others v Attorney General & 4 others* [2020] eKLR quoting the Black’s Law Dictionary, stated 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”.

30. Discussing the principle, the Court in *Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] eKLR explained:

“26. 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.

27. The legal doctrine known as ‘mootness’ is well developed in constitutional law jurisprudence. Accordingly, a case is a moot one if it:



“...seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy.”

28. Furthermore, a case will be moot-

“...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, and the court is without power to grant a decision.”

29. Barron and Dienes put it succinctly when they observe that “a case or controversy requires present flesh and blood dispute that the courts can resolve.” Loots, a South African constitutional commentator, endorses these sentiments and points out that a case-

“...is moot and therefore not justiciable if it no longer presents an existing or live controversy or the prejudice, or threat of prejudice, to the plaintiff no longer exists.”

30. However, a court will decide a case despite the argument of mootness if to do so would be in the public interest.”

31. As a matter of fact, Gazette Notice Number 1649 of 10th February, 2023 that had established Talanta Hela Council and its Technical Committees was revoked by Gazette Notice No.7509. That was the end game in so far as this controversy is concerned. This revocation struck a deadly blow that went to the root of this controversy hence no useful purpose can be served by insisting on pursuing this Petition. The petitioner claimed that the Talanta Council and its Technical Committees had been re-established illegally but in the light of a formal gazette notifying the general public of their revocation, the Petitioner’s claim flies in the face. I find that this contention was effectively displaced. In my humble assessment, the proposed amendments cannot give the kiss of life to this Petition which was rendered totally moot by Gazette Notice number 7509 of 7th June, 2023. It no longer presents a justiciable cause worth pursuing.

32. The Petition is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH, 2024.

.....

L N MUGAMBI

JUDGE

