

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 17 OF 2021

BETWEEN

COMMISSION FOR HUMAN RIGHTS AND JUSTICE.....PETITIONER

VERSUS

ASSETS RECOVERY AGENCY.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

AND

ALICE MATE.....INTERESTED PARTY

RULING

Introduction

1. The Petition dated 30th July 2021 challenges the 1st Respondent's failure to declare and advertise a vacancy in the office of the Director of the 1st Respondent.
2. The Petitioner avers that the recruitment process should be done through a fair competitive process in line with Article 10 and 232 of the Constitution and not under secrecy.
3. Consequently, the Petitioner challenges **Section 53(2) of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA)** for violating **Articles 10 and 232 of the Constitution.**

The Petitioner further takes issue with **Section 54A (1) & (6)** of the **POCAMLA** on the basis that it violates Article 248 of the Constitution in designating the 1st Respondent as an independent commission. Accordingly, the Petitioner seeks the following reliefs against the Respondents:

- i. A permanent injunction restraining the 1st Respondent and Interested Party from discharging any function of Assets Recovery Agency until the Proceeds of Crime and Anti-Money Laundering Act, 2009 is amended to create a Board for Assets Recovery Agency.***
- ii. A declaration that the Interested Party, was not appointed in accordance with Articles 10 and 232 of the Constitution and in accordance with Section 10 of the Public Service (Values and Principles) Act No. 1A of 2015 and that she is therefore in office illegally and is incapable of discharging the functions of Agency Director under the Act.***
- iii. An order of injunction restraining the Interested Party from entering or remaining in the office of Agency Director of Assets Recovery Agency or discharging any functions of agency director.***
- iv. A declaration that Section 54A(1) of POCAMLA is unconstitutional to the extent that it categorizes Assets Recovery Agency as a commission of Independent office within the meaning of Article 248 and 249 of the Constitution and is therefore null and void.***
- v. A declaration that Section 54A (6) of POCAMLA is unconstitutional and therefore null and void to the extent that it authorizes Assets Recovery Agency to keep holding money that it does not use or need.***

vi. Costs of this Petition be provided for.

The Preliminary Objection

4. The 1st Respondent filed a **Notice of Preliminary Objection dated 9th February 2022** against the entire Petition hence this ruling. The grounds raised in the Objection are:
- i. The Petition is moot as the impugned Sections of the Proceeds of Crime and Anti-Money Laundering Act, 2009 have been repealed and/or amended by the Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2021.*
 - ii. With the Amendments, there is no live controversy between the parties and there are no issues for determination before the Court affecting or potentially affecting the rights of the parties.*
 - iii. The doctrine of mootness is part of a general public policy that a Court may decline to decide on a case which raises merely hypothetical or abstract questions.*
 - iv. Proceeding with the Petition will amount to an academic exercise and a waste of judicial time.*
 - v. This Preliminary Objection be heard and determined in limine.*

Parties Submissions

1st Respondent and Interested Party's Submissions

5. The 1st Respondent through its Counsel, Mohammed Adow filed submissions dated 23rd May 2024 in support of both the Petition and its Preliminary Objection.

6. With specific focus on the instant objection, Counsel submitted that the 2nd Respondent was empowered to appoint the Interested Party under Section 53 of POCAMLA. It was argued that the Petitioner had failed to demonstrate how the 2nd Respondent how in complying with that provision Respondent violated the Constitution and the law. Counsel for this reason contended that the Petitioner was on a fishing expedition as the allegations were unsupported and that no affidavit had been sworn to that effect.
7. Equally, Counsel argued that the Petitioner had failed to demonstrate the manner in which Section 54A (1) and (6) of the POCAMLA was inconsistent with the cited constitutional provisions.
8. Counsel further pointed out that the tenure of the Interested Party being the serving Director is protected under the new amendments and Section 130c of the POCAMLA. Considering this, it was stressed that the instant Petition is moot and thus lacking merit.

Petitioner's Submissions

9. Shabaan Associates LLP for the Petitioner filed submissions dated 29th January 2024 in view of the Petition and the Preliminary Objection.
10. With regards to the instant Preliminary Objection, Counsel acknowledged that the law does not act retrogressively but matter, it was filed validly when the repealed law was still in force yet the Interested Party whose appointment is challenged, still holds the office.

11. As such despite the cited amendments, the question that remains is whether or not the Interested Party was lawfully appointed. Considering this, it was argued that the Interested Party's appointment cannot be argued to be moot.

2nd Respondent's submissions

12. The 2nd Respondent did not file submissions in relation to the instant preliminary objection. This party only filed submissions in relation to the Petition dated 5th February 2024.

Analysis and Determination

13. Having reviewed the parties' pleadings and submissions, the key issues that arise for determination are as follows:

- i. Whether the 1st Respondent's Notice of Preliminary Objection satisfies the threshold of preliminary objections*
- ii. Whether the jurisdiction of this Court is barred by the doctrine of mootness.*

Whether the 1st Respondent's Notice of Preliminary Objection satisfies the legal threshold of a proper preliminary objection

14. The threshold of a preliminary objection was laid out in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 69** and has been numerously sanctioned in subsequent court decisions including by the Supreme Court in **Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others (2014) eKLR** as follows:

"[31] To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696:*

"a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion"

15. On utility of raising preliminary objections, the Supreme Court elaborated as follows in **Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Civil Application 36 of 2014) [2015] KESC 2 (KLR) (15 December 2015) (Ruling):**

"21. The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits... In the instant matter, we consider the objector to have moved her motion, more as a sword than a shield. Such a course is not to be permitted, as it is apt to occasion an injustice

to the applicant, and indeed, to the wider public interest.”

16. Going by the above, I would summarize the essential characteristics of a proper preliminary objection to be as follows:
- a) *if argued successfully, a preliminary objection should be capable of disposing of the suit.*
 - b) *is argued on the assumption that all the facts pleaded by the other side are correct*
 - c) *It cannot be raised if any fact has to be ascertained*
 - d) *It cannot be if what is sought is the exercise of judicial discretion.*
17. In the instant suit, there is no contest based on facts. Indeed, the issue upon which the preliminary objection hinges on is that the provisions of **Proceeds of Crime and Anti-Money Laundering Act (POCAMLA)** that this Petition is founded on have since been repealed.
18. Mootness simply means the controversy no longer exists and thus no practical dispute exists to deserve Court’s consideration. If mootness is successfully demonstrated, it becomes a jurisdictional limitation as the Court does not need to be engaged in matter where no controversy or dispute exists for resolution.
19. I thus find this P.O satisfies the essential characteristics of a proper Preliminary Objection hence the next issue of whether the Petition is barred by the doctrine of mootness.

Whether the jurisdiction of this Court is barred by the doctrine of mootness.

20. In **Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] eKLR** the Court of Appeal citing with approval the High Court decision of *Daniel Kaminja & 3 others (Suing as Westland Environment Caretaker Group vs County Government of Nairobi (2019) eKLR* explained the doctrine of mootness as follows:

"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..."

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 judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity..."

21. Equally, the Court of Appeal in **National Assembly of Kenya & another v Institute for Social Accountability & 6 others [2017] eKLR** stated as follows:

"... 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."

.... 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..."

22. In **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)** the South African constitutional Court while assessing the relationship between mootness and public interest observed as follows:

"[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."

23. A look at the undisputed facts of this case, discloses that the 1st Respondent's P.O. is premised on the claim that **Section 53(2); 54A (1) and (6) of the POCAMLA** which this Petition questions

have since been amended through ***Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2021.***

24. The impugned provisions read as follows:

Section 53(2) of the POCAMLA:

The Attorney-General shall upon recommendation by the Advisory Board appoint a fit, competent and proper person to be the Director of the Agency (hereinafter referred to as the "Agency Director").

Section 54A (1) & (6) of the POCAMLA:

(1) The National Assembly shall allocate adequate funds to the Agency to enable the Agency perform its functions under this Act and any other written law and the budget shall be a separate vote.

...

(6) The receipts, earnings or accounts of the funding and balance of the funding at the close of each financial year, shall not be paid into the Consolidated Fund, but shall be retained for the purposes of the Agency.

25. The Petitioner in particular sought to have the Interested Party's appointment under Section 53(2) of the POCAMLA, declared unlawful for being in violation of Article 10 and 232 of the Constitution. Further that Section 54A (1) and (6) of the POCAMLA is unconstitutional.

26. Section 10 of the Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2021 amended Section 53 (2) as follows:

Section 53 of the principal Act is amended—

in subsection (2), by inserting the words "upon the recommendation by the Oversight Board" immediately after the words "the Attorney-General shall".

27. Section 10 also amended the following provisions under Section 53:

(b) by inserting the following new subsection immediately after subsection (2) —

"(2A) The Agency Director shall hold office for a term of four years and shall be eligible for re-appointment for one further term of four years."

(c) by deleting subsection (3) and substituting therefor the following new subsection-

(3) For a person to be appointed as the Agency Director, that person shall —

(a) hold a degree in law from a recognized university;

(b) have at least fifteen years work experience, of which at least five shall be in senior management;

(c) meet such other requirements that may be specified by the Oversight Board.

28. Furthermore, Section 12 of the Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2021 amended Section 54A as follows:

Section 54A of the principal Act is amended by deleting subsection (1) and substituting therefor the following new subsection —

"(1) The National Assembly shall allocate adequate funds to the Agency to enable the Agency perform its functions under this Act and any other written law and the budget shall be a separate vote."

29. Considering the above, it is crystal clear that, Sections 53(2) and 54A (1) of the POCAMLA have been amended by the Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2021.
30. In respect to Section 54A (1) of the Act, it is appreciated that the Petitioner's central contention was that the 1st Respondent was being referred to as a Commission in violation of Article 248 and 249 of the Constitution. A reading of this provision makes it plain that this provision was deleted in its entirety. In my view, this settles that contention. Effective from the date the provision was deleted, that status went with it. Consequently, it is my considered view that there is no live controversy in regard to that particular issue.
31. On the continuation of the Interested Party serving as Agency Director; it is evident that she was appointed under the provisions of the legislation as it prevailed then which at the time enjoyed the presumption of constitutionality having never been declared by any court to be unconstitutional. The provision of law that was relied upon in appointing her as the Director has however been subsequently repealed while she is still serving in the position of the Director of the Agency. The amendments are not indicated to have retrospective application.
32. **Section 23 of the Interpretation of Statutes and General Provisions** provides as follows in regard to the implication of repeal or amendment of the law.

Provisions respecting amended written law, and effect of repealing written law

23 (3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or
- (c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or
- (d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or
- (e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.

33. The amendments to the Act have introduced fresh requirements to be met for appointment of Asset Recovery Agency Director. This cannot in view of Section 23 (3) a, b & c revive what was not in force at the time the repeal took place, or affect the previous operation of the law so repealed or anything done or suffered under the written law so repealed or affect the right or privilege obligation or liability acquired or accrued or incurred under the law so repealed.

34. This Court cannot also be called upon to look back and determine the constitutionality of a repealed provision as it would not make any practical sense.
35. The proper question therefore would be, what is the implication of the new statutory provisions going forward but not backwards. The answer lies in Section 23 (3) of the Interpretation of Statutes and General Provisions cited above. The sitting Director's tenure, in the absence of any express provision invalidating her tenure, continues to completion as envisaged under the law under which she was appointed but any future appointment or reappointment must conform with the new statutory requirements.
36. In the light of the amendments to and/or repeal of the impugned provisions that formed the substratum of this Petition, it is my finding that the instant Petition has been rendered moot and the jurisdiction of this Court to determine this matter no longer exists by reason of mootness.
37. The upshot is that this Petition is struck out. As this is public interest litigation, each Party shall bear its

Dated, signed and delivered electronically in Nairobi this 31st day of December, 2024.

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L N MUGAMBI
JUDGE