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THE DOCTRINE OF MOOTNESS.

This doctrine requires that controversy must exist throughout judicial proceedings.

When to consider a matter as moot.

A matter is considered moot when a decision will not resolve a live controversy affecting or potentially affecting the rights of the parties. In other words, when the matter has no practical significance or effect on the rights of the parties before the court. If a court's decision has no such effect, it will decline to decide the case.

Accordingly, a live controversy must exist between the parties at all stages of the case. If, after proceedings begin, events change the facts or law, depriving the parties of the pursued outcome or relief, the matter becomes moot. This controversy must be present both when the case starts and when the court renders its decision. (*Institute for Social Accountability & another v National Assembly & 3 others (Petition 1 of 2018) [2022] KESC 39 (KLR) (8 August 2022) (Judgment)*)

A further explanation to the above is 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 or when the cause of action has been lost or overtaken by intervening events. In such instance, there is no actual substantial relief which a litigant 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. (*Ole Pere & another v District Land Adjudication and Settlement Officer, Narok South & 24 others; Pere & another (Interested Parties) [2025] KECA 113 (KLR)*)

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Precedence

Lenaola SCJ in the case of *Attorney General & 3 others v David Ndii & 73 others: Prof Rosalind Dixon & 7 others (amicus curiae) (SC Petition 12, 11 & 13 of 2021 (Consolidated) [2022] KESCA 8 (KLR) (Constitutional and Human Rights) (31 March 2022) (Judgment)* (with dissent), quoted with approval the decision of the High Court of South Africa in *Afriform NPC and others v Eskom Holdings SOC Limited & others 3 All SA 663 (GP)* where it stated:

> 'The mootness barrier therefore usually arises from events arising or occurring after an adverse decision has been taken or a lawsuit has got underway, usually involving a change in the facts or the law, which allegedly deprive the litigant of the necessary stake in the pursued outcome or relief. The doctrine requires that an actual controversy must be extant at all stages of review and not merely at the time the impugned decision is taken or the review application is made.' [Emphasis added]

The Supreme Court of *Kenya Institute for Social Accountability & Another vs. National Assembly & 3 Others & 5 Others (Petition 1 of 2018) [2022] KESC 39 (KLR)* (8 August 2022) (Judgment) after considering authorities on the doctrine of mootness held:

> "The common thread from the above decisions is 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."

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In *Okiya Omtatah Okoiti & 2 Others vs. Attorney General & 4 Others [2020]* at paragraph 65, while citing the High Court decision in *Daniel Kaminja & 3 others (suing as Westland Environment Caretaker Group) vs. County Government of Nairobi [2019] eKLR* held that:

> "A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic Mootness arises when there is no longer an actual controversy between the parties to a court case and any ruling by the court would have no actual practical impact...
>
> No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. In the instant case, a consideration of the petition based on a press statement which was later followed by a legal notice which amended the provisions of the governing Regulations would become academic, cosmetic and of no utilitarian value or benefit as the aim of the petition has been overtaken by the amendments. See *Oladipo vs. Oyelami [1989] 5 NWLR (Pt. 120) 210; Ukejianya vs. Uchendu [1950] 13 WACA 45*
>
> 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. See *Plateau State vs. A.G.F. {2006} 3 NWLR (Pt. 967) 346 at 419* paras. F-G wherein the Nigerian Supreme Court defined an academic suit or petition the above terms..."

The constitutional court of South African in *Normandien Farms (Pty) Limited vs. South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others [2020] ZACC 5* discussing the doctrine of mootness stated as follows:

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> "Mootness is when a matter 'no longer presents an existing or live controversy'. The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are 'abstract, academic or hypothetical'.
>
> This Court has held that it is axiomatic that 'mootness is not an absolute bar to the justiciability of an issue [and that this] Court may entertain an appeal, even if moot, where the interests of justice so require'. This Court 'has discretionary power to entertain even admittedly moot issues'.
>
> Moreover, this Court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter."

The instances in which a dispute is rendered moot were also discussed by the Supreme Court of *Canada in Borowski v Canada (Attorney General) [1989] 1 SCR 342*, where it stated that a repeal of a by-law being challenged; an undertaking to pay damages regardless of the outcome of an appeal; non- applicability of a statute to the party challenging the legislation; or the end of a strike for which a prohibitory injunction was obtained were some of the circumstances that render an appeal moot. The court further opined that determining whether an appeal is moot or not requires a two-step analysis.

1. A court is first required to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so,
2. It is then necessary to decide if the court should exercise its discretion to hear the case.

Exceptions to the Doctrine

Courts generally declined jurisdiction over cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised required the formulation of controlling principles to guide the bench, the bar and the public; or when the case was capable of repetition.

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Also, a case was not moot so long as the plaintiff continued to have an injury for which the court could award relief, even if entitlement to the primary relief had been mooted and what remains was small. The presence of a "collateral" injury was an exception to mootness. Distinguishing claims for injunctive relief from claims for damages was important. Because damage claims sought compensation for past harm, they could not become moot. (*Republic v Kenya Maritime Authority & another; Zam Zam Shipping Limited (Interested party) 2021] KEHC 309 (KLR)*)

Another exception to the doctrine is 'Capable of Repetition, Yet Evading Review'. This exception does apply but only in exceptional situations in which the matter is in a duration too short to be fully litigated prior to cessation or expiration; and there is a reasonable expectation that the same complaining party will be subject to the same action again. If this exception to mootness did not exist, then certain types of time-sensitive controversies would become effectively unreviewable by the courts.

For example, a pregnant woman's constitutional challenge to an abortion regulation. Once a woman gives birth, abortion is no longer an option for terminating that particular pregnancy. However, litigation of national political significance can rarely be fully resolved in a mere nine months; the normal 266-day human gestation period is so short that pregnancy will come to term before the parties and the court could realistically litigate a constitutional challenge to an abortion statute to its conclusion. Thus, if a challenge to an abortion regulation became moot as soon as the challenger gave birth, pregnancy litigation seldom would survive much beyond the trial stage.

Conclusion

The doctrine of mootness is based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law and that courts should avoid deciding on matters that are abstract, academic, or hypothetical.