



REPUBLIC OF KENYA



**Karimi & 59 others v Cabinet Secretary, Ministry of Agriculture  
Livestock and Fisheries & 10 others (Constitutional Petition  
8 of 2019) [2024] KEHC 10748 (KLR) (29 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10748 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CONSTITUTIONAL PETITION 8 OF 2019  
LW GITARI, J  
AUGUST 29, 2024**

**BETWEEN**

**ROSE KARIMI ..... 1<sup>ST</sup> PETITIONER**  
**ALMANO BARIU ..... 2<sup>ND</sup> PETITIONER**  
**DOMIANO MURIUNGI ..... 3<sup>RD</sup> PETITIONER**  
**PAULINE KANINI ..... 4<sup>TH</sup> PETITIONER**  
**ZABERA KARIMI ..... 5<sup>TH</sup> PETITIONER**  
**ROSE KARIMI ..... 6<sup>TH</sup> PETITIONER**  
**JADIEL KAIRITHA ..... 7<sup>TH</sup> PETITIONER**  
**JACOB M'ARITHI ..... 8<sup>TH</sup> PETITIONER**  
**CYPRIAN MITHIKA ..... 9<sup>TH</sup> PETITIONER**  
**JOSHUA MCOITI ..... 10<sup>TH</sup> PETITIONER**  
**JUMA MURIKINYI ..... 11<sup>TH</sup> PETITIONER**  
**MARTIN KIMATHI ..... 12<sup>TH</sup> PETITIONER**  
**FRANCIS LAICHENA ..... 13<sup>TH</sup> PETITIONER**  
**EDWARD KIREMA ..... 14<sup>TH</sup> PETITIONER**  
**JOHN KOBIA ..... 15<sup>TH</sup> PETITIONER**  
**FRANCIS KOBIA ..... 16<sup>TH</sup> PETITIONER**  
**JOSEPH MWITI ..... 17<sup>TH</sup> PETITIONER**  
**MORIS KAILEMA ..... 18<sup>TH</sup> PETITIONER**



HARISON MURUNGI .....	19 <sup>TH</sup> PETITIONER
PAGRAS KABIRI .....	20 <sup>TH</sup> PETITIONER
STEPHEN THINGAU .....	21 <sup>ST</sup> PETITIONER
M'MARETE MWENDA .....	22 <sup>ND</sup> PETITIONER
JOSPHAT KAIRICU .....	23 <sup>RD</sup> PETITIONER
JACOB KOBIA .....	24 <sup>TH</sup> PETITIONER
EDWARD KANGWE .....	25 <sup>TH</sup> PETITIONER
NICHOLAS KOBIA .....	26 <sup>TH</sup> PETITIONER
HENRY BAARIU .....	27 <sup>TH</sup> PETITIONER
DANIEL GIKUNDI .....	28 <sup>TH</sup> PETITIONER
JOEL BUNDI .....	29 <sup>TH</sup> PETITIONER
SAMUEL KAIBUNGA .....	30 <sup>TH</sup> PETITIONER
JANET KEGENDO .....	31 <sup>ST</sup> PETITIONER
M'EMBU THANIA M'IMANYARA .....	32 <sup>ND</sup> PETITIONER
PATRICK KITHINJI .....	33 <sup>RD</sup> PETITIONER
TIMOTHY KIREMA .....	34 <sup>TH</sup> PETITIONER
TIMOTHY MUNGORI .....	35 <sup>TH</sup> PETITIONER
JOSEPH KARIITHI .....	36 <sup>TH</sup> PETITIONER
JOSEPH KIMATHI .....	37 <sup>TH</sup> PETITIONER
MERCY KEENDI .....	38 <sup>TH</sup> PETITIONER
RAYMOND KITHERA .....	39 <sup>TH</sup> PETITIONER
SIMON KARIITHI .....	40 <sup>TH</sup> PETITIONER
JAMES CHOKERA .....	41 <sup>ST</sup> PETITIONER
STANLEY MWENDA .....	42 <sup>ND</sup> PETITIONER
DOUGLAS MIRITI .....	43 <sup>RD</sup> PETITIONER
JOSHUA KIREMA NDEGWA .....	44 <sup>TH</sup> PETITIONER
GIDIEL MWITI M'ARIMI .....	45 <sup>TH</sup> PETITIONER
JOHN PAUL MURIITHI .....	46 <sup>TH</sup> PETITIONER
JAPHITHA NTO'NDAI .....	47 <sup>TH</sup> PETITIONER
GEORGE NTORIBI .....	48 <sup>TH</sup> PETITIONER
JOSEPH KILIARA .....	49 <sup>TH</sup> PETITIONER
DANIEL GIKUNDI .....	50 <sup>TH</sup> PETITIONER



MORIS KAILEMA .....	51 <sup>ST</sup> PETITIONER
MOSES THURANIRA .....	52 <sup>ND</sup> PETITIONER
JULIUS MWINGIRWA .....	53 <sup>RD</sup> PETITIONER
JAPHITHA KILEMI .....	54 <sup>TH</sup> PETITIONER
GEORGE KIBATI .....	55 <sup>TH</sup> PETITIONER
JOHN MWENDA .....	56 <sup>TH</sup> PETITIONER
PATRICK MUTHOMI .....	57 <sup>TH</sup> PETITIONER
STEPHEN MUNYORI .....	58 <sup>TH</sup> PETITIONER
GEOFFREY KIEMA .....	59 <sup>TH</sup> PETITIONER
JOSEPH KUBAI .....	60 <sup>TH</sup> PETITIONER

**AND**

THE CABINET SECRETARY, MINISTRY OF AGRICULTURE LIVESTOCK AND FISHERIES .....	1 <sup>ST</sup> RESPONDENT
AGRICULTURE AND FOOD AUTHORITY .....	2 <sup>ND</sup> RESPONDENT
THE HONOURABLE ATTORNEY GENERAL .....	3 <sup>RD</sup> RESPONDENT
NATIONAL ASSEMBLY (PARLIAMENT) .....	4 <sup>TH</sup> RESPONDENT
SENATE (PARLIAMENT) .....	5 <sup>TH</sup> RESPONDENT
SPEAKER OF THE NATIONAL ASSEMBLY (PARLIAMENT) ....	6 <sup>TH</sup> RESPONDENT
SPEAKER OF THE SENATE .....	7 <sup>TH</sup> RESPONDENT
KENYA BUREAU OF STANDARDS .....	8 <sup>TH</sup> RESPONDENT
COMPETITION AUTHORITY .....	9 <sup>TH</sup> RESPONDENT
NUT PROCESSORS ASSOCIATION OF KENYA (NUTPAK) ....	10 <sup>TH</sup> RESPONDENT
CABINET SECRETARY, NATIONAL TREASURY .....	11 <sup>TH</sup> RESPONDENT

**JUDGMENT**

1. Before this Court is the Amended Petition dated 27<sup>th</sup> January, 2020 seeking the following reliefs:
  - a. Prohibition order do issue suspending and/or quashing Section 43 AFFA Act No. 13 to the extent that prohibiting export of mature, machine dried macadamia with shell is unlawful, unconstitutional and in gross violation of Articles 11, 19, 20, 21, 24, 27, 28, 40, and 47 of *the Constitution*.



- b. A declaration that mature and processed macadamia by way of machine drying but which has not been removed from the shell is not raw macadamia within the meaning of Section 43 of the AFA Act.
- c. A declaratory order do issue forthwith that the meaning of “raw macadamia” is strictly limited to immature and inedible nuts which may prejudice the consumer rights and quality standards.
- d. A declaratory order do issue forthwith decreeing that the Petitioners are entitled to own use of their macadamia including buying and/or selling of their macadamia to the buyer of their choice locally and/or internationally with/or without shell provided that the same is not raw macadamia as stated hereinabove at prayer 3.
- e. A declaratory order do issue forthwith decreeing that prohibiting export and/or sale of mature, machine dried and macadamia with shell is unlawful, unconstitutional and in gross violation of Articles 19, 20, 21, 24, 28, 32(1) & (4), 40, 43, 46, and 47 of *the Constitution* of Kenya 2010.
- f. An order do issue that macadamia being a fruit that can only be consumed according to individual style, wish and consumer rights, the any directive that macadamia can be removed shell contrary to the consumer rights and their wishes is unreasonable in an open and democratic based on human rights and dignity contrary to Article 24 of *the Constitution* of Kenya 2020 and violates the Petitioners Human Dignity, Human rights, Cultural Practices, Freedom of conscience, religion and belief contrary to articles 11, 19, 20, 24, 21, 47, 27, and 46 of *the Constitution*.
- g. A declaratory order do issue declaring that limiting and/or restricting the enjoyment of the petitioners’ right to their property and arbitrarily depriving the enjoyment of the Petitioners right to their property namely macadamia shell and which is of interest and commercial use of the Petitioners and which the Petitioners have right over is illegal, unlawful, unconstitutional and in violation of articles 19, 40, 47, and 24 of *the Constitution* of Kenya 2010.
- h. A declaratory Order do issue decreeing that allowing a section of business people to export macadamia while denying the Petitioners an equal opportunity to export macadamia, the Respondents are discriminating against the Petitioners thereby threatening and violating Article 27.
- i. An Order for compensation do issue to the Petitioners for the loss of business suffered as a result of illegal limitations and/or denying the Petitioners right to sell macadamia with shell to market of their choice, loss of an international market, loss of business opportunity & costs all totaling Kenya Shillings 3 Billion and the money be paid in full directly from the Ministry of Agriculture Livestock and Fisheries Exchequer account at National Treasury within 30 days of the Orders of this court to the Petitioners joint account which will be served upon the Respondents.

### **Summary of The Petitioners’ Case**

The Petitioner’s case may be summarized as follows:-

- a. Macadamia with shell cannot be termed as raw macadamia
- b. Macadamia has two shells, the outer green shell and the brown and upon removal of the outer green shell, the macadamia cannot be termed as raw macadamia;
- c. Section 43 of the *Agriculture and Food Authority Act* which prohibits the export of raw macadamia except with authority of the Cabinet Secretary and the Act which



prohibits the export of raw macadamia violates the right to dignity, freedom from discrimination, cultural rights of macadamia consumers and is at odds with national principles and values set out in [the Constitution](#).

- d. Section 43 of AFA Act inhibits fair compensation in the macadamia sector;
- e. The [Crops Act](#) offends schedule 4 of [the Constitution](#) which has bestowed County Governments the role of administering agriculture and the 2<sup>nd</sup> Respondent has no role in licensing the growth of macadamia in Kenya.
- f. There is a substantially similar Petition (Constitutional Petition [No.4 of 2018](#)) pending before the High Court at Chuka whose substance is materially and substantially similar to the substance of the instance petition and which has progressed.
- g. The issues in the Petitions are similar and they should be heard together by transferring the matter from Meru to Chuka to avoid contradicting outcomes by the courts.

### Summary of The 1<sup>st</sup> Respondent's Case

The 1<sup>st</sup> Respondent reply may be summarized as follows:-

- a. The Constitutionality of Section 43 of the AFA Act has been settled severally in Nairobi Judicial Review No.78 of 2012; Nairobi Judicial Review No.368 of 2012 and Embu Constitutional Petition [No.9 of 2018](#).
- b. The petition is thus a forum shopping venture.

### Summary of The 2<sup>nd</sup> Respondent's Case

The 2<sup>nd</sup> Respondent opposed the application vide the Replying Affidavit of Richard Ndegwa which may be summarized as follows:-

- a. The Petition is founded on flawed understating of Section 43 of the [Agriculture and Food Authority Act](#);
- b. There is no blanket prohibition of exporting raw macadamia as Section 43 provides that the Cabinet Secretary may give authority for export of raw macadamia;
- c. The Petitioners have not demonstrated that they have sought authority of the Cabinet Secretary to export raw macadamia and the authority has been unjustly denied; the Petition is thus premature for failing to exhaust alternative remedy;
- d. Additionally, the Petitioners have not rebutted the presumption of constitutionality of Section 43 of the AFA Act;
- e. The Petitioners' contention that macadamia with brown shell is processed macadamia is untenable because the removal of the outer green shell cannot amount to processing;
- f. Similarly, Section 43 of the AFA Act does not infringe on the bill of rights;
- g. Section 13, 14, 15 and 16 of the [Crops Act](#) does not violate schedule 2 of [the Constitution](#) by taking away the function of Agriculture from County Governments; These sections govern the licensing of dealers and processors of macadamia at an international front; the Republic of Kenya is an international entity and County Governments are not.
- h. The [Crops Act](#) does not speak of licensing farming of macadamia as a schedule crop rather; it speaks of licensing dealers who are defined as person engaged on collecting,



transporting, storing, buying or selling crops or crop products but in case of food crops excludes any non- commercial activity.

- i. The Petition is thus premature and is borne of a misreading of the AFA Act and Crops Act;
  - j. The claim for 3 billion as compensation is unsubstantiated and no evidence of such loss has been tendered to support the prayer.
2. The 1<sup>st</sup> Respondent opposed the Petition vide the Replying Affidavit of Prof. Hamadi L. Boga sworn on 2<sup>nd</sup> May, 2019 and filed on 5<sup>th</sup> September, 2019. It is contended that the constitutionality of Section 43 of the AFA Act has been settled severally in Nairobi Judicial Review No.78/2012, 368/2020 and Embu 9/2018 that the petitioner is forum shopping.
  3. The 2<sup>nd</sup> Respondent responded to the Petition vide the Replying Affidavit of Richard Ndegwa sworn on 1<sup>st</sup> April, 2019 and filed in court on 3<sup>rd</sup> April, 2019. He contends that the petition is based on flawed understanding of Section 43 of AFA Act, The petitioners have not demonstrated that they have sought the Authority of the Cabinet Secretary to export raw Macadamia and the authority has been unjustly denied. That the petition is premature for failing to the explore alternative remedy. That there is no blanket prohibition of exporting Raw macadamia as the Cabinet Secretary can give authority under Section 43 of Act
  4. On its part, the 8<sup>th</sup> Respondent opposed the Petition vide the Replying Affidavit sworn on 4<sup>th</sup> May, 2022 by Zacharia Lukorito Chepkania, the 8<sup>th</sup> Respondent's Head of Department – Standard Development and Trade.
  5. The Petition was canvassed by way of written submissions.  
The Petitioners did not file their final submissions as directed.

### **The 2nd Respondent's Submissions**

6. It was submitted on behalf of the 2<sup>nd</sup> Respondent that the present Petition is founded on flawed understanding of Section 43 of the Agriculture and Food Authority Act. That there is no blanket prohibition of exporting raw macadamia as Section 43 provides that the Cabinet Secretary may give authority for export of raw macadamia. That as such, the Petitioners have failed to demonstrate that they sought the authority of the Cabinet Secretary to export raw macadamia and such authority was unjustly denied. The Petitioners thus maintain that the instant Petition is premature for failing to exhaust alternative remedy. Further, that the Petitioners have not rebutted the presumption of constitutionality of Section 43 of the AFA Act.

### **8th Respondent's Submissions**

7. On behalf of the 8<sup>th</sup> Respondent, it was submitted that no cause of action has been shown against the 8<sup>th</sup> Respondent in the Petition. That a cursory look at the entire Petition shows that the prayers being sought by the Petitioners lay blame on the 1<sup>st</sup>, 2<sup>nd</sup>, and 10<sup>th</sup> Respondents who ideally have the mandate and authority to deal with the issues raised in these proceedings. Further, it was submitted that the Petitioner has failed to show that they are macadamia farmers dealers or that they have been registered through the relevant authority as macadamia farmers. The 8<sup>th</sup> Respondent thus urged this Court to dismiss the Petition and order the Petitioners to pay the costs of the 8<sup>th</sup> Respondent.



## Issues for Determination

8. I have considered the Petition filed on 4<sup>th</sup> September, 2018, the responses thereto as well as the submissions of the parties. The main issues that arise for this Court to determine are:
  - a. Whether the said Petition is premature;
  - b. Whether the Petitioners have demonstrated unconstitutionality of Section 43 of the AFA Act and Crops Act and infringement of the Petitioners' rights;
  - c. Whether the Petitioners are entitled to the prayers sought;

## Analysis

### a. Whether the petition is premature

9. This matter revolves around the exportation of macadamia nuts from Kenya to foreign markets.
10. Section 43 of the Agriculture and Food Authority Act - Cap 317 of the Laws of Kenya (hereinafter the "AFA Act") provides as follows:

“A person shall not export raw cashewnuts, pyrethrum, bixa, macadamia or any other agricultural product as may be prescribed, except with the written authority of the Cabinet Secretary.”
11. The “Cabinet Secretary” is defined under Section 2 of the Agriculture and Food Authority Act to mean “the Cabinet Secretary for the time being responsible for matters relating to agriculture”.
12. I agree with the submission of the 2<sup>nd</sup> Respondent that it is clear from a reading of Section 43 of the AFA Act that the same does not give a blanket prohibition of the exportation of raw macadamia but rather it provides that the exportation of raw macadamia should only be allowed after the authority of the Cabinet Secretary is given. The Petitioners have however not demonstrated that they sought the authority of the Cabinet Secretary and that the same was denied arbitrary. In the circumstances, it is my view that the Petition is indeed premature. See the locus classicus, the case of Speaker of the National Assembly-v- James Njenga where the Court of Appeal while allowing the application annunciated the principle that “where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly follows.” The Petitioners ought to have exhausted the options available to them in their quest to export raw macadamia by seeking the authority of the Cabinet Secretary.

### b. Whether the Petitioners have demonstrated that Section 43 of the AFA Act and Section 14 of the Crops Act are unconstitutional.

In Susan Wambui Kaguru & 7 Others v Attorney General [2013] eKLR; the court while dismissing a Petition challenging the constitutionality of some provisions of the Traffic Act restated the principle of constitutional law principle that every statute passed by the legislature enjoys a presumption of constitutionality and the court is entitle to presume that parliament acted in a constitutional and fair manner unless the contrary is proved by the petitioner. The court went on to note that the substantial part of the petitioners' case dwelt on whether the Amendments were appropriate or right or that the legislature could have adopted better strategies to deal with the issue of road safety. The courts stated that it was not a super legislature to decide what is the 'appropriate', right' or 'wise' legislative policy



to govern various matters for which the legislature is called upon to legislate. The court's duty, in a proper case, is to ensure that the legislature acts within the constitutional limits of its power.

13. On the claim that the Petitioners have been discriminated based on the implementation of Section 43 of the AFA Act, it is my view that the said allegation has not been substantiated by evidence. The Petitioners have failed to demonstrate that they depend on the export of processed in shell macadamia nuts and that they have a ready international market which the Respondents have hindered them from accessing.
14. It is further my view that the Petitioners have also failed to demonstrate how the said section offend *the Constitution* and infringe on their rights.

**c. Whether the Petitioners are entitled to the reliefs sought**

15. The Petitioners in this case have sought for several declaratory orders. In the persuasive case of *Bitange Ndemo v. Director of Public Prosecutions & 4 Others* [2016] eKLR, the Court considered what a declaration seeks to do by expressing itself as follows:

“90. 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.”

I am persuaded by the holding as a declaration cannot be enforced by itself, further litigation will be required to reap the benefits of the declaration.

16. In this case, having herein found that the Section 43 of the AFA Act only limits the export of raw macadamia to having obtained an authority from the Cabinet Secretary, it follows that the said provision does not limit the rights of macadamia farmers to enjoyment of their property as alleged by the Petitioners. That being the case, it follows that the Petitioners have failed to demonstrate that they are entitled to the declaratory orders being sought for in their Petition.
17. With respect to the prayer for compensation to the tune of Kshs.3 Billion, I agree with the submission of the 2<sup>nd</sup> Respondent that the Petitioners have not proved that they were arbitrarily denied the right to sell macadamia. Even if the same had been proved, the Petitioners have not demonstrated that they suffered losses amounting to the said sum of Kshs.3 Billion or at all.

**Conclusion**

18. From the foregoing analysis, it is my view that the present Petition is devoid of merit and ought to be dismissed.

I order that the Petition be dismissed. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 29<sup>TH</sup> DAY OF AUGUST 2024.**

**L. W. GITARI**

**JUDGE**

**29/8/2024**

