Mwangi & another v Attorney General & 3 others; Kenya University Biotechnology Consortium (KUBICO) & 2 others (Interested Parties) (Constitutional Petition E475 of 2022 & Petition E519 of 2022 (Consolidated)) [2023] KEHC 3943 (KLR) (Constitutional and Human Rights) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3943 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E475 OF 2022
& PETITION E519 OF 2022 (CONSOLIDATED)

M THANDE, J

APRIL 28, 2023

BETWEEN

PAUL MWANGI ..... 1ST PETITIONER

KENYA PEASANTS LEAGUE ..... 2ND PETITIONER

AND

THE HON. ATTORNEY GENERAL ..... 1ST RESPONDENT

CABINET SECRETARY, AGRICULTURE, LIVESTOCK, FISHERIES .... 2ND RESPONDENT

THE NATIONAL BIOSAFETY AUTHORITY ..... 3RD RESPONDENT

THE CABINET SECRETARY, TRADE, INVESTMENT & INDUSTRY ..... 4TH RESPONDENT

AND

THE KENYA UNIVERSITY BIOTECHNOLOGY CONSORTIUM (KUBICO) ..... INTERESTED PARTY

BIODIVERSITY AND BIOSAFETY ASSOCIATION OF KENYA ... INTERESTED PARTY

ASSOCIATION OF KENYA FEEDS MANUFACTURERS . INTERESTED PARTY

RULING

1. The background of this matter as set out in the 1st Petitioner's Petition dated 13.10.22 is that on 3.10.22, the Cabinet of the Republic of Kenya lifted the ban on the cultivation within and importation into the Republic of Kenya, of foods and animal feeds that are produced from genetically modified seeds and other organisms (GMO). This in effect removed the prohibition that had been put in place by a Cabinet resolution of 8.11.12. At the time, there were concerns regarding the use of genetically modified foods. Cabinet stated that the basis of the ban was the "lack of sufficient information on the public health impact of such foods", and that the ban would remain in effect until there was sufficient information, data and knowledge demonstrating the GMO foods are not a danger to public health." The 2012 ban did not close the door on the use of biotechnology but on the introduction of foods untested by local regulatory agencies in disregard of the health, religious and cultural sensitivities of the people of Kenya and their right to be consulted when decisions with a far reaching effect on their lives and rights are made by government.

2. It is the 1st Petitioner's case that the Cabinet decision of 3.10.22 removed all regulatory barriers that had been established over the last 10 years for the protection of the people of Kenya. He terms the decision a threat to the rights or fundamental freedoms in the Bill of Rights and if not quashed will result in the derogation of the rights and freedoms of the 1st Petitioner and the people of Kenya. He therefore seeks the following reliefs:

    1. A declaration that the decision of the Cabinet of the Republic of Kenya made on the October 3, 2022, purportedly lifting a ban on the cultivation within and importation into the Republic of Kenya of foods and animal feeds that are produced from genetically modified seeds and other organisms is unconstitutional for derogating and threatening to derogate the following rights and freedoms of the petitioner and of the people of the Republic of Kenya.

        a. Freedom of conscience, religion, thought, belief and opinion as guaranteed by Article 32 of the *Constitution*.

        b. Right to access to information as guaranteed by Article 35 of the *Constitution*.

        c. Right to food of acceptable quality as guaranteed by Article 43 of the *Constitution*.

        d. Consumer rights guaranteed by Article 46 of the *Constitution*.

        e. Right to fair administrative action as guaranteed by Article 47 of the *Constitution*.

    2. A declaration that the decision of the Cabinet of the Republic of Kenya made on the 3rd October 2022, purportedly lifting a ban on the cultivation within and importation into the Republic of Kenya of foods and animal feeds that are produced from genetically modified seeds and other organisms is unconstitutional for derogating and threatening to derogate the following rights and freedoms of peasants and other people working in rural areas as

guaranteed by Article 2(5) and "(6) and/ or Articles 19 (3) (b) and 21(3) of the *Constitution*.

a. The right to adequate food that is produced through ecologically sound and sustainable methods that respect culture and preserves access to food for future generations as guaranteed by Article 15 of the *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*.

b. The right to protection of traditional knowledge relevant to plant genetic resources for food and agriculture and the right to maintain, control, protect and develop own seeds and other propagating material and to obtain the support of the state to do so as guaranteed by Article 19 of the *United Nations declaration of the Rights of Peasants Working in Rural Areas*.

3. An order awarding costs of the petition to the Petitioner.

4. Any other or further order writs and directions this court may consider appropriate in the circumstances the purpose of the protection of the petitioners' rights.

3. The 2nd Petitioner's Petition was similarly provoked by the same Cabinet decision of 3.10.23. The Petitioner claims that vide a letter dated 12.10.22, it sought from the 3rd Respondent a copy of any report that could have informed the Cabinet decision as well as evidence of public participation concerning the matter, but no response was given. On 18.11.22, the 4th Respondent stated in a press conference that he would issue a gazette notice to allow importation of maize whether GMO or otherwise. He further acknowledged the risk that GMOs pose to the right to life and stated that there was nothing wrong to adding GMOS to the list of things that could kill Kenyans. The 2nd Petitioner contends that neither the decision nor reports preceding the decision, if any, were subjected to public participation. The 2nd Petitioner is thus apprehensive that the GMOs if permitted into the country will gravely affect their farming, productivity and sustainability as peasant farmers. Further that there is real apprehension that the GMOs may compromise the right to health, dignity and right to life of the 2nd Petitioner and the general public.

4. The 2nd Petitioner seeks the following reliefs in its Petition:

a. A declaration be and is hereby made that by declining to respond to the petitioner's letter dated 12 October 2022, the 2nd respondent breached the petitioner's right to access information under Article 35 of the *Constitution*.

b. A declaration be and is hereby made that the respondents breached the petitioner's rights to public participation and transparency contrary to the provisions of Article 10 of the *Constitution*.

c. A declaration be and is hereby made that the respondents breached the petitioner's right to *fair administrative action act* as envisaged under Article 47 of the *Constitution*.

d. A declaration be and is hereby made that the respondents breached the petitioner's right to consumer protection as provided for under Article 46 (a) (b) & (c) of the *Constitution*.

e. A declaration be and is hereby issued that the decision of the Government of Kenya vide the Cabinet's Despatch dated October 3, 2022 in relation to GMO be acted ultravires in usurping the powers of the 2nd respondent and subsequent thereto, pleased to issue an order of certiorari quashing the decision dated October 3, 2022.

f. An order of prohibition and permanent conservatory order be issued restraining the respondents either by themselves or through agents or such other person acting on their behalf from lifting the ban and/ or importing and cultivating GMOs save as prescribed under the laws of Kenya, the international conventions and protocols; and the observations of this Honourable Court.

g. Costs of the petition herein.

h. Any other order as this Honourable Court may deem fit.

5. The 2 Petitions were consolidated by an order of this Court. The Petitions are opposed by the Respondents.

6. In addition to their responses, the Respondents have filed an application dated 23.2.23 which is the subject of this ruling. In their Application, the Respondents seek the following orders:

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2. This Honourable Court be pleased to certify this matter as raising substantial questions of law under Article 165(4) of the *Constitution of Kenya, 2010* and to direct that the file be placed before the Chief Magistrate for appointment of a bench of not less than three (3) judges to hear and determine the matter.

3. Pending the empanelment of the bench by the Chief Justice, there be a stay of further proceedings in this petition.

4. Costs of the application be provided for.

7. The application is premised on the grounds on its face and in the supporting affidavit sworn on even date by Dr. Roy Mugiira, the Chief Executive Officer of the 3rd Respondent. The summary of the grounds is, that the Petition raise substantial questions of law bordering on the constitutional provisions of Articles 2(5), 2(6), 10, 19(3)(b),21(3, 26, 32, 35, 43(1) (c), 47, and 69. The Petitions raise novel issues not considered with finality by the Supreme Court of Kenya on the issues of GMOs. The Petition also raise issues of great public interest and substantial national importance, for which the Court's consequent finding will inform the public policy in relation to food security both locally and regionally. Finally, that the Petitions raise seriously contested issues that require a decision to be made after balancing the interests of the Petitioners on one hand and the obligation of the Respondents to address the food security situation in the country.

8. The Application is opposed by the 1st Petitioner vide his replying affidavit sworn on 21.3.23. He deposed that the primary issue being raised in the Petition is that by lifting the ban on genetically modified organisms (GMOs) through the cabinet directive of 3.10.22, the Respondent has failed to adhere to the regulatory barriers of public participation and risk assessments that have previously been set to ensure that the cultivation and consumption of GMOs does not have adverse effects on health and environment. Additionally, that the issues raised in the Petitions do not constitute a substantial question of law as Courts have pronounced themselves on the same. The 1st Petitioner acknowledges

that the Petition raises novel and complex issues of the effect of consumption and growing of GMO products on health and the environment, which are of great public interest. The issues raised however are matters of evidence as opposed to matters of law. Further that issues of public participation and risk assessment, which are the gist of the Petitioner's case constitute constitutional and legal principles that well established and have been interpreted by the courts within the Republic of Kenya

9. The 1st Petitioner further contends that the issues raised in the Petition do not constitute a substantial point of law warranting certification for empanelment of a bench as sought. The Judge seized of the matter is competent to hear and determine the evidentiary issues, though they be novel and complex, as the constitutional and legal principles have already been established. This Court has equal as a three-judge bench, thus it issued orders that expert witness evidence be adduced to ascertain the effects of GMOs. Additionally, this matter has already been committed to hearing of the main suit, several issues have already been canvassed during the hearing of the application for conservatory orders. The present Application is thus an afterthought and untenable.

10. The 2nd Petitioner filed replying affidavit by David Calleb Otieno sworn on 10.3.23 opposing the application. He averred that the application is misguided and premised on a mischaracterization of the consolidated Petitions which principally touch on the constitutionality, legality and/or procedural propriety or lack thereof of the impugned Cabinet decision. Further that every prayer stems from this question. The Respondent's claim that the Petitions are inviting this Court to determine on merit whether GMO foods and crops is not correct. The 2nd Petitioner holds a similar position as the 1st Petitioner that the novelty or complexity of a question before a court does not automatically translate into a substantial question of law under Article 165(4) of the *Constitution*.

11. The 1st Interested Party supported the application and did not file response but filed submissions.

12. In a replying affidavit sworn by Anne Maina on 14.3.23, the 2nd Interested party supported prayer 2 of the application. She deposed that issue raised in the Petitions as to whether the impugned Cabinet decision was made in violation of Articles 10, 35, 43, 46 and 47 of the *Constitution* constitutes a substantial question of law. The Petitions also raise issues of public interest with regards to whether the Cabinet should lift of the ban on GMO foods allowing the importation of GMO foods which can be harmful to the health of humans and animals. They also raise the issues whether Cabinet has the power to limit constitutional rights and specifically whether use GMO for food security, is a justifiable limitation under Article 24 of the *Constitution*.

13. The 3rd Interested Party did not file response or submissions, but supported the Application.

14. I have carefully considered the parties' pleadings and submissions. The only issue for determination is whether the Respondents have demonstrated to the satisfaction of this Court, grounds to warrant the certification that the consolidated Petitions raise a substantial question of law that should be heard by an uneven number of Judges assigned by the Hon. Chief Justice.

15. The jurisdiction of this Court to certify a matter suitable for hearing by an expanded bench is provided for in Article 165(4) of the *Constitution* as follows:

> Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

16. Clause s(3) (b) and (d) provide:

Subject to clause (5), the High Court shall have—

(a) ...

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) ...

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

17. The matters contemplated under Article 165(4) that are those that raise a substantial question of law where the issue is first, whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; second, whether any law is inconsistent with or in contravention of this Constitution; third, whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; fourth, any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and fifth, a question relating to conflict of laws under Article 191 of the *Constitution*.

18. the *Constitution* does not define the term "substantial question of law". Our superior courts have however pronounced themselves on the same thereby providing apt guidance on how to determine the same. In the case of *Stanley Livondo v Attorney General* [2020] eKLR, Korir, J. (as he then was) stated:

> The law as to what amounts to a substantial question of law is now well settled. In Sir Chunilal V. Mehta and Sons, Ltd v The Century Spinning and Manufacturing Co. Ltd 1962 AIR 1314 the elements of a substantial question of law were stated follows:
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> > "The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

19. Flowing from the above decision, a substantial question of law is one that is of great public interest or directly and substantially affects the rights of the parties. A substantial question of law is also one which

is yet to be settled by the highest court in the land. Similarly, a matter where the general principles to be applied in determining the question before Court are not well settled, will constitute a substantial question of law.

20. In the case of *Okiya Omtatah Okoiti & another v Uhuru Muigai Kenyatta & 7 others* [2016] eKLR, Lenaola, J. (as he then was) stated:

> The different approaches taken by the High Court as shown above would make it clear that whether a substantive question of law arises under 165(4) is dependent on the circumstances of a particular case. Furthermore, that the list of relevant factors is not exhaustive and that the presence or absence of one is not necessarily decisive in a particular case. Ultimately, the presiding judge has to exercise his or her discretion on whether, on his or her appraisal of the factual and legal matrix, a substantial question of law arises.

21. And in the case of *County Government of Meru v Ethics and Anti-Corruption Commission* [2014] eKLR, Majanja, J. had this to say about the definition of substantial question of law:

> I have considered the arguments by the parties and I take the following view of the matter. In the case of Community Advocacy and Awareness Trust and Others v Attorney General Nairobi Petition No. 243 of 2011 (Unreported), I observed that, "[8]the *Constitution* of Kenya does not define, "substantial question of law." It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine a matter ..... [10]... giving meaning to "substantial question" must take into account the provisions of the *Constitution* and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter."

22. The common thread that runs through the cited decisions is that the certification of a matter under Article 165(4) of the *Constitution*, is a matter of judicial discretion. Such discretion must however be exercised judiciously, the overriding and guiding principle being the need to do real and substantive justice to the parties before court.

23. In the cited case of *County Government of Meru*, Majanja, J. stated as follows on the exercise of discretion in an application under Article 165(4):

> The principles which govern the exercise of discretion in an application such as the one before the court can be distilled as follows;
>
> a. The grant of a certificate under Article 165(4) of the *Constitution* is an exception rather than the rule.
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> b. The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or fact or even one that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.
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> c. Public interest may be considered but is not necessarily a decisive factor. It is in the nature of petitions filed to enforce the provisions of the *Constitution* to be matters of public interest generally.

24. In the Petition herein, the issues that the Court is called upon to determine fall within the purview of Article 165(3)(b) and (d), namely, whether jurisdiction to determine the question whether a right or fundamental freedom of the Petitioners in the Bill of Rights has been denied, violated, infringed or threatened and whether the impugned decision by Cabinet is inconsistent with, or in contravention of, this Constitution.

25. Under Article 165 of the *Constitution* a single Judge of the High Court has the mandate to interpret and apply the *Constitution*. It is well settled that whereas Article 165(4) allows for certain matters to be heard by an uneven number of Judges, this ought to be viewed as an exception rather than the rule and ought not to be exercised flippantly. Indeed, almost 13 years after the promulgation of the *Constitution*, few provisions thereof remain untested in our courts. A High Court Judge sitting alone routinely and competently hears matters that raise complex and novel issues in exercise of the jurisdiction conferred by the *Constitution*. This was reinforced by the Court of Appeal which in the case of *Peter Nganga Muiruri v Credit Bank Limited & 2 others* [2008] eKLR, stated that any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question.

26. It is a legal fact that the decision of a single Judge exercising jurisdiction conferred by the *Constitution* has equal force to that of a bench of not less than 3 Judges assigned by the Chief Justice. In this regard I concur with Majanja, J. who in the case of *J. Harrison Kinyanjui v Attorney General & Another [*2012] eKLR, stated:

> Therefore, giving meaning to "substantial question" must take into account the provisions of the *Constitution* as a whole and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the *Constitution*, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges.

27. A High Court Judge therefore ought not to shy away from his or her constitutional mandate of interpreting and applying the *Constitution*, (see *Centre for Rights Education and Awareness & another v Speaker of National Assembly & 5 others* [2017] eKLR).

28. The Court acknowledges that the issues raised in the Petitions revolving around whether the cultivation and importation of GMOs pose a threat to human life, are the novel and complex. Indeed, this Court called for expert evidence to be adduced in the matter. This however does not preclude a single judge from handling the same. As indicated, Judges sitting alone, are time and again called upon to determine novel and complex issues and do so competently. In this regard, I associate with the decision in *Wanjiru Gikonyo v Attorney General & another; Kajiado County Governor and 4 others (Interested Parties)* [2020] eKLR where Korir, J. (as he then was) stated:

> 27. It is also noted that although the petition raises novel issues which are of public interest, these are the kind of matters that confront judges on a regular basis. The issues call for the application of constitutional and legal principles to the facts of the case at hand. Those constitutional and legal principles are already established and a single judge can apply them in the manner that a panel of judges would do. In this regard I agree with Odunga, J when he observes in Wycliffe Ambetsa Oparanya (supra) that:-

> "25. In my view a High Court Judge ought not to shy away from his constitutional mandate of interpreting and applying the *Constitution*. Whereas the *Constitution* permits certain matters to be heard by a numerically enlarged bench, that is an exception to the general legal and constitutional position and it is in my view an option that ought not to be exercised lightly."

29. It is common ground that the consolidated Petitions raise matters of great public importance to wit consumption and cultivation of GMOs and the risk to life and health that may be associated therewith. At the core of the issues to be determined by the Court is whether the impugned Cabinet decision passed constitutional muster. The Court is called upon to determine whether public participation and risk assessment were undertaken prior to the making of the impugned decision. The Court will also consider whether the rights and fundamental freedoms of the Petitioners and the general public have been or at risk of being denied, violated, infringed or threatened. These are not new issues, both having been the subject of consideration and interpretation by our superior courts, including the Supreme Court. They do not in my view raise a substantial question of law as contemplated in Article 165(4) of the *Constitution*.

30. In the case of *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties);Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR, the Supreme Court considered the constitutional principle of public participation and consultation which goes to the constitutional tenet of the sovereignty of the people, and rendered its opinion thereon.

31. Additionally, the fact that the judiciary as an institution is not well resourced and is under strain due to a backlog of cases, is common knowledge. Empanelling a bench will thus put a strain on the already stretched limited resources and will invariably lead to delay for a variety of reasons including synchronising the already clogged diaries of the Judges to be assigned. To avoid jeopardising the efficient use of limited judicial resources therefore, reference of matters to the Hon. Chief Justice for empanelment of an uneven number of judges for hearing and determination should be treated with circumspection. Such reference should only be made where it is absolutely necessary and in compliance with the enabling constitutional provisions and relevant case law.

32. In this regard, I associate with Odunga, J. (as he then was) who in *Peter Solomon Gichira v Attorney General & another* [2015] eKLR, considered an application for empanelment and stated:

> In my view the decision whether or nor to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitutional and statutory provisions. This country, despite great strides made in the enlargement of the bench in the recent past still does not enjoy the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are still very scarce and although the time taken for hearing a petition by a single judge may not be any different from that taken by a bench empanelled pursuant to Article 165(4) of the *Constitution*, it must be appreciated that the empanelling such a bench invariably leads to delays in determining cases already in the queue hence worsening the problem of backlog crisis in this country.

33. After considering the matter herein, it is evident that the issues raised call for the application of the already established constitutional and legal principles, which can competently be done by a single Judge in the manner that a panel of Judges would. Accordingly, I decline to certify that this matter raises a

substantial question of law that warrants reference to the Chief Justice as provided for under Article 165(4) of the *Constitution*. The Application dated February 23, 2023 therefore fails and is hereby dismissed. Costs will be in the cause.

DATED AND DELIVERED IN NAIROBI THIS 28TH DAY OF APRIL 2023

M. THANDE

JUDGE

In the presence of: -

.....for the 1st Petitioner

.....for the Respondents

.....for the 1st Interested Party

.....for the 2nd Interested Party

.....for the 3rd Interested Party

.....for the 4th Interested Party

.....Court Assistant