



**Jamii & 3 others v CS Agriculture & 7 others; Agriculture And Food Authority (Interested Party)  
(Constitutional Petition 1 of 2022) [2023] KEHC 22642 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22642 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CONSTITUTIONAL PETITION 1 OF 2022**

**CM KARIUKI, J**

**SEPTEMBER 28, 2023**

**FORMALY NAIVASHA CONSTITUTIONAL PETITION NO. E005 OF 2002**

**BETWEEN**

**HAKI JAMII & 3 OTHERS ..... PETITIONER**

**AND**

**CS AGRICULTURE & 7 OTHERS ..... RESPONDENT**

**AND**

**AGRICULTURE AND FOOD AUTHORITY ..... INTERESTED PARTY**

**JUDGMENT**

1. The Petitioners filed a petition dated 4th August 2021 seeking the following prayers: -
  - I. That the honorable court do declare the Crops (Irish Potato) Regulations 2019 as unprocedural, unlawful, colonial, punitive, discriminative, unilateral, oppressive, embarrassing, and unconstitutional and subsequently stay, suspend, and nullify the same permanently;
  - II. That the honorable court do specifically declare section 18 (1), 6, 21 (1), (2), (3), 22 (1), (2), (3), 23 (1), (2), (3), 24, 25 and 26 of the Crops (Irish Potato) Regulations 2019 and or the entire policies thereunder as unconstitutional;
  - III. That the honorable court do permanently bar, stop, refuse, restrain and restrict the Respondents from arresting potato farmers, traders, and transporters with any criminal and statutory offense arising from potato growing and or trade activities as prescribed under Crops (Irish Potato) Regulations 2019 and or at all until the oppressive and unconstitutional provisions thereto are reviewed amended and or rectified in line with the spirit and principles of public participation in line with Kenya Constitution 2010;



- IV. That the 1st Respondent be directed to come up with a national and participatory potato policy to promote and regulate potato farming and trade laws for enactment by the office of 8th Respondent herein within 90 days of this judgment and determination of this petition or as the court will direct toward the enactment of Potato Act providing a Potato Board or Authority interalia to avoid discrimination of potato farmers and traders in Kenya;
- V. That the honorable court do restrain the 1st, 2nd, 3rd, 4th, 5th, and 6th Respondents from arresting potato farmers, traders, transporters, dealers, and stakeholders for an alleged offense arising from Crops (Irish Potato) Regulations 2019 interalia; and
- VI. Costs of the petition be provided for
2. The Petitioners averred that the 1st Respondent did not out any legally suitable mechanism for public participation to collect stakeholders' views, particularly the Petitioners and their membership and indeed residents of Nyandarua county that produce and sell at least 30% of total potato crop in Kenya and therefore some of the sections of the Crops (Irish Potato) Regulations 2019 are grossly skewed, lopsided, biased, impractical, oppressive, repressive, inconveniencing and economically disruptive of potato farming and trade in Nyandarua and continue to cause farmers financial loss and this continues to threaten the general social, economic lifestyle of Petitioners, their membership, families, communities and generally the Nyandarua County community.
3. That the Crops (Irish Potato) Regulations 2019 have been implemented in a repressive and unconstitutional manner, causing the Petitioners, their membership, and indeed the residents of Nyandarua County great economic loss and disruption in potato farming and marketing of the produce hence social economic embarrassment of the entire Nyandarua County residents.
4. It was stated that the Crops (Irish Potato) Regulations 2019 imposed unreasonable, unlawful and unconstitutional fines on offenders under the Potato Farming and Trade Regulation 2019 caught in the process of potato production, transportation and marketing which is economically dangerous and will pauperize them consequently making small scale potato farming extinct due to apathy and administrative manufactured fears.
5. The Petitioners averred that it is important and pertinent for the sake of the rights of the Petitioners and stakeholders in Nyandarua County that the 1st and 7th Respondent do formulate a suitable potato policy and seek enactment of a parent potato farming and trade act that has a potato board or authority to regulate and safeguard the interest of all potato stakeholders.
6. The Petitioners seek the protection of their fundamental rights of access to justice, fair trial, and dignity as Kenyan citizens and seek to be allowed to do potato farming and trade activities without discrimination, intimidation, hindrances, and or imposition of irregular tariffs, charges or precondition licenses as this is illegal, irregular, oppressive and unconstitutional intended under the Crops (Irish Potato) Regulations 2019, the Regulations hereinafter.
7. The 5th and 6th Respondents filed a replying affidavit dated 6th December 2021, sworn by Kevin Ikua Ndegwa. They sought that the petition be dismissed, terming it as an abuse of the court process and a hamper to the functions of the county government. It also argued that the issues raised in the petition were dealt with in a judicial review filed in Nairobi, i.e., High Court JR No. 250 of 2019.
8. Similarly, the Interested Party filed it's replying affidavit on 20th September 2022, deponed by Milton Munialo. It sought to have the petition dismissed as the regulations were properly and procedurally promulgated and that the petition seeks to derail the implementation of the regulations.



9. In their submissions, the Interested Party reiterated that due process was followed in the promulgation of the Regulations in accordance with the [Statutory Instruments Act](#). It was asserted that public participation is an important tenet of any government process, as outlined in Article 10 of [the Constitution](#). That there were sufficient consultations carried out in 17 counties in Kenya and a national consultative forum at the Kenya Agriculture Livestock Research Organization (KALRO) held between 18th June 2018 and 4th July 2018.
10. Furthermore, public views were invited in writing, and consultations at the Nyandarua county were held on 20th June 2018, whereby 38 persons were present in the meeting. After the consultations, the stakeholders' views countrywide were considered before coming up with the final Regulations.
11. The Interested Party asserted that the said Regulations should remain in force as per [the Constitution](#), which mandates the national government through its ministries to formulate policies. In contrast, the county governments implement the policies formulated. It would therefore be wrong to leave the legislation that was in force not to operate as required by law.

The Interested Party invoked the doctrine of res judicata provided for under Section 7 of the [Civil Procedure Act](#). It was asserted that the matter before the court is res judicata because the issues in question have been litigated severally and to finality by courts of similar jurisdiction. The cases in issue are outlined as follows: Nairobi High Court Petition No. 31 of 2015: Julius Mutiga & 16 Others vs CS Ministry of Agriculture & 3 Others [2020] eKLR, Nairobi High Court Judicial Review No. 250 of 2019; Republic of Kenya v Ministry of Agriculture, Livestock, Fisheries and Irrigation, Agriculture and Food Authority & Another Ex-Parte Susan Wanjiku & 80 Others [2021] eKLR and Narok HCCHR Pet 003 of 2021: James Karanja versus The CS Agriculture and Food Authority.

12. The Interested Party argued that in the matters above the courts extensively discussed that the Potato Regulations were mandatory to give full effect to Section 40 of the Crop Act 2013. Additionally, Justice Ngaah extensively dealt with the issues of public participation in the judicial review case.
13. On whether the doctrine applies to constitutional matters, the Supreme Court has settled the issue in the cases cited and conclusively held that it applied in all matters, including constitutional matters. This is in tandem with Articles 50 and 159 of [the Constitution](#).

### **Analysis and Determination**

14. I have considered the petition, the affidavits herein, submissions, and the annexures and authorities relied on. The main issue for determination is whether the petitioner has made out a satisfactory case for the grant of the orders sought in the petition herein.
15. I would like to first dispense with the issue of res judicata as raised by the Interested Party. The Interested Party invoked the doctrine of res judicata provided for under Section 7 of the [Civil Procedure Act](#). It was asserted that the matter before the court is res judicata because the issues in question have been litigated severally and to finality by courts of similar jurisdiction. The cases in issue are outlined as follows: Nairobi High Court Petition No. 31 of 2015: Julius Mutiga & 16 Others vs CS Ministry of Agriculture & 3 Others [2020] eKLR, Nairobi High Court Judicial Review No. 250 of 2019; Republic of Kenya v Ministry of Agriculture, Livestock, Fisheries and Irrigation, Agriculture and Food Authority & Another Ex-Parte Susan Wanjiku & 80 Others [2021] eKLR and Narok HCCHR Pet 003 of 2021: James Karanja versus The CS Agriculture and Food Authority.



16. The Interested Party argued that in the matters above, the courts extensively discussed that the Potato Regulations were mandatory to give full effect to Section 40 of the Crop Act 2013. Additionally, Justice Ngaah extensively dealt with the issues of public participation in the judicial review case.
17. On whether the doctrine applies to constitutional matters, the Supreme Court has settled the issue in the cases cited and conclusively held that it applied to all matters, including constitutional matters. This is in tandem with Articles 50 and 159 of *the Constitution*.
18. The substantive law on Res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21, which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”
19. The Black’s Law Dictionary 10<sup>th</sup> Edition defines “res judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits, and (3) the involvement of same parties, or parties in privity with the original parties...”
20. The doctrine of res judicata may be pleaded by way of estoppel so that future and further proceedings are estoppel where a judgment has been given. Essentially, a party is not allowed to commence more than one action in respect of the same or a substantially similar cause of action. The Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in action to avoid a multiplicity of actions. Therefore, the provision is on the fundamental doctrine that there should be an end of litigation.
21. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that a court of competent jurisdiction has conclusively determined. Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties.
22. the Court of Appeal held in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR that:

For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

  - a) The suit or issue was directly and substantially in issue in the former suit.
  - b) That former suit was between the same parties or parties under whom they or any of them claim.
  - c) Those parties were litigating under the same title.
  - d) The issue was heard and finally determined in the former suit.



- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

23. The Court went on to state the role of the doctrine:

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation. It affords parties closure and respite from the spectre of being vexed, haunted, and hounded by issues and suits that a competent court has already determined. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favorable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.

24. Accordingly, in order to decide whether an issue in a subsequent matter is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire case and the instant matter to ascertain: -

- i) What issues were really determined in the previous Application;
- ii) whether they are the same in the subsequent Application and were covered by the Decision.
- iii). whether the parties are the same or are litigating under the same Title and that a court of competent jurisdiction determined the previous Application.

25. Further, in *Abok James Odera vs. John Patrick Machira Civil Application No. Nai. 49 of 2001*, the court held that to rely on the defense of res judicata, there must be: -

- i) a previous suit in which the matter was in issue;
- ii) the parties were the same or litigating under the same title;
- iii) a competent court heard the matter in issue;
- iv) the issue had been raised once again in a fresh suit.

26. On whether the doctrine of res judicata applies to constitutional Petitions, the Supreme Court found that the doctrine of res judicata also applies to constitutional petitions. The Supreme decision rendered in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR* comprehensively dealt with the different facets making up the doctrine of res judicata. The court stated that: -

“... We reaffirm our position as in the *Muiri Coffee* case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded, and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties. It ensures that litigation comes to an end, and the verdict duly translates into fruit for one party and liability for another party, conclusively.....

If we find that the doctrine does not apply to constitutional litigation, the doctrine may lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation, starting with the application of Article 159 of *the Constitution* in



both civil and criminal litigation. Its application is now embedded in all procedural statutes. Further, Article 50 on the right to a fair hearing and Article 48 on access to justice are fundamental rights to which every litigant is entitled. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res judicata, they only need to invoke some constitutional provision or other...”

27. The apex court also dealt with the contention as to whether the issues raised in the two suits therein were directly and substantially the same, it was noted that the initial suit was instituted by way of a judicial review application whereas the subsequent suit was by way of a constitutional petition. The Court also noted that the issues raised in the constitutional Petition were more than those decided in the judicial review application. The Court held that: -

“From the face of it, it would appear that the issues in the present suit and JR 130 of 2011 are directly and substantially the same. However, the Appellants herein predicated their petition on inter alia grounds that the bilateral agreement should have been approved by Parliament in order to form part of Kenyan law, and in failing to do so, the Respondents contravened Article 2. They further alleged that the Respondents herein purported to usurp the role of Parliament and, in doing so, contravened Articles 94(5) and (6) of *the Constitution*. They further alleged that the FERI and COD certificates threatened to infringe on their right to property under Articles 40(1)(a) and (2)(a) when the Respondents threatened to arbitrarily deprive them of their property. The Court sitting in the determination of a judicial review application did not have jurisdiction to render itself on these issues. We, therefore, find that the principle of res judicata was wrongly invoked on this ground”

28. Consequently, in the petition in issue herein raised questions as to the constitutionality of the Crops (Irish Potato) Regulations 2019, mainly based on the argument that sufficient public participation was not carried out before the Regulations were promulgated. They contended that the Crops (Irish Potato) Regulations 2019 have been implemented in a repressive and unconstitutional manner, causing the Petitioners, their membership, and indeed the residents of Nyandarua County great economic loss and disruption in potato farming and marketing of the produce hence social, economic embarrassment of the entire Nyandarua County residents.
29. On the other hand, the 5th and 6th Respondents together with the Interested Party, asserted that the issue had been dealt with in Nairobi High Court Judicial Review No. 250 of 2019; the Republic of Kenya v Ministry of Agriculture, Livestock, Fisheries and Irrigation, Agriculture and Food Authority & Another Ex-Parte Susan Wanjiku & 80 Others [2021] eKLR

In the aforementioned matter, the applicants were aggrieved by the Regulations and for that reason, they moved the Court by way of a motion dated 27<sup>th</sup> September 2019 seeking judicial review orders of certiorari and prohibition; the prayers for these orders were framed as follows:

- “2. That this Honourable Court be pleased to grant an order of certiorari to remove into court and quash the Respondent’s decision of gazetting and implementing the punitive crops (Irish Potato) regulations, 2019.
3. That this Honourable Court be pleased to grant an order of prohibition directed at the Respondent whether by themselves (sic), their servants (sic) agents (sic) officers (sic), successors (sic) and or assigns (sic), prohibiting them (sic) from implementing the punitive crops (Irish Potato) regulations, 2019.”



30. According to the applicants, the Regulations are irrational, unreasonable and were made without the participation of stakeholders in the Irish potato sector or, generally the public at large. They are alleged to be unfair and punitive while at the same time ignoring consumer needs and stakeholder rights. The applicants have also contended that the Respondent has unlawfully exercised its discretion.

31. Consequently, the court dealt with the issue of public participation extensively stating thus: -

“... Turning back to the applicants’ application the grounds upon which the reliefs are sought are stated as follows:

**a) Non-objective, irrational and unreasonable**

The regulations were made in utter disregard of the applicants(sic) and other stakeholders’ inputs and or participation. The regulations for instance provide for the mandatory existence and operation of collection centers and designated (sic) that are non-existent and for this reason frustrating compliance.

**b) The Crops (Irish Potato) Regulations are unfair and punitive**

The regulations do not take into account the consumer needs by for instance requiring that farmers pack their potatoes in sacks of 50 kilograms yet various consumers have different needs. This in itself frustrates the stakeholders’ business wise.

**c) Unlawful exercise of discretion**

The Respondent in their decision to Gazette and implement the Crops (Irish Potato) Regulations 2019, put into account relevant considerations and failed to take into account relevant and most appropriate considerations such as the consumers’ wants and stakeholders’ rights.”

Though it is not so categorically stated, the applicants have invoked all the three grounds of irrationality, illegality and procedural impropriety and therefore it behooves this court to interrogate the applicants’ application and determine whether there is evidence to sustain all or any of these grounds.

Given the technical meaning of the word ‘irrationality’, the immediate question that arises with respect to the applicant’s application is whether the Crops (Irish Potato) Regulations, 2019 or the decision to regulate the Irish potato sector in the manner prescribed by these regulations is “so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

32. Furthermore, the court stated that: -

“... In all probability, the decision to develop and implement the Regulations was well-informed, reasonable and bona fides. There is nothing in the decision that suggests that it is either outrageous or it defies logic or accepted moral standards. It is certainly a decision that a sensible person, applying his mind to the question to the issue at hand, could have come to. I am not persuaded that the decision was irrational and therefore this ground of the applicants’ application fails.

Regarding the ground of illegality, there is no evidence that in developing and implementing the Regulations, the Respondent and the 1<sup>st</sup> Interested Party fell afoul of the law from which they derive the mandate to make these regulations. On the contrary, the available evidence



points to the fact that they correctly understood the law regulating their decision-making power and gave effect to it.

...

It has never been suggested that this provision of the law is invalid; neither has it been alleged that the Regulations made are contrary to any aspect of this provision of the law or ultra vires the parent Act in any other respect. Instead, it is apparent that in compliance with this section, the development and implementation of the Regulations is not only a consultative exercise amongst the cabinet secretary, the Respondent, the 1<sup>st</sup> Interested Party, and the County Governments but also an exercise involving stakeholders in the potato sector.

There is evidence that prior to the coming into force, the Regulations were gazetted vide gazette notice No 11205 of 26 October 2018, inviting public comments. They were subsequently laid before Parliament for scrutiny in compliance with Part IV of the *Statutory Instruments Act*. On 23 April 2019, the Regulations were laid before the Select Committee on Delegated Legislation pursuant to sections 12 and 13 of the *Statutory Instruments Act*, 2013, for consideration. The committee was satisfied that the Regulations complied with the *Statutory Instruments Act*, 2013, and conveyed its resolution to the cabinet Secretary vide a letter dated 6 May 2019.

There is, therefore, no hint of illegality in the impugned regulations.”

33. On procedural impropriety and public participation, the court stated as follows: -

“The final ground upon which the applicants have impugned the Regulations is that of procedural impropriety; this ground is closely related to that of illegality, and this in itself should not be surprising because, more often than not, the grounds for judicial review are not purely exclusive; they overlap in certain instances.

From what I gather from the applicants’ application, this ground is mainly based on the fact that, in coming up with the Regulations, the Respondent and the 1<sup>st</sup> Respondent ignored a very vital aspect of public participation.

It is true that under *the Constitution*, and in particular Article 10 (2)(a), public participation is one of the national values and principles of governance. And according to section 4(3) of the Fair Administrative Actions Act, where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall, inter alia, give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; and, an opportunity to be heard and to make representations in that regard. And closer to the issue at hand, section 40 (1) of the Agriculture, Fisheries and Food Authority Act, No. 13 of 2013 is specific that there has to be close consultations with farmers in the development of policies or regulations that affect them or the agricultural sector in general. That section reads as follows:

34. Participation of farmers

To ensure the effective participation of farmers in the governance of the agricultural sector in Kenya, there shall be close consultation with all registered farmers’ organizations in the development of policies or regulations before making any major decision that has an effect on the agricultural sector.



The question that the Respondent and the Interested Parties were bound to answer is whether the public was involved in the development of the Regulations. In my view, there is sufficient evidence that they did.

Going by the affidavit of Leonard Kubok, the Agricultural Food Authority comprehensively mapped out the key stakeholders in the Irish potato subsector at the infancy stages of the Regulations. The stakeholders included organizations such as county governments representatives, County Executive committee members, National Government, National Potato Council of Kenya, National Potato Farmers Association, Kenya Plant Health Inspectorate Services and International Potato Center Research Institutions, the general public, members of the academia, farmers, and farmers representatives, traders, private sector players such as warehouse owners, marketers, packers, processors, seed potato multipliers, importers and representatives of the Authority itself as the regulator of the sector.

Apart from involving all the key stakeholders, the 1<sup>st</sup> Interested Party also issued a general notice to the public on the intensive public participation fora on the Regulations in 17 counties in Kenya and a national consultative forum at Kenya Agriculture, Livestock Research Organization Headquarters, which were held between 18<sup>th</sup> June 2018 and 4<sup>th</sup> of July 2018. Members of the public were also invited to make other comments and views in writing on the proposed regulations.

Public consultations were conducted, and a substantial number of stakeholders and members of the public attended the forum and engaged in discussions in the draft regulations. There was proof that the attendees signed attendance sheets as evidence of participation in these meetings. The views and inputs of the members of the public and the stakeholders were considered and incorporated in the final draft of the regulations. The Respondent and the 1<sup>st</sup> Interested Party exhibited to their affidavit what they described as 'an explanatory memorandum' giving a brief of the consultations, an outline of results, and a brief explanation of the changes made to the regulations to demonstrate that indeed these consultations were conducted in accordance with all the enabling laws.

This evidence of the Respondent's and 1<sup>st</sup> Interested Party's engagement with the stakeholders and the public at large on the development of the regulations has yet to be controverted. In the absence of any contrary evidence, I am satisfied that there was sufficient public participation in the development of the Regulations. To that extent, the Regulations cannot be faulted on the ground of procedural impropriety ostensibly because of lack of public participation.

The applicants have yet to suggest that they ever attended any of the meetings called by the 1<sup>st</sup> Interested Party or that if they attended, their views were not taken into account in the final draft of the regulations. The evidence by the Respondent and the 1<sup>st</sup> Interested Party that the views of those who attended the meetings were taken on board have yet to be controverted.

In any event, to prove public participation, the Respondent and the 1<sup>st</sup> Interested Party are not under any obligation in law to demonstrate that they took views of the public into account. The words of Sachs, J. in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (supra) and which Lenaola, J. acknowledged in his judgment in *Nairobi Metropolitan Psv Saccos Union Limited & 25 others v County Of Nairobi Government & 3 others* [2013] eKLR Lenaola J. would be befitting on this point; the learned judge said of public participation as follows:



“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

been given the opportunity to ventilate their view on the Regulations, I am satisfied that the applicants were treated fairly. This is all that would concern a judicial review court; it is the process rather than the decision that would matter. In this regard, Lord Hailsham L.C. in *Chief Constable of North Wales Police vs. Evans* (1982) 3 ALL E.R. at pg. 141 ring true; the learned judge said of the remedy of judicial review as follows:

“It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.”

35. In the end the court concluded that: -

“In the ultimate, I am not persuaded that the Respondent’s decision is deficient on any of the judicial review grounds of illegality, irrationality or procedural impropriety. There is no evidence that, in developing the Regulations and implementing them, the Respondent or the 1<sup>st</sup> Interested Party acted without jurisdiction, or exceeded their jurisdiction, or misapprehended the law or the decision is unreasonable in the *Wednesbury* sense (*Associated Provincial Picture Houses Limited vs. Wednesbury Corporation* (1948) 1 K.B. 223).

As was noted earlier in this judgment, according to section 40 of the *Crops Act*, the 1<sup>st</sup> Respondent has the mandate to come up with regulations to put into effect the provisions of the Act. It is trite that a judicial review court will not interfere in any way with the exercise of any power which has been conferred on a body unless it has been exercised in a way that is not within that body’s jurisdiction or the decision is unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. It has been said that if the court were to attempt the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power, be guilty of usurping power. (See *Chief Constable of North Wales Police vs. Evans* (1982) 1 W.L.R. 1155 at pg. 1173).”

I am inclined to reach the conclusion that the applicants’ application lacks merit and is therefore dismissed with costs. Orders accordingly.”

36. Moreover, the Petitioners prayed That the honorable court do specifically declare section 18 (1), 6, 21 (1), (2), (3), 22 (1), (2), (3), 23 (1), (2), (3), 24, 25 and 26 of the Crops (Irish Potato) Regulations 2019 and or the entire policies thereunder as unconstitutional. They stated that the same was grossly skewed, lopsided, biased, impractical, oppressive, repressive, inconvenienced, and economically disruptive of potato farming and trade in Nyandarua. In analyzing the petition, the Petitioners underpinned the aforementioned claim on the fact that public participation was not carried out when coming up with the Regulations as required by the law.



37. however, I find that there is no doubt that the issues of the lack of public participation as raised in the instant petition, were issues that were determined in the aforementioned judicial review case; therefore, this court will not spend its judicial time determining this matter any further.

38. Moreover, the issue of Regulation 19(1) & (2) was exhaustively dealt with by the court in Julius Mutiga & 16 others v CS Ministry of Agriculture & 3 others [2020] eKLR, where the court in determining the issue of the directive to pack potatoes in 50kg bags as per the Regulations concluded thus: -

“.....From the cited authority, it therefore follows that the petition should stand dismissed at this stage. I will, nevertheless, point to the Petitioners the single reason why their petition should have failed anyway. Section 42 of the Agriculture, Fisheries and Food Authority Act, 2013, being the law that was in force at the time the 1<sup>st</sup> Respondent issued the impugned directive, provided that:

The unit measurement of the weight of all produce subject to regulation by the Authority shall be the kilogram, and each single package shall not exceed a weight of fifty kilograms.

The 1<sup>st</sup> Respondent was therefore restating the law in issuing the impugned directive. Nowhere in their pleadings have the Petitioners challenged the constitutionality of Section 42 of the Agriculture, Fisheries and Food Authority Act, 2013. The impugned directive was therefore issued in accordance with a valid law.

For the stated reasons, I find the instant petition without merit. The same is dismissed. The parties are directed to meet their own costs of the proceedings.”

39. I agree with the sentiments of Kuloba J (as he then was). As was stated in the case of Njangu vs Wambugu and another Nairobi HCC No.2340 of 1991 (unreported), as relied on in Kennedy Mokuwa Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022], eKLR held that:

“If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic facelift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

40. Accordingly, it is my view and holding that the two matters squarely settle the issues in the petition herein.

41. For the foregoing reasons, I hold that the instant petition is unmerited and thus make orders;

- i. The petition is hereby dismissed.
- ii. Parties to bear their costs.

**DATED, SIGNED AND DELIVERED AT OLKALOU THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

.....

**CHARLES KARIUKI**

**JUDGE**

