



**Mbirira & 11 others v Attorney General & 4 others; Council of Governors
(Intended Interested Party) (Petition 117 of 2020) [2022] KEHC 15441 (KLR)
(Constitutional and Human Rights) (18 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 117 OF 2020
HI ONG'UDI, J
NOVEMBER 18, 2022**

BETWEEN

**SHADRACK WASILWA MBIRIRA & 5 OTHERS 1ST PETITIONER
JAMIN CHEPTORUS KANGUGO 2ND PETITIONER
ZEPHANIA KEMOBI CHEMWENO 3RD PETITIONER
TOM WANAMBISI 4TH PETITIONER
ALEX WAFUBWA MALIEKHE 5TH PETITIONER
SAMSON KAMARICH LOITAMA (REPRESENTING POKOT FARMERS CO-
OPERATIVE UNION) 6TH PETITIONER
JOHNSON AKUNGA & 5 OTHERS 7TH PETITIONER**

AND

**ATTORNEY GENERAL 1ST RESPONDENT
CABINET SECRETARY NATIONAL TREASURY AND NATIONAL
PLANNING 2ND RESPONDENT
CABINET SECRETARY MINISTRY OF AGRICULTURE FISHERIES AND
LIVESTOCK 3RD RESPONDENT
AGRICULTURE AND FOOD AUTHORITY (AFA) 4TH RESPONDENT
NEW KENYA PLANTERS CO-OPERATIVE UNION 5TH RESPONDENT**

AND

COUNCIL OF GOVERNORS INTENDED INTERESTED PARTY



JUDGMENT

1. The petitioners through the amended petition dated November 18, 2020 and supported by the verifying affidavits of the petitioners dated March 20, 2020 and the supplementary affidavit of Shadrack Mbirira Wasilwa dated November 18, 2020 pray for the following reliefs:
 - a. A declaration that the entire *The Public Finance Management Coffee Cherry Advance Revolving Fund Regulations, 2020* are illegal, invalid, null and void for being ill-motivated, lack of Public participation, Fairness, transparency, accountability, legitimate expectation, progressive Socio-economic trajectory, discriminative and ultravires.
 - b. An order prohibiting the Cabinet Secretary national Treasury and planning 2nd, 3rd, 4th and 5th respondents from disbursing the appropriated Kshs.3 billion coffee cherry advance revolving fund through any other entity other than the Commodities Fund.
 - c. An order Prohibiting the Agriculture and Food Authority from licensing New Kenya Planters Co-operative Union (New KPCU) as a miller, dealer, warehouseman or marketing agent of coffee, using name or Infrastructure of the Defunct KPCU.
 - d. An order quashing/revoking the Coffee Milling Licence, Licence to conduct the Business of Coffee Marketing, Dealer's Licence and Licence to Conduct the Business of Coffee warehouseman issued by the 4th respondent to the 5th respondent.
 - e. Costs.
 - f. Any other order which this honourable court shall deem fit and expedient to grant.
2. The petitioners in support of the petition rely on the verifying affidavits of Johnson Akunga sworn on March 18, 2020, Samson Kamarich Loitama sworn on March 20, 2020, Alex Wafula Macheke sworn on March 20, 2020; Tom Wamambisi sworn on March 20, 2020, Zephania Kemboi Chemweno sworn on March 20, 2020, Jamin Cheptomes Kangungo sworn on March 20, 2020, verifying and supplementary affidavits of Shadrack Mbirira Wasilwa sworn on March 20, 2020 and November 18, 2020 respectively, and written submissions and authorities filed herein.
3. The petitioners have deponed that Coffee growers in Kenya are categorized into two namely "small scale holder" in their co-operative societies or "Estate". The co-operative is a cluster of small scale holder growers while Estate is for licenced growers of 5 acres and above. They have deponed that coffee is a vision 2030 flagship project given its contribution to GDP. That on the advent of the new constitution 2010 the National government was left with facilitative and regulatory roles only. Further that it regulates through Agriculture and Food Authority (AFA) while funding is through the Commodities Fund.
4. It is deponed that in the 2019 – 2020 financial year the government proposed to set aside Kshs 3 billion for prioritized reforms in the Agriculture docket. They point out that when it came to appropriation the 3 billion does not appear anywhere in the vote for the Agriculture docket (SM-3).
5. The Public Finance Management Coffee Cherry Advance Revolving Fund was however established to manage the said Kshs 3 billion a move the petitioners are against. regulations were gazetted and under regulation 7 the 3 billion fund is outsourced to New Kenya Planters Co-operative Planters Union, a State corporation. The petitioners are opposed to the government having a hand in the management of this fund, as they feel there shall be no transparency and accountability.



6. It is averred that the membership of coffee growers has rejected the new move by the government through the Cherry Fund. The members are contended with the Commodities Fund. The new development they say will not serve them at all, and it will not fulfil the intention of section 10 of the Crops Act.
7. They depone that the regulations are discriminatory against coffee producers of more than 20 acres in regulation 9, and section 10 of the Crops Act. It is feared that the 3 billion fund will not reach the grower and the objective in section 3 of the Crops Act will not be achieved.
8. In the supplementary affidavit the deponent annexed the budget statement for 2019/2020 (SM 13), diagrams (SM 14 A & B), Report of the Coffee Task force (SM 15).

Responses

The 1st, 2nd & 3rd Respondents' response.

9. The 1st – 3rd respondents filed a replying affidavit by Julius M Muia the Principal Secretary national Treasury. It is dated May 5, 2021. He annexed several documents in bundle (JMM-1) to the affidavit. He deponed that coffee is a major contributor to the country's economy and there had been a drastic decline in its production by over half. A National Task Force on Coffee sub-sector Reforms was appointed by H E the President to look into what was ailing the sector.
10. The Task Force established delayed payments as one of the major challenges affecting the coffee sector. After consultations, the National Assembly appropriated Kshs 3 billion to the Cherry Fund in the budget of the State department for Co-operatives for the financial year 2019/2020. He deponed that all dues processes were adhered to including public participation before the enactment of the PFM (*Coffee Cherry Advance Revolving Fund*) Regulations 2020. He averred that the Regulations were published *vide* Legal Notice No 29 of March 12, 2020.
11. He averred that the Commodities Fund established under sections 9 and 10 of the Crops Act 2013 is specific and does not cater for advances to coffee farmers thereby necessitating the establishment of the Cherry Fund. He denies the claim that the Cherry Fund is contradictory and discriminatory. He adds that matters on establishment, management and administration of public funds, such as the Cherry Fund are the preserve of the Cabinet Secretary for National Treasury and Planning under Sections 6 & 24 of the PFM Act and not the Cabinet Secretary responsible for Agriculture and Agriculture Food Authority.
12. He deponed that the new KPCU is a State corporation and plays its role as per the State Corporations Act requirements. The said Cherry Fund has already been rolled out and has been well received. He further deponed that the 5th – 7th petitioners had not annexed any authority to confirm that they were acting on behalf of their societies. That theirs was an advancement of personal and not public interests.

The 4th respondent's response

13. The 4th respondent's replying affidavit is dated July 28, 2021 through Isabella Nkonge, the Director Coffee Directorate of the 4th respondent. She averred that the role of the 4th respondent is to administer the Crops Act and any other functions as provided for under Section 4 of the Agriculture and Food Authority Act 2013. It plays no role in the development, enactment or gazettment of legislation related to the coffee sub-sector. It only deals with the Commodities Fund and not the Coffee Cherry Advance Revolving Fund.



14. Further that it renews licences to the 5th respondent under the *Crops Act 2013* which does not require issuance of notices. That the creation of the *Public Finance Management (Coffee Cherry Advance Revolving Fund) Regulations 2020* was done in compliance with the law by the 2nd respondent.

The 5th respondent's response

15. The replying affidavit by the 5th respondent is by Henry Gichuhi Kinyua (Chairman of the 5th respondent's society) sworn on April 14, 2021. He deponed that the amended petition was not factual, but reckless, misdirection, misinformation and misrepresentation of the state of facts and what the real state of affairs was as at the time of filing the petition.
16. He depones that there was a fully detailed and structured public participation in the making of the impugned Regulations. That the said Regulations 2019 were published on December 27, 2019 (HGK/1). And an advert of the same was placed as sponsored contents on January 14, 2020 when members of the public were invited to participate (HGK/3 a & b). After consultation they were revised giving rise to the Coffee Cherry Fund Regulations 2020 (HGK/2). An advert of the same was placed at page 12 of the Daily Nation Newspaper of March 12, 2020 for reactions by members of the public. A letter dated January 14, 2020 (HGK/4) addressed to all Governors concerned was sent for their participation.
17. He deponed stating that the Ministry had set ten (10) meeting centres in the mentioned counties, and all meetings took place as scheduled. He annexed lists of the attendees at the respective centres (HGK/5 (a-(i)) ranging from 100 – 250 persons, who included members of Parliament MCAs, Executive County members among many others.
18. The draft regulations plus comments were then presented to the National Assembly for discussion and all other processes followed. The replying affidavit sworn on April 6, 2020 was not traced at the time of writing this judgment. It is however noted that the replying affidavit of April 14, 2021 reiterated what was stated in the earlier one of April 6, 2020.

Submissions

19. The petitioners' submissions are dated February 16, 2022 and filed by the firm of DB Wati & company advocates. Counsel gave a back ground of the pleadings. He submitted that contrary to what the Principal Secretary stated section 19(1) of the *Crops Act* caters for advances to farmers. Secondly it provides for the management under section 9(3) of the *Crops Act*. Further that in disregard to sections 9 & 10 the Cabinet Secretary for National Treasury set up a rival outfit to administer the impugned Cherry Advance Fund. In reference to Regulations 2, 6 & 7 of the said Fund, Counsel submitted that the New Kenya Planters Co-operative Union a commercial enterprise has its expenses paid for from the Kshs 3 billion state appropriation fund.
20. It's his submission that the impugned fund will be hemorrhaging funds meant for the farmer. That it is also a duplication of tasks and crowding of the coffee sector with a multiplicity of institutions identified by the taskforce as a constraint and a burden to the coffee value chain (refers to the Taskforce report). He therefore dismisses the "*Public Finance Management Coffee Cherry Advance Revolving Fund Regulations 2020*" as an unnecessary burden.
21. He contends that the petitioners had a legitimate expectation that any new product in the coffee sub-sector would be channeled through the Commodities Fund. He relied on the case of *Cosu v Minister*



for *Civil Service* [1985] A/C 374 where the two ways in which a legitimate expectation (sometimes referred to as reasonable) expectation arises were explained as:

“From an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.”

22. He submitted further that there was no public participation as provided for under Article 118(1) (b) of the Constitution, before the Regulations were approved. He referred to the Petition No 532 of 2013 *Robert N Gakuru & others vs The Governor, Kiambu County & others*. He contends that from Mr Muia’s purported summary of the Farmers views during the public hearings it’s clear that the Farmers were resistant to KPCU. There was a complaint of KPCU owing Farmers money for 1998/99 crop season and issues were raised about the composition of the Board. They also challenged the long procedure involved before receiving funds.
23. Still on public participation counsel referred to *Robert N Gakuru & others* (supra) and submitted that posting of notices, or disposing thereof copies of the draft should have been done. There was also no use of the radio made etc. There was no willingness to incorporate views of others. Counsel contends that the Regulations in draft and final copy are no different. Further the Farmers are tied to KPCU with no choices to make if they want to benefit from the Fund.
24. He argues that the 4th respondent has conceded that the requisite 30 days notice was not issued before the new KPCU was given a milling, warehousing or marketing licences, ostensibly because the new KPCU assumed the management of the defunct KPCU. He submits that this was a breach of the law since the new KPCU is a new parastatal with a Registration Certificate.
25. Counsel submitted that the impugned Regulations outplay other players in the coffee financing field in favour of the New KPCU. That by advancing money directly to the Farmer without regard to the preceding creditors poses a danger of exceeding the sums expected to be realized from the sale, thereby subjecting the coffee financial ecosystem to the uncertainty and instability. These he says are part of the side effects of the New KPCU outfit.
26. Referring to Nairobi Civil Appeal No 110 of 2001 – *Rashid Odhiambo Aloggoh & 245 others v Haco Industries*. Counsel submitted that the Court of Appeal, in giving guidelines on how to resolve a Constitutional petition, held that the court should first find out if the facts alleged by the petitioners are there or not. If true then the court moves to assess if they constitute violation of constitutional rights. If that is confirmed then what remedies should be given are considered. He contends that the petitioners have made out a case to warrant the award of the reliefs sought.

The 1st, 2nd & 3rd Respondents’ submissions.

27. These were filed by Senior State Counsel M/s Patricia A Chibole and are dated February 14, 2022. Counsel gave a summary of the pleadings and identified the following as the issues for determination.
 - a. Whether the cherry fund violates the 4th schedule part 2 of the Constitution of Kenya, 2010
 - b. Whether the *Public Finance Management coffee Cherry Advance Revolving Fund Regulations, 2020* is Constitutional.
 - c. Whether the accountability of the Cherry fund will be comprised.
 - d. Whether the Regulations violates Article 36(1) of the Constitution by limiting access to the impugned fund to farmers affiliated to New Kenya Planters Co-operative Union.
 - e. Whether the affidavits in support of the petition has probative evidence.



28. On the first issue counsel submitted that the Cherry Fund is a National Government Public Fund, and is governed by the Public Finance Management (PFM) Act No 18 of 2012. Referring to the 4th schedule part 2(1) of the Constitution of Kenya 2010 and section 4 of the PFM Act she submitted that all the legal requirements for the creation of the Regulations were adhered to prior to the gazettment of the PFM (Coffee Cherry Advance Revolving Fund) Regulations, 2020.
29. On the 2nd issue counsel submitted that all the processes in setting up the Cherry Fund were adhered to. She referred to section 24 (3) of the PFM Act No 18 of 2012 and explained what steps were taken before the Regulations were gazetted. That Article 259(1) of the Constitution, section 11 (1) of the [Statutory Instruments Act, 2013](#) were all adhered to. On public participation she relied on *Minister for Health v New Chicks South Africa Pty Ltd* CCT 59/04.
30. On the 3rd issue and while referring to Sections 6, & 24 of the PFM Act counsel contends that matters on establishment, management and administration of public funds such as a Cherry Fund are the preserve of the Cabinet Secretary for National Treasury and Planning and not the Cabinet Secretary Agriculture and Agriculture Food Authority as submitted by the petitioners. The designated administration is required by law to ensure proper expenditure of the Fund.
31. On issue no (4) she submitted that pursuant to Regulation 9 a person is eligible to benefit from the Fund if he is a member of a registered coffee co-operative or is affiliated to the new KPCU Ltd. On determining the constitutionality of a Statute counsel referred to the following cases:
 - i. [Kenya Human Rights Commission v Attorney General & another](#) [2018] eKLR
 - ii. *The Queen v Big M Drug Mart Ltd* 1986 LRC (Const) 332. Supreme Court of Canada.
 - iii. [Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers \(Kudheiba Workers Union\) v Kenya Revenue authority & 3 others](#) [2014] eKLR.
32. Lastly on issue no. 5 she submitted that the 5th, 6th & 7th petitioners have not demonstrated their interest in the Cherry Fund, since they have not provided any evidence of membership to the co-operatives or evidence that they are coffee producers. Further they have not annexed any authority allowing them to act on behalf of the society or proof of any dissatisfaction by the other members of their alleged cooperative societies. No certificate of registration has been annexed to the affidavit. She referred to sections 107 & 108, [Evidence Act](#) and *Halsburrys Laws of England* 4th Edition Vol 17 to show on whom the burden of proof lies.
33. The 4th respondent's submissionS are dated July 7, 2022 and filed by Mugoye & Associates. Counsel gave a brief of the pleadings and facts. He identified two issues for determination namely;
 - i. Whether the petitioner's rights have been violated by the 4th respondent.
 - ii. Whether public participation was undertaken in respect of the *Public Finance Management (Coffee Cherry Advance Revolving Fund) Regulations 2020*.
34. Counsel submitted that the test for instituting a constitutional petition was well settled in the matter of [Anarita Karimi Njeru v Republic](#) [1979] eKLR and further reiterated in [Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others](#) [2013] eKLR. It's counsel's submission that the Amended Petition though well intentioned fails to meet the substantive test for a constitutional petition as laid



out in the *Anarita Karimi Njeru case* (supra). He contends that the petitioners' complaint is based at paragraph 13 of the Amended Petition where the petitioner states:

“Further, the aforesaid proposed regulations contradict the objectives and purposes of the Commodities Fund set out in Section 10 of the *Crops Act*, violate principles of accountability, public participation, equality of access, legitimate expectation enshrined in Articles 10, 27, 36, 47 and 118 of the Constitution, duplicate functions of the Commodities Fund saddling the coffee grower with debts, ill-motivated, *ultra vires*, spur coffee theft and hawking, breach the coffee production chain, puncture the coffee payment ecosystem, divert funds away from the intended beneficiaries and not of assistance to the coffee grower.”

That the petition has failed to particularize each and every specific instance of the alleged violations.

35. On the second issue counsel submitted that public participation is enshrined in Article 10(2)(a) of the Constitution of Kenya. That the impugned Regulations were subjected to public participation as stated by the respondents in their responses. He referred to *Robert N Gakuru & others* (supra); *Doctors for Life International vs Speaker of the National Assembly & others* (CCT 12/05) [2006] ZACC 11: 2006 (12) BCLR 1399 (CC) 2006(6) SA 416 (CC) and *Matatiele Municipality & others vs the Republic of South Africa & others* (2) CCT 73/05A) [2006] ZACC 12; 2007(1) BCLR 47 (CC). He contends that public participation in a matter of this nature is very important. He submitted that the petitioners participated in the formulation of the Regulations being a stakeholder in the coffee sector.

The 5th respondent's submissions.

36. These are dated June 30, 2022 and were filed by Gitonga, Muriuki & co advocates. Counsel identified the following as the issues for determination:
- i. Whether the petitioners' constitutional rights have been violated
 - ii. Whether public participation was undertaken in respect of the *Public Finance Management (Coffee Cherry Advance Revolving Fund) Regulations, 2020*
 - iii. Whether the petitioners should be granted the relief they seek from the court in their amended petition dated November 18, 2020.
37. On the 1st issue and while relying on the *Anarita Karimi Njeru case* (supra), (ii) *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* [2014] eKLR, (iii) *Kefa Nyaga Kairuki & Officer Commanding Station Kikuyu Police Station & 3 others; Welton Kibiwott Tubei (Interested Party* [2022] eKLR submitted that the petition does not meet the threshold for a constitutional petition. That the petitioners are merely inviting the court to attack the merits of policy and legislature decision of the Executive arm of government through the back door. Secondly they have not substantiated the alleged violations. They appear to speak for unnamed persons. He refers to paragraphs 51 & 28 of the verifying affidavit of the 1st petitioner. There are inconsistencies in the averments see (paragraph 50) of the verifying affidavit.
38. On the 2nd issue counsel has reiterated the submission by the other respondents on the issue of public participation. He refers to the case of *Josphat Musila Mutua & 9 others vs Attorney General & 3 others* [2018] eKLR, where it was held:

“45. Public participation and stake holder engagement during legislative process is a constitutional requirement. Laws are enacted to serve the society and therefore



members of the public have a right to participate and give their input prior to legislation. This is constitutional requirement that cannot be overlooked since it is one of the values and principles of our Constitution.

46. Article 10 is clear that these national values and principles of governance bind all state organs, state officers, public officers and all persons whatever they apply or interpret the Constitution, enact, apply or interpret any law, or make or implement public policy decisions. The national values and principles of governance under Article 10 of participation of the people cannot be undermined.”
39. He submitted that the 5th respondent has comprehensively outlined how public participation was undertaken in respect of the Cherry Fund Regulations.
40. On the 3rd issue counsel has submitted that the petitioners are inviting the court to delve into the merits of the policy and administrative decisions of the 2nd respondent which is unprocedural. He referred the court to;
- i. *Joshua Sembei Mutua vs Attorney General & 2 others* [2019] eKLR
 - ii. *Republic v Zacharia Kabuthu & another (sued as Trustees and on behalf of and as officials of the Kenya Evangelical Lutheran Church); Johanness Kutur Ole Meliyio & 2 others (Interested Parties) Ex parte Benjamin Kamala & another* [2020] eKLR.
41. Furthermore counsel submits that the 5th respondent was duly licensed inter alia as a Miller, Dealer, Marketer and Warehouseman. It has been ministering the Fund effectively, and there are no complaints in the public domain against it. That the petitioners represent a very small portion of coffee growers.
42. Counsel contends that contrary to the petitioners’ assertions the Cherry Fund is available to small scale coffee growers with no restrictions. It therefore serves every coffee farmer with no restrictions. He further submits that section 24(4) & (5) of the PFM Act empowers the Cabinet Secretary to make the kind of decision he made in setting up the Cherry Fund. Lastly on Coffee Sector Reforms counsel submits that the Task Force was formed to address the serious challenges the sector was facing making it come down so badly yet it had been a top foreign exchange earner in the country. The impugned Fund is addressing the issue of delayed payments to growers, among many others.
43. The Council of Governors which is the interested did not participate in these proceedings at all.

Analysis and determination

44. Having carefully considered all the pleadings, submissions, cited authorities, and the law I find the main issues for determination to be:
- i. Whether the *public Finance Management Coffee Cherry Advance Revolving Fund Regulations, 2020*, are constitutional.
 - ii. Whether the petitioner’s constitutional rights have been violated by the respondents.
 - iii. Whether the petitioners should be granted the reliefs sought in their amended petition dated November 18, 2020.



Issue No. (i) Whether the public Finance Management Coffee Cherry Advance Revolving Fund Regulations, 2020, are constitutional.

45. The petitioners have raised issues on how the *Coffee Cherry Fund Regulations 2020* are unconstitutional as their enactment did not involve public participation, they are discriminative and the said Fund is a duplication of the Commodities Fund under the *Crops Act*. They also claim that the 2nd respondent has no mandate to prepare such Regulations as the same is the sole mandate of the Cabinet Secretary of Agriculture, Fisheries and Livestock under the *Crops Act*. All these allegations have been denied by the respondents vide the replying affidavits and submissions.
46. There is no dispute that coffee has been one of the major export earners in the nation of Kenya. It is also not disputed that the coffee sector has seen one of the greatest declines in the export market. The national government would not sit back and do nothing as the market of the said product rapidly declined. In the year 2016 a Task Force was set up by the then President H E Uhuru Kenyatta to seek views and make recommendations on the way forward, in respect of this matter.
47. The report by the Task Force has been produced as SM-15 by the petitioners. The Coffee (General) Regulations 2016 were formulated under section 40 of the *Crops Act 2013* by the Cabinet Secretary Ministry of Agriculture. Under the *Crops Act* is the commodities Fund which caters for specific financial needs of the coffee growers. According to the petitioners the appropriation of kshs 3 billion should have gone to the Commodities Fund and not the Coffee Cherry Advance Fund.
48. Under Chapter Seven (7) of the Task Force Report (SM-15) at page 92 is the implementation plan, part of which states:
1. Fast Track the review of legal and institutional policies that govern the sub-sector and, in particular focus on; Amendment of the Cooperative Act, 2012 in order to provide effective management and governance of cooperatives and cap cooperatives administrative deductions at 15 percent of net proceeds; and Review Crops and AFFA Acts, 2013 and fast-track the enactment of Warehouse Receipt Systems Bill, 2015 and Geographical Indications bill, 2007.
 - ii. Establishment of a subsidy programme to cater for smallholder and small estate coffee farmers. The subsidy will be offered as a package including fertilizer, planting materials for new varieties, capacity building and training of farmers and rehabilitation of at least 500 cooperative pulping stations;
 - iii. Establishment and implementation of a cherry advance system to pay KSh. 15 per kg of cherry upon delivery by farmers. This will also involve the establishment of a Central Depository Unit (CDU) and digitization of coffee value chain. iv. Provide for debt waiver to cooperative societies, SACCOs and Unions, the STABEX revolving fund and undertake audits to ascertain the indebtedness of the coffee sub-sector and the farmers' assets held by various institutions such as Kenya Planters Cooperative Union (KPCU) and Coffee Directorate.

7.2 Excepted outcomes.

At the farm level, the combined effect of the subsidy together with the impact of the cherry payment is estimated to increase coffee production by at least 3 times to 90,000 MT in year 4 resulting into an additional US\$ 220 million per year (at the current average coffee prices). The extra earning will be even more after taking into account the extra production from small estates. For smallholders, this is estimated lead to an extra income of KSh 120, 000 per acre per year (an extra 2,000 kg of cherry per acre at an average price of KSh 60 per kg of Chery).



The report therefore brings out what needed to be done to revamp the Coffee Sector.

49. The Coffee Cherry Fund Advance Fund is established under the *Public Finance Management Act* No 18 of 2012 (PFM) (ACT) section 24 of the said Act provides;
- (4) The Cabinet Secretary may establish a national government public fund with the approval of the National Assembly.
 - (5) The Cabinet Secretary shall designate a person to administer every national public fund established under subsection (4).
 - (6) The administrator of a national public fund shall ensure that the earnings of, or accruals to a national public fund are retained in the fund unless the Cabinet Secretary directs otherwise.
 - (7) The administrator of a national public fund shall ensure that money held in the fund, including any earnings or accruals referred to in subsection (6), is spent only for the purposes for which the fund is established.
 - (11) The regulations shall provide for the establishment, management, operation or winding-up of national public funds.
 - (12) This section applies to all other national public funds including funds earmarked for specific purposes established by an Act of Parliament but does not apply to a public fund established by the Constitution.
 - (13) In this section— “administrator”, in relation to a national public fund, means a person designated by the Cabinet Secretary under sub-section (5) to administer the fund; and “national public fund” means a public fund established under subsection (4).
50. The said section clearly sets out how such a fund is to be established and thereafter managed. The Cabinet Secretary was therefore acting within his statutory powers when he set up the said fund. Under the same section at subsection 11 the cabinet Secretary developed Regulations as provided for under the Act. The first set of Regulations (2019) published in Kenya Gazette Supplement No 207 (Legislature supplement No 72) of December 27, 2019 were revoked with the approval of the Attorney General on March 3, 2020. The revocation was according to the Cabinet Secretary’s letter dated February 24, 2020 to enable the task force to incorporate in the regulations the comments raised during the public consultations on the same.
51. A set of the consolidated Public comments plus the attendance lists are annexed to the replying affidavit of the Permanent Secretary, Mr Julius M Muia on behalf of the 1st – 3rd respondents (Appendix 1). Also annexed are copies of Public Notices Newspaper adverts, Notices to all the Governors in the Coffee growing counties.
52. All these material was availed to the court in form of replying affidavits plus annexures. There is no material presented by the petitioners to rebut these averments. The Council of Governors (Interested Party) whose members had been invited did not file any response to the petitioner overlooking the invitation to participate, yet their members were to benefit.



53. The right to public participation is entrenched in the *Constitution of Kenya* under Article 118(1) & (2). There are no hard rules about this. This is an issue which has been decided on severally. Odunga J (as he then was) in the case *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* Machakos, High Court Constitutional Petition 305 of 2012, 34 of 2013 & 12 of 2014 [2015] eKLR stated thus:

“Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance.

To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show international inclusivity and diversity. Any clear and intentional attempts to keep out *bona fide* stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or public official must take into account the subsidiarity principle; those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive.

However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all views received as part of the public participation programme. The government urgency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the constitutional box.

Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross – fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.”

54. In *Simon Mbugua & another v Central Bank of Kenya & 2 others* [2019] eKLR the Court stated:

“It is thus well settled that there are no hard and fast rules on how public participation is to be applied or implemented. The parameters depend on the unique circumstances of each case.”

55. Coming back to this case, it’s clear that there was an opportunity given to the public to air their views on the impugned Regulations. From the annexures a good number of Kenyans participated and aired their views. There is no law that requires all views to be included in the approved document. Secondly the PFM (ACT) under section 205 provides:-

(1)The Cabinet Secretary may make regulations, not inconsistent with this Act respecting any matter that is necessary or convenient to be prescribed under this Act or for the carrying out or giving effect to this Act.

(4) Regulations under subsection (1) shall not take effect unless approved by a resolution passed by Parliament.

(5) Regulations approved under subsection (4) shall take effect on the day after the date on which both Houses approved them or, if a later date is specified in the regulations, on that later date.



- (6) If a House of Parliament does not make a resolution either approving or rejecting any regulations within fifteen sitting days after submission to it for approval, the House shall be deemed to have approved those regulations.
56. The impugned Regulations were on March 12, 2020 published *vide* Legal Notice No 29 of the same date. On March 18, 2020 the Cabinet Secretary forwarded to the National Assembly the necessary documents in accordance with the [statutory Instruments Act 2013](#) for necessary action. The PFM (Act) is clear on the process of approval of the Regulations by Parliament. Furthermore if the petitioners had any issues on the approval or disapproval by Parliament then the National Assembly should have been made a party in these proceedings. Failure to enjoin it confirms that they were satisfied with the role the National Assembly played in the approval of the Regulations.
57. Furthermore it is agreed that Agriculture is a devolved function to the counties. The Council of Governors and Governors of the Coffee growing counties were sent notices to attend the various stakeholder meetings. They chose not to attend while the Council of Governors elected not to participate in these proceedings. The conclusion is that they did not find anything significant to offer in the proceedings.
58. The Petitioners claim that the notices were not sufficient since the various co-operative societies should have been notified. A perusal of the Attendees list which has not been rebutted shows the names of institutions represented and the title or occupation of the attendees. These lists clearly disapprove the claims by the petitioners. As stated earlier not every coffee grower would have attended to confirm public participation. To this extent I am satisfied that there was sufficient public participation.
59. The Coffee Cherry Fund is a program which aims at lowering the costs of Coffee production, thus increasing coffee production in the country and improving farmers' livelihoods. The new KPCU PLC has been given the mandate to manage and administer Coffee Farms Input Subsidy Program together with the Coffee Cherry Advance Revolving Fund.
60. On the other hand the mandate of the Commodities Fund under [Crops Act](#) is to provide sustainable and affordable credit and advances to farmers for farm improvement, fair inputs, farming operations, price stabilization and any other lawful purpose approved by the 4th Respondent.
61. A reading of the mandate of the two Funds reveals that the Commodities Fund deals with Farmers generally. The Farmers may apply for funds under the said Fund if they qualify. On the other hand the Coffee Cherry Fund deals with coffee growers and is meant to address the challenges faced by the coffee growers. There is therefore no justification for the hue and cry raised by the petitioners on this issue. The criteria for qualification is set out in the Regulations and if the petitioners qualify then they should be able to access the advance payments without much ado. At the same time they are eligible for funds from the Commodities Fund. It is nowhere stated that one cannot access funds from the two bodies.
62. The presumption always been that every Legislation is deemed to be constitutional until declared otherwise. See:
- i. [Kenya Human Rights Commission v Attorney General and another](#) 2018 eKLR.
 - ii. [Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers \(Kudbeiba Workers Union\) v Kenya Revenue Authority & 3 others](#) [2014] eKLR.
 - iii. *Robert N Gakuru v. Kiambu county & 3 others* (supra)
 - iv. *Matatiele Municipality & others* (supra).



63. In this case the petitioners have only tried to show their dissatisfaction with the New Fund and the New KPCU. They have failed to show the non-participation by majority of the stakeholders in the approval of the Regulations. Furthermore the Regulations were approved by the National Assembly confirming there was no challenge to the said Cherry Fund. It is the same National Assembly which appropriated the Kshs.3 billion to the said Fund under the state department of cooperatives.

Issue No. (ii) Whether the petitioner’s constitutional rights have been violated by the respondents.

Petitioners are required under sections 107 & 108 of the *Evidence Act* to explicitly demonstrate to this Court how and which of their constitutional rights were violated by the respondents.

64. They claim that the New KPCU is a new parastatal with a Registration Certificate to prove it was not a reincarnation of the defunct KPCU. Further that one could not register an entity already in existence. I have perused all the replying affidavits and I have not come across the “Registration Certificate” of the New KPCU referred to by counsel for the Petitioners. The 4th respondent who issued the licences to the New KPCU has explained its position on the issuance of licences in its replying affidavit. The licences were not imposed or issued illegally as the New KPCU is a state corporation, and was taking over from the defunct KPCU.

65. The petitioners in their pleadings have not come out clearly and with precision to state which rights of theirs have been violated. They state at paragraph 11 of the amended petition that they have been aggrieved by the decision of the Cabinet Secretary for National Treasury and Planning. Infact this is the bedrock of the petition. Being aggrieved in itself is not evidence of violation of a right. In *Anarita Karimi Njeru v Republic* [1979] eKLR which was followed by *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR the Court of Appeal clearly sets out what a Petitioner should bring out in a constitutional petition. In the former case the Court of Appeal stated thus;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” (Emphasis supplied).

66. On this issue I find that the petitioners have failed to satisfy this court of any constitutional violations meted out against them by the respondents.

Issue No (iii) Whether the petitioners should be granted the reliefs sought in their amended petition dated November 18, 2020.

67. The elementary principle as stated is that he who alleges a fact must prove it. It was for the petitioners to demonstrate that the impugned Regulations were imposed by the Cabinet Secretary who had no authority to do so. Further that the process for enacting the said Regulations was not adhered to. They ought to have demonstrated for the court to see how the said Regulations were discriminatory and how the Commodities Fund and Coffee Cherry Fund Advancement were one and the same thing.

68. The issue of advancing money directly to the farmer without regard to the preceding creditors raised by the petitioners is a pure policy and administrative issue to be dealt with by the 2nd respondent in its decision making process. The court cannot get into that arena.

69. I find that the issues advanced by the petitioners were more personal for reasons known to them other than constitutional, violations.



70. I find no merit in them and hereby dismiss the petition with costs.

Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 18TH DAY OF NOVEMBER, 2022 IN
OPEN COURT AT MILIMANI, NAIROBI.**

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

