Edible Oil Products Limited & 10 others v National Assembly & 3 others (Constitutional Petition E498 of 2021) [2022] KEHC 17097 (KLR) (Constitutional and Human Rights) (16 December 2022) (Judgment)

Neutral citation: [2022] KEHC 17097 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E498 OF 2021

AC MRIMA, J

DECEMBER 16, 2022

BETWEEN

EDIBLE OIL PRODUCTS LIMITED ..... 1ST PETITIONER

PWANI OIL PRODUCTS LIMITED ..... 2ND PETITIONER

GOLDEN AFRICA KENYA LIMITED ..... 3RD PETITIONER

UNITED MILLERS LIMITED ..... 4TH PETITIONER

KAPA OIL REFINIERIES LIMITED ..... 5TH PETITIONER

DARFORDS INDUSTRIES LIMITED ..... 6TH PETITIONER

GILOIL COMPANY LIMITED ..... 7TH PETITIONER

SALWA KENYA LIMITED ..... 8TH PETITIONER

BIDCO AFRICA LIMITED ..... 9TH PETITIONER

MVITA OILS LIMITED ..... 10TH PETITIONER

MORL ..... 11TH PETITIONER

AND

THE NATIONAL ASSEMBLY ..... 1ST RESPONDENT

CABINET SECRETARY - AGRICULTURE, LIVESTOCK, FISHERIES AND CO-OPERATIVES ..... 2ND RESPONDENT

AGRICULTURE AND FOOD AUTHORITY ..... 3RD RESPONDENT

THE ATTORNEY GENERAL ..... 4TH RESPONDENT

JUDGMENT

1. The Petition subject of this judgment variously challenged the constitutionality of some provisions of the *Crops Act*, No. 16 of 2013 and the Crops (Nuts and Oil Crops) Regulations, 2020.

2. The Petitioners are limited liability companies engaged in the manufacture, sale and distribution of edible vegetable oils whose raw materials are nuts and oils. They are aggrieved by the manner in which the Respondents introduced taxes in the sub-sector.

3. By these proceedings, the Petitioners sought to mainly forestall, inter alia, the implementation, administration, application and enforcement of the Third Schedule of the Crops (Nuts and Oil Crops) Regulations, 2020 (hereinafter referred to as 'the Regulations').

4. The Petition is opposed.

The Petitioners' case:

5. The Petition is dated 22nd November, 2021 and is supported by the Affidavit of Rajan Malde deposed on an even date. The Petition was further supported by a Further Affidavit sworn on 15th December, 2021 and a Supplementary Affidavit sworn on 9th March, 2022 by the said Rajan Malde.

6. The Petitioners also filed written submissions and a List of Authorities in further support of the Petition. They also highlighted on the submissions.

7. Concurrently, to the Petition, the Petitioners filed an application by way of a Notice of Motion which was evenly dated. It was also supported by an Affidavit evenly deposed to by the said Rajan Malde. The application was filed under certificate of urgency.

8. The application sought conservatory orders restraining the 2nd Respondent from implementation, further implementation, administration, application and/or enforcement of Regulations 8, 29, 30, 34, and 35 and the Third Schedule thereof and from collecting and/or demanding payment of the imported levy of 2% on raw materials and inspection fees of between Kshs. 1,000 to Kshs. 10,000 pending the hearing and determination of the application and the Petition.

9. Upon consideration of the application, the Court did not issue any interim reliefs, but instead focused on the sooner determination of the Petition. To that end, and on the consensus of Counsel and upon approval by the Court, the Court directed that both the Petition and the application be heard together, hence this judgment.

10. In holding that the Regulations and levies therein were unconstitutional, unlawful and unreasonable, the Petitioners raised various grounds.

11. It was pleaded that the implementation of the Regulations had the effect of rising the costs of living for Kenyans. They alleged that the Regulations threatened the survival of the Petitioner's businesses and other innocent third parties given that the businesses form the basis of livelihood for the Petitioners and their families.

12. Further, the Petitioners averred that their trade employs a considerable number of trained, untrained and or minimally trained persons whose jobs and livelihoods are under real and imminent threat.

13. Additionally, the Petitioners maintained that their manufactured products are essential basic products like cooking oil and bar soap whose utilization and or consumption is indispensable.

14. They contended that the net effect of the impugned Regulations and levies therein, led to rising of the cost of living for the Kenyans.

15. The Petitioners also posited that the Regulations were undertaken in grievous infringement of Articles 2(4), 10(1) and (2), 26, 28, 43, 46, and 209(1) of *the Constitution*.

16. They posited that the consequent tax burden imposed on the Petitioners by the impugned Regulations amounted to double taxation, hence, unsustainable, unfair, arbitrary, irrational, highly punitive and consequently in contravention of Article 201 of *the Constitution*.

17. Issues relating to lack of public participation, the failure by the Parliament to discharge its role in the process leading to the enactment of the Regulations, overlap and conflict between various legislations, infringement of economic and consumer rights among other issues were raised in the Petition and the application.

18. On the foregoing, the Petitioners prayed for the following orders: -

    i. A declaration directing the 2nd and 3rd Respondents to harmonize the regulation of the Nuts and Oil Crops industry with regard to licensing of manufactures as prescribed under Section 3, 17 as read with Section 18 of the *Crops Act*, 2013;

    ii. A declaration that the provisions of Section 18 of the *Crops Act*, 2013 as read with Regulation 8 of the Crops (Nuts and Oil Crops) Regulations, 2020 is inconsistent to and in violation of Articles 94 (b) and 209 (5) of *the constitution*;

    iii. A declaration that the provisions of Regulation 29 as in the 3rd Schedule of the Crops (Nuts and Oil Crops) Regulations, 2020 amounts to double taxation and is contrary to the provisions of Article 2(2), 10, 43, 46, 47, 201, and 209 of *the Constitution* in so far as it purports to levy import duty of 2% on raw materials therefore null and void ab initio;

    iv. A declaration that standardization and quality assurance of products in Kenya is the preserve of the Kenya National Bureau of Standards;

    v. A declaration that the provisions of Regulations 30, 34 and 35 of the Crops (Nuts and Oil Crops) Regulations, 2020 are inconsistent to and contrary to Articles 2 (2) and 10 of *the Constitution* and as such null and void ab initio;

    vi. An order of prohibition be and is hereby issued restraining the 3rd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of the third schedule of the Crops (Nuts and Oil Crops) Regulations, 2020 in so far as it purports to levy import levy of 2% on raw materials and inspection fees of between Kshs. 1,000 - 10,000;

    vii. The costs of this Petition be borne by the Respondents;

    viii. Any other or further order or relief that this Honourable Court deems fit to grant.

The Petitioners' submissions:

19. The Petitioners' were both on the application and the Petition. Citing various provisions of *the Constitution* and the law and referring to judicial decisions, the Petitioners impressively dealt with the principles for consideration in applications for conservatory orders in detail in laying a basis for allowing the application.

20. The submissions on the main Petition were equal detailed. The Petitioners formulated the following issues for determination: -

    i. Whether the 3 Respondent's preliminary objection has merit.

    ii. Whether this Honourable Court has Jurisdiction to hear and determine a question of Constitutionality of a Legislation and whether this contravenes Article 94 and 95 of *the Constitution*

    iii. Whether the imposition of the 2% import levy under Regulation 29 as read with Third schedule imposes an unfair tax burden contrary to Article 201 of *the Constitution*

    iv. Whether the imposition of the 2% import levy violates the Petitioners economic rights under Article 43 of *the Constitution*

    v. Whether the 2% import levy infringes on consumers right to health enshrined under article 46 of *the Constitution*.

    vi. Whether the provisions of Regulations 29, 30, and 35 are contrary to and violate the provisions of Article 10 of *the Constitution*.

    vii. Whether the impugned Regulations are procedurally improper for lack of public participation

21. On the first issue, the Petitioners submitted that the Respondent's Preliminary Objection was not merited. It was submitted that it raised mere technicalities as opposed to dealing with substantive justice.

22. The Petitioners posited that the requirement of authority to plead on behalf of a Company was aptly taken care of by the provisions of Article 159(2)(d) of *the Constitution* and Sections 1A and 1B of the *Civil Procedure Act*.

23. In contending the Petition was properly filed, they submitted that Mr. Rajan Malde was properly authorized to plead, swear affidavits and record witness statements in the proceedings on behalf of the other Petitioners. That in doing so, that the 1st Petitioner complied with Order 4 Rule 1(4) of the Civil Procedure Rules by duly filing an authority authorizing the 1st Petitioner to file the Petition on behalf of the 2nd to 11th Petitioners and further conferring authority to Mr. Rajan Malde to swear affidavits in support of the Petition.

24. It was submitted that the above was preceded by resolutions of the Boards of Directors of the Petitioners in giving the authority. The Petitioners relied on Agricultural Research Institute (K.A.R.I) V Farah Ali, Chairman Isahakia self-help group (sued on his own behalf and on behalf of members of the group) and Anor. High Court at Nakuru HCCC No. 23 of 2011, in support of the submission.

25. Further submissions were made that a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, it was submitted, was, therefore, not fatal to the suit as per finding in Leo Investments Limited V Trident Insurance Company Limited [2014] eKLR.

26. On the second issue, the Petitioners were categorical that the High Court had the requisite jurisdiction over the matter and that Articles 94 and 95 of *the Constitution* as well as the principle of constitutionality of statutes were not infringed in any way.

27. The Petitioners submitted that allowing such an objection to reign would be tantamount to unlawfully curtailing the public from questioning of the legislative freedom and wisdom of Parliament in discharging its mandate contrary to *the Constitution*.

28. To the Petitioners, the reference to only Articles 94 and 95 of *the Constitution* amounted to selective cherry-picking of constitutional provisions in a bid to misguide this Court into interpreting provisions of *the Constitution* in isolation as opposed to as a whole. The Supreme Court decision in The Matter of the Kenya National Human Rights Commission, Advisory Opinion No. 1 of 2012; [20141 eKLR, was relied on.

29. The Petitioners affirmed that Article 165(3) of *the Constitution* clothed the High Court with jurisdiction to protect *the Constitution* and in doing so to put to question the actions and or omissions of the other arms of Government. The Supreme Court decisions in Re the Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011; Law Society of Kenya v Attorney General & 2 others [2016] eKLR which made reference to the case of Speaker of National Assembly vs Attorney General and 3 Others (2013) eKLR; and cases in: Miscellaneous Civil Application 391 of 2017 referring to Doctors for Life International vs. Speaker of the· National Assembly and Others (CCT12/05) [2006] ZACC 11; and the case of Hugh Glenister vs. President of the Republic of South Africa & Others Case CCT 41/08; [2008] ZACC 19 were referred to at length in supporting the position.

30. On the principle of presumption of constitutionality of statutes, the Petitioners argued that *the Constitution* qualified the said presumption with the requirement that such does not limit human rights and fundamental freedoms, and if so, then the limitation should be strictly within *the Constitution*. Reliance was placed on Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others (2015) eKLR, Republic v National Assembly & another Ex-parte Coalition for Reform and Democracy (CORD) [2016] eKLR and Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).

31. On the third issue, the Petitioners submitted that the imposition of an import levy under Regulation 29 as read with Schedule 3 of the impugned Regulations (that requires the Petitioners to pay an import levy of 2% on all nuts and oil crops produce) was unsustainable, unfair, arbitrary, irrational, highly punitive and consequently in contravention of Article 201(a), (b)(i) of *the Constitution* as it amounted to double taxation.

32. They argued that currently, the Petitioners were required to pay an import levy on the same products under the East African Customs Management Act 2004. That, the introduction of a similar tax under the Regulations was to the detriment and suffering of the Petitioners. It was further argued that the East African Community External Tariff, 2017 provided an elaborate classification of goods with import levy rates.

33. The Petitioners referred to various decisions on the nature of double taxation. They included Constitutional Petition E005 & E001 (Consolidated) of 2021; Kenya Pharmaceutical Association & Another vs Nairobi City County and the 46 Other County Governments & Another [2017] eKLR; Waweru & 3 others (suing as officials of Kitengela Bar Owners Association) & another v National Assembly 2 others; and Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested parties) (Constitutional Petition EO05 & E001 (Consolidated) of 2021) [2021] KEHC 58 (KLR) (20 September 2021) (Judgment), cases.

34. The Petitioners, therefore, submitted that taxing the Petitioners on the same income twice is not only unconstitutional and unlawful, but also economically punitive. The decision in Keroche Industries Limited vs. Kenya Revenue Authority and 5 Others HC Misc. Civil Application No. 743 of 2006[2007] eKLR was relied on.

35. The Petitioners further took issue with Regulation 29 which called for manufacturers to pay import levies prior to the arrival of the imported goods. They argued that such a provision was premature and regressive mode of taxation. They alleged that the mode was ignorant of the fact that at the time of imposition of the impugned import levy, the goods are yet to be shipped and or received at the port. As such, in the event that the consignment is cancelled or fails to arrive for whatever reason, the Petitioners will have been prematurely and unjustifiably charged upon a tax for goods not imported.

36. Challenging further the mode of taxation adopted by the Respondents, the Petitioners posited that they were already paying other forms of taxes, hence, increasing the burden. For instance, pursuant to Section 7 of the *Miscellaneous Fees and Levies Act*, 2016, manufacturers are required to pay an import declaration levy of 1.5% on raw materials. That further, under Section 8 of the *Miscellaneous Fees and Levies Act*, 2016 the Petitioners' are also required to pay a railway development levy of 1.5%.

37. Apart from the introduction of import levy, the Regulations introduced other new fees and levies in Regulations 10, 11, 12, 13 and 17 as read with the Second and Fourth Schedules, the Petitioners' alleged.

38. The Petitioner further submitted that the 1st and 2nd Respondents in coming up with the impugned Regulations did not consider the fact that at the East African Community, the Petitioners and other manufacturers of edible oils who import raw materials (crops) not grown in their member states attract a tax rebate, thereby the imposition of the taxes under the Regulations will amount to a negation of tax incentives provided at the East Africa Community level aimed at supporting local manufacturing.

39. Consequently, the Petitioners contended that the imposition of double levies and new charges is in contravention of Section 3 as read with Section 6(2) of the *Crops Act* which expressly mandates National and County Governments to accelerate the growth and development of agriculture in general, enhance productivity and incomes and efficiency of the agri-business.

40. The Petitioners, therefore, contended that *the Constitution* enjoins Parliament to impose taxation in accordance with the national values and principles of governance enshrined under Articles 10 (2) (b), 26, 27 (1), (2) and (4), 28, 40 (2) & (3), 43, 73 (1) & (2), and 201 (a), (b) of *the Constitution*. The case of Kenya Flower Council vs. Meru County Government [2019] eKLR was relied upon.

41. On the fourth issue, the Petitioners argues that the introduction of additional and largely duplicate levies and fees will unnecessarily drive-up the cost of manufacturing of edible oils in Kenya. Subsequently, making local manufactured products price uncompetitive vis-a-vis imported finished products from neighbouring countries and other economies and in blatant contravention of Articles 201 (b) and 209 (5) of *the Constitution* as read with Section 3 and 6 (2) of the *Crops Act*. It was argued

that indeed the 3rd Respondent in paragraph 7 of its Replying Affidavit admitted that indeed there exists deficit between local demand and production of the nuts and oil products.

42. Decrying the impact of the licensing fees and levy charges imposed by Regulations 10, 11, 13, and 29, the Petitioners alleged that the total taxes and charges amount to a sum exceeding 10% of the gate value of the produce. They contended that it amounts to derogation of Section 6(1) (a) of the *Crops Act* and is a clearly infringement of the Petitioners' socio-economic rights under Article 43 of *the Constitution*. It was also contended that the aforesaid is a further infringement of the Petitioners' proprietary rights.

43. It was further argued that the impugned Regulations threaten the sanctity of the right to human dignity as enshrined under Article 28 of *the Constitution*.

44. On the fifth issue, the Petitioners contended that the effect of the impugned taxes was to drive the cost of living high contrary to Articles 43 and 46 of *the Constitution*. They relied in Association of Kenya Medical Laboratory Scientific Officers V Ministry of Health & another [2019] eKLR in support of the submission.

45. On the sixth issue, the Petitioners contended that Regulations 12, 30 and 35 of the impugned Regulations violated Article 2(4) as read with Article 10 of *the Constitution* as the said Regulations are manifestly riddled with ambiguity, uncertainty, contradictions and lack of clarity for the duplicity of levies required of the Petitioners. The Petitioners referred to Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR and Keroche Industries Limited vs. Kenya Revenue Authority &5 Others Nairobi HCMA No. 743 of 2006 (2007) 2 KLR 240.

46. They argued that the inconsistencies place the Petitioners at a position of uncertainty as to what is applicable to them in respect of Income Tax and, further, that the inconsistency is not only unlawful but also contravenes the cardinal rule of legislation, and more so fiscal policies, that they must be clear and certain. The decision in Kenya Breweries Association V Attorney General &another; Central Bank of Kenya (Interested Party) (2019) eKLR was cited.

47. On the multiplicity of taxes imposed by the Regulations, the Court's attention was directed to Section 32 of the *Food, Drugs and Chemical Substances Act*, Cap. 254 and Regulation 10 of the Food, Drugs and Chemical Substances (General) Regulations, 1978; and Sections 2 and 18 of the *Competition Act*, No. 12 of 2010.

48. On the uncertainty in the provisions of the impugned Regulations, the Petitioners now face a danger likely to be occasioned by the proposed draft Regulations on food standards and labelling under the Kenya Nutritionists and Dietetics Act and the proposed Nairobi County Food Safety and Fortification Bill which will cause more bureaucracy on the Petitioners in terms of standardization.

49. That in accentuating the duplicity and/or overlap in roles contrary to Article 10 of *the Constitution* as read with Sections 3 and 6 of the *Crops Act*, the Petitioners contended that they were already required to comply with several registration licensing and levies related thereto by other State agencies such as KEBS, Public Health Departments (both at National and County Level) and Kenya Plant Health Inspectorate Services.

50. The Petitioners also took issue with Regulations 30, 34 and 35 in alleging that the 3rd Respondent was unlawfully usurping the role of the Kenya Bureau of Standards (KEBS) with respect to the mandate of quality assurance which is a preserve of KEBS already set at the regional level of the East African Community. In furthering the argument, the Petitioners referred to Section 4 of the *Standards Act* on the roles of the KEBS and Section 3 of the *Crops Act* on the objects and purposes of the *Crops Act*. They contended that there was no mention of the role of quality control in Section 3 of the *Crops Act*.

51. It was argued that quality control was a preserve of KEBS and the law also allows KEBS to undertake inspection of premises to ensure quality of goods under Section 14 of the *Standards Act* Cap. 496. The decision in Dickson Matei t/a Machete Auctioneers & 10 others vs Nairobi County Government and Another [2016] eKLR. Was called into place in support of the argument.

52. The Petitioners asserted that the existence and enforcement of these overlapping multiplicity of impugned Regulations demonstrated the abdication of the 3rd Respondent's duty under Section 3 of the *Crops Act*. Additionally, that the National Government through the Kenya Revenue Authority was already imposing custom duty on the raw materials used in the manufacture of the Petitioner's products, therefore, the levying of further import levy by the 3rd Respondent is punitive and contrary to Article 201 as read with Article 209 (1) of *the Constitution*.

53. On the seventh issue, the Petitioners submitted that the impugned Regulations were procedurally improper for lack of public participation, since the Regulations were not subjected to meaningful public participation; as contemplated under Article 2, 10(1) and (2), 232(1)(d) as read with section 40 of the *Crops Act* and section 5 of the *Statutory Instruments Act*, 2013.

54. The Petitioners conceded that it is the duty of the Cabinet Secretary to enact Regulations. However, that the Regulations can only be enacted after consultation with the County Governments and the authority as stipulated under Section 40 of the *Crops Act*. That on the contrary, in this instance case as with the impugned Regulations, there was no such consultation with the County Governments thus leading to the unjustifiable egregious and punitive Regulations.

55. The Petitioners authoritatively submitted that public participation and stakeholder engagement during legislative process remains a constitutional requirement. That, such is a constitutional requirement that cannot be overlooked since it is one of the values and principles of our Constitution. Reliance on the case of Josephat Musila Mutua &9 others v Attorney General & 3 others [2018] eKLR; Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) vs. Salaries and Remuneration Commission. Petition No. 294 of 2013, South African case of Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others [20016] ZAACC 22.

56. The Petitioners denied that they were invited for public participation forum on the Regulations. They held that Memo to the effect of inviting the Petitioners to the said forum was only presented to Court. Accordingly, the Petitioners argued that even the County Governments were not invited as well.

57. However, the Petitioners attached evidence to show that they submitted a memorandum through their governing body Kenya Association of Manufacturers dated 23rd April, 2021. That the 3rd Respondent responded to the memorandum through its letter of May, 2021. As such, that the Petitioners hold that they have been continually engaging the 2nd and 3rd Respondents with the view of rectifying the manifest unconstitutionalities on the face of the impugned regulations.

58. The Petitioners further contended that the passing of the impugned amendment also offended the principle of legitimate expectation of the Petitioners and the general public that the 1st Respondent would always uphold the supremacy of *the Constitution* and the law.

59. In the end, the Petitioners prayed for the Petition to be wholly allowed with costs.

The Respondents' cases:

60. The Respondents opposed both the application and Petition.

61. The 1st Respondent filed a Replying Affidavit sworn on 15th December, 2021 by Michael Sialai, C.B.S, the Clerk of the National Assembly. Further, the 1st Respondent filed their written submissions.

62. The 2nd and 4th Respondents through the Hon. Attorney General relied on the responses filed by the 3rd Respondent. They did not file written submissions either.

63. The 3rd Respondent filed a Preliminary Objection dated 7th February, 2022 and as well as two Replying Affidavits deposed to by Rosemary Owino, the 3rd Respondent's Director of Nuts and Oils Directorate, on even date. The Affidavits are in response to the application and the Petition respectively.

DIVISION - The 1st Respondent's case:

64. In his Replying Affidavit, Mr. Michael Sialai averred that the mandate of the National Assembly in regard to subsidiary legislation is anchored under Article 94 of *the Constitution*, Section 11 of the *Statutory Instruments Act* No. 23 of 2013 and Standing Order 210 of the National Assembly Standing Orders.

65. He averred that in dealing with the impugned Regulations, the National Assembly fully complied with *the Constitution*, the law and its Standing Orders.

66. Further, it was averred that the Regulations were properly dealt with by the National Assembly's Committee on Delegated Legislation and that deliberations on the Draft Regulations were further dealt with in liaison with a delegation from the Ministry of Agriculture, Livestock, Fisheries and Co-operative.

67. It was posited that the 1st Respondent also satisfied itself that the Respondents had conducted adequate public participation in the formulation of the Regulations. That, it also duly considered the Stakeholders' comments and submissions. It was deposed that the Regulations were also laid before the Senate on 3rd November, 2020.

68. The 1st Respondent further posited that the impugned Regulations were registration and licensing and were aimed at primarily serving public interest by ensuring proper oversight, regulation and accountability of the Nuts and Oils sub-sector.

69. It was further averred that the impugned Regulations were further aimed at raising funds through the imposition of fees, levies or charges to be utilized in the growth of the very sub-sector. It was argued that Licences and Permits are regulatory devices that ensure compliance with the rules and regulations put in place to govern the industry and to protect market players from exploitation while promoting the growth of the industry.

70. The deponent maintained that the imposition of fees and levies in order to acquire certain certifications and approvals through licences is a concept in regulatory frameworks and applies to almost all sectors and businesses in Kenya.

71. The 1st Respondent, therefore, urged this Court to be guided by the Supreme Court in Speaker of the Senate & another v Attorney General & 4 others [2013] eKLR where it was held that '.... this Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.....'.

72. Through its submissions, the 1st Respondent formulated the following issues for determination: -

a. Whether the National Assembly satisfied itself that the 3rd Respondent conducted adequate public participation.

b. Whether the impugned regulations are unconstitutional.

c. Whether the impugned provisions impose an unfair tax burden on the Petitioners.

d. Whether the impugned provisions violated the Petitioners' rights under Article 46 of *the Constitution*.

73. On the first issue, the 1st Respondent posited that in accordance with Part IV of the Statutory Instrument Act and particularly Section 13 thereof, the role of Parliament is to scrutinize a statutory instrument to ensure compliance with the delegated authority and the law and to either approve or reject it.

74. That the Section requires the relevant Committee of Parliament in carrying out its scrutiny of any statutory instrument or published Bill be guided by the principles of good governance, rule of law and shall in particular consider whether the statutory instrument meets the requirements set out in section 13 of the Act.

75. Further, that Section 5 of the *Statutory Instruments Act* requires that before a regulation making authority makes a statutory instrument that has a direct, or a substantial indirect effect on business or restrict competition, the regulation making authority makes appropriate consultations with persons who are likely to be affected by the proposed instrument. That this position was affirmed in British American Tobacco Ltd V Cabinet Secretary for the Ministry of Health & 5 Others, Civil Appeal No. 112 of 2016; [2017] eKLR.

76. The 1st Respondent averred that the report filed in the National Assembly by the regulation making authority indicated that the impugned Regulations were submitted to extensive public participation. That, the same was evidenced through invitations to stakeholders and corresponding attendance lists for the various public forums conducted.

77. Further, that the National Assembly Committee on Delegated Legislation satisfied itself on the extent and quality of public participation conducted by the Respondents in approving the Regulations. That, the Committee subjected the impugned Regulations to the test specified in the *Statutory Instruments Act* and ensured that the impugned Regulations were compliant. Accordingly, that the National Assembly followed due procedure in enacting the impugned Regulations.

78. To buttress the foregoing, the 1st Respondent referred to the Court of Appeal in Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR to the effect that a Court reviewing the procedure of a legislature is not a super-legislature, sitting on appeal on the wisdom, correctness or desirability of the opinion of the impugned decision-making organ.

79. To that end, the 1st Respondent asserted that the Petitioner's attempt to interfere with or question the National Assembly's mandate of reviewing, scrutinizing and approving the impugned statutory instrument is unfounded and ill-informed for the reason that it ignores Parliament's legislative mandate and oversight roles; as under Articles 94 and 95 of *the Constitution* and Part IV of the *Statutory Instruments Act*.

80. On the second issue, it was the 1st Respondent's submission that it was trite law that every legislation and every decision of Parliament is presumed constitutional and where a person alleges that an Act of Parliament or any decision of Parliament is unconstitutional, the burden lies with that person to prove the unconstitutionality of the same.

81. Further, that every law has in its favour the presumption of constitutionality and to justify its nullification, there must be a clear and unequivocal breach of *the Constitution* and not a doubtful and argumentative one. A statute or a part thereof will be sustained unless it is plainly, obviously, palpably and manifestly in conflict with some provision(s) of the fundamental law.

82. On the test for establishing constitutionality of a statute, the decisions in Institute of Social Accountability & Another vs. National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR, Council of Governors & 3 others v The Senate & 53 others [2015] eKLR, Commission for Implementation of *the Constitution* - Parliament of Kenya & Another; High Court Petition No. 454 of 2012 and in Law Society of Kenya vs Attorney General & 2 Others [2013] eKLR.

83. According to the 1st Respondent, it was argued that the Petitioner had not discharged the burden of proof in demonstrating the manner in which the impugned Regulations were in violation of *the Constitution*.

84. On the third issue, the 1st Respondent posited that a State has the power to formulate policies and legislation to deal with matters of public interest unique to them where it deems appropriate despite Regional or International Treaties and instruments. The case in Scotch Whisky Association and others vs the Lord Advocate and Another (2017) UKSC 76.

85. It was argued that Article 94(5) of *the Constitution* accorded Parliament the sole authority of making provisions having the force of law in Kenya.

86. It was, therefore, further argued that the nature and extent of application of regional laws must not undermine domestic legislation dealing with the specific issue at hand (See Beatrice Wanjiku & Anor Vs. Attorney General & Anor [2012] eKLR).

87. On the imposition of the import levies through the Third Schedule by the 2nd Respondent and the regional levies, it was argued that the enactments by Parliament take precedence over the provisions of regional legislation. That, Regulation 38(1) specifically empowered the Cabinet Secretary to charge levies on imports and exports as set out in the Third Schedule. The case of Basco Products (K) Limited & 4 others v National Assembly & 3 others; Kenya Association of Manufacturers (Interested Party) [2022] eKLR was referred to in support of the position.

88. Further, it was argued that the Petitioners had not adduced any evidence showing that they were paying any levies pursuant to the East African Community Common External Tariff, 2017.

89. On the alleged existence of various permits and licenses imposed on the Petitioners, the 1st Respondent submitted that the Petitioners were bound to comply with any licenses or fees imposed by other regulatory authorities as such other licenses and fees remained lawful. Reliance was made on Advanced Gaming Limited v Betting Control and Licensing Board & 2 others; Safaricom Limited (Interested Party) [2019] eKLR.

90. On the fourth issue, the 1st Respondent submitted that the right to property under Article 40 of *the Constitution* was not absolute and was subject to reasonable restrictions in public interest. That taxes are sanctioned by *the Constitution* and, therefore, ought not be viewed as equal to a criminal penalty. The case of Welch Vs Henry, 305 U.S 134 (1938) quoted in the case United States v. Carlton, 512 U.S. 26, 30-31, 32 (1994) was referenced.

91. It was also submitted that the imposition of tax in the form of levies by a law cannot, of itself, amount to arbitrary deprivation of property contrary to Article 40 of *the Constitution* as was held in Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (KUDHEIHA Workers Union) V Kenya Revenue Authority & 3 Others [2014] eKLR and in Huitson v HMRC [2011] EWCA Civ. 893.

92. On the basis of the foregoing, the 1st Respondent submitted that Courts are required to balance the public interest with individuals' interest. The 1st Respondent submitted that it was in public interest that taxes be paid.

93. It denied that the impugned Regulations infringed on the Petitioners' rights to property and urged that they are instead aimed at serving a legitimate public interest.

94. On the fifth issue, the 1st Respondent contended that the Petitioners failed to make any valid claim and that they were speculative and hypothetical on the resultant effects of the impugned provisions.

95. It was argued that no evidence was adduced to corroborate the claim that the imposition of fees and levies infringes on consumer rights as enshrined under Article 46(1) of *the Constitution* and by prejudicing the economic interests of consumer or how the impugned adjustments will expose consumers to unreasonably high prices for basic commodities, since distributors, wholesalers and retailers will be forced to increase their profit mark-ups in a bid to absorb new fees.

96. The 1st Respondent maintained that it was trite law that he who alleges must prove and reliance on Coast Legal Aid & Resource Foundation (Clarf) & Another v County Government of Mombasa & 2 others [2021] eKLR and Christian Juma Wabwire vs. Attorney General [2019] eKLR, where the Court referred to the decision in Lt. Col Peter Ngari Kagume and 7 others vs. AG, Constitutional Application No. 128 of 2006 on the issue at hand.

97. On the sixth issue, the 1st Respondent pleaded that the jurisdiction of this Honourable Court can only be invoked in the event of breach of *the Constitution* and that there was no evidence at all, of such violation of *the Constitution* and/or the Petitioners' rights and fundamental freedoms enshrined therein.

98. To the contrary, it was argued that there was ample evidence showing compliance with *the Constitution* and statutory procedure and as enunciated in Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others, Nairobi Civil Appeal No. 290 of 2012.

99. It was the 1st Respondent's submission that taking the above into account, the Court can only intervene where: a. There was a breach of *the Constitution* or any other law; b. The Committee failed to adhere to the rules of natural justice; c. The process leading up to the final report and recommendations of the committee is proved to be improper and/or illegal. The cases of Petition No. 227 of 2013 Okiya Omtatah Okoiti & 3 Others v Attorney General & 5 Others (2014) eKLR; and Judicial Service Commission -vs- Speaker of the National Assembly and others Petition No. 518 of 2013 (UR), were relied upon.

100. Importantly, it was submitted that in exercising its mandate, the Court must give Government organs sufficient leeway to discharge their mandate and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of *the Constitution*. The Supreme Court of Kenya case of Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017) eKLR, was relied on.

101. In closing its case, the 1st Respondent submitted that the Petitioner had failed to demonstrate any grounds for the grant of the orders sought in the Petition and the application.

102. Accordingly, this Court was urged to dismiss the Petition with costs to the 1st Respondent.

The 3rd Respondent's case:

103. As stated earlier, the 3rd Respondent filed a Preliminary Objection together with two Replying Affidavits in opposition to the application and the Petition respectively.

104. The objection was hinged on the following grounds: -

1. The Notice of Motion and Petition (hereinafter referred to as "the proceedings") were filed by the 1st Petitioner without a valid authority duly signed/executed on its behalf by either its two authorised signatories or by its director in the presence of a witness attesting to the signature of that director as required by Section 37 of the *Companies Act* No. 17 of 2015.

2. The authority exhibited by the 1st Petitioner as "RM-1" purportedly instructing the firm of Okwach & Company Advocates to commence the proceeding herein on behalf of the 1st Petitioner is invalid, null and void ab initio as it is not duly signed/executed on behalf of the 1st Petitioner by either two authorised signatories of the 1st Petitioner or by a director of the 1st Petitioner in the presence of a witness attesting to the signature of that director as required by Section 37 of the *Companies Act* No. 17 of 2015.

3. The authority produced by the 1st Petitioner supposedly authorising it to commence proceedings on behalf of the 2nd-11th Petitioners is fatally defective, incurably incompetent and/or invalid as it is not duly signed/executed on behalf of these Petitioners by either two authorised signatories of each of these Petitioners or by a director of each of these Petitioners in the presence of a witness attesting to the signature of that director as required by Section 37 of the *Companies Act* No. 17 of 2015.

4. The deponent, Rajan Malde, was not authorized properly to swear affidavits, witness statements, and/or any other suit document in the proceedings herein on behalf of the 1st Petitioner and/or the other Petitioners as the alleged authority exhibited as "RM-1" is not duly signed/executed on behalf of the 1st Petitioner by either two of its authorised signatories or by its director In the presence of a witness attesting to the signature of that director as required by Section 37 of the *Companies Act* No. 17 of 2015.

5. The authority by the 2nd-11th Petitioners granting the 1st Petitioner authority to commence the proceedings on their behalf is fatally defective, invalid, and off ends the mandatory provisions of Section 37 of the *Companies Act* No. 17 of 2015 as It is not duly signed/executed on behalf of these Petitioners by either two authorised signatories of each of these Petitioners or by a director of each of these Petitioners in the presence of a witness attesting to the signature of that director.

6. That further and/or other grounds in support of the of the Preliminary Objection to be adduced at the hearing thereof.

105. Additionally, in the Replying Affidavit, though the disposition of Rosemary Owino, the assertion that the 3rd Respondent lacked the mandate to develop the impugned regulations was incorrect and unreasonable since the law granted the 3rd Respondent the mandate in Section 40 of the Crop Act and Section 3 of the *Agriculture and Food Authority Act* to come up with regulations.

106. On the allegation of lack of public participation, the 3rd Respondent termed it as incorrect and misleading on account of the fact that the 3rd Respondent in conjunction with the Ministry of Agriculture, Livestock and Co-operatives issued a Gazette Notice No. 1908 dated 1st March, 2019 and a newspaper advertisement published in the 7th March, 2019 issue of the Daily Nation newspaper requesting for comments on the Regulatory Impact Statement dated February, 2019 and the Crops (Nuts and Oil Crops) Regulations, 2019.

107. Further, that the 3rd Respondent sent letters to different stakeholders from different counties inviting them to a public forum to discuss the proposed Regulations, which forums were conducted on 28th March 2019 and 9th April 2019.

108. That the resulting report from the consultations were captured and shared with the relevant National Assembly and Senate Committees on delegated legislation which resulted in the development of the impugned Nuts and Oil Draft Regulations.

109. The Draft Nuts and Oil Regulations were further subjected to review by the Kenya Law Reform Commission and the Office of the Attorney General to establish if they were in tandem with *the Constitution* of Kenya in conflict with any other existing laws.

110. The deponent posited that the claim of lack of public participation was not proved and that the evidence demonstrated that sufficient and adequate public participation was conducted.

111. That the Petitioners' claim that the Regulations usurp the role of the Kenya Bureau of Standards was misleading and/or a misapprehension of fact and law since Section 4(1)(a) of the *Standards Act* No. 17 of 1973 holds otherwise.

112. It was deposed that the Kenya Bureau of Standards was charged with the role of promoting standardization in industry and commerce and that the Petitioners' interpretation failed to differentiate between "promotion" and "control."

113. Reference was made to the Black's Law Dictionary 4th Edition which defines "promote" as "to contribute to growth, enlargement, or prosperity of; to forward; to further; to encourage; to advance."

114. The 3rd Respondent further argued that the correct interpretation of Section 4(l)(a) of the *Standards Act* can be gleaned from its Section 21 of the same Act.

115. The 3rd Respondent further flawed the Petitioners' argument that the Regulations overlapped and duplicated the roles of other bodies. Reference was made to Section 4 of the Agriculture and Food Authority; Section 5 of the *Kenya Plant Health Inspectorate Service Act* No. 54 of 2012; Section 80 and 88 of the *Environmental Management and Co-ordination Act* No 1999; Regulation 5 of the Food, Drugs, and Chemical Substances (General) Regulations 1978.

116. It was also argued that the contention that the Regulations will increase the cost of living was not proved and that to the contrary, the Regulations would instead lead to increased quality and quantity of nuts and oil products.

117. The 3rd Respondent buttressed the foregoing in its submissions.

118. The following issues for determination were framed for the disposition of the objection: -

a. Whether the Preliminary Objection meets the required threshold of Preliminary Objections.

b. Whether there is a valid resolution granting the 1st Petitioner the authority to commence pleadings on its behalf.

c. Whether there is a valid resolution granting the firm on Okwach & Company Advocates to commence proceedings on behalf of the Petitioners.

d. Whether there is a valid resolution authorizing the 1st Petitioner to commence proceedings on behalf of the other Petitioners.

e. Whether there is a valid resolution authorizing the deponent Rajan Malde, to swear affidavits on behalf of the Petitioners.

f. Whether there is a valid resolution of the 2nd-11th Petitioners authorizing the 1st Petitioner to commence proceedings on their behalf.

119. The 3rd Respondent also developed other issues for determination in respect to the Petition. The issues are as follows: -

i. Whether the 3rd Respondent has the legal mandate to develop and finalize the Nuts and Oil Regulations.

ii. Whether the 3rd Respondent carried out public participation before enacting the Nuts and Oil Regulations.

iii. Whether the Nuts and Oil Regulations usurp the role of the Kenya Bureau of Standards [hereinafter referred to as "KEBS").

iv. Whether the Agriculture and Food Authority [hereinafter referred to as "the 3rd Respondent") duplicates and overlaps the roles of other bodies.

v. Whether the implementation of the Nuts and Oil Regulations will increase the cost of living.

vi. Whether imposing levies on the scheduled crops is tantamount to double taxation.

vii. Whether the Petitioners are entitled to the orders sought.

120. The 3rd Respondent made the submissions hereunder on the objection; and as per the issues it enlisted.

121. On issue first issue, the 3rd Respondent submitted that the threshold of a Preliminary Objection as established are: firstly, it raises a pure point of law. Secondly, it is argued on the assumption that all the facts pleaded by the other side are correct. and Finally, Thirdly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion; the Preliminary Objection should, if successful, dispose of the suit. Reliance was placed in the landmark case of Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd (1969) EA 696.

122. The 3rd Respondent posited that the instant Preliminary Objection was predicated on the fact that the Petitioners flouted statutory provisions of Section 37 of the *Companies Act*. That the said section required every document executed by a company to be duly signed/executed on behalf of the company, by either two authorised signatories or by a director of the company, in the presence of a witness attesting to the signature of that director.

123. To the 3rd Respondent, the objection was on a pure point of law as it delved into the compliance with Section 37 of the *Companies Act* in interpretation of circumstances surrounding the preparation of the Petitioners' "Resolution."

124. On the second issue, the 3rd Respondent consolidated the issue (b) to (f) above, as to whether there was a valid authority in place.

125. The 3rd Respondent submitted that the Petitioners filed these proceedings in gross violation of the rules governing commencement of suits by companies; specifically violating the threshold requirements provided under Section 37 of the *Companies Act* No. 17 of 2015.

126. That the eleven Petitioners had to each provide an authority indicating that they have resolved to commence the present proceedings. And that the authorities would only be valid once they were duly signed/executed on the Petitioners' behalf by either two authorised signatories of each Petitioner or by a Director of each Petitioner in the presence of a witness attesting to the signature of that director. The 3rd Respondent maintained that the requirement was not complied with by the 11 Petitioners and that the 1st Petitioner could not authorize the firm of Okwach & Company Advocates to plead on behalf of the Petitioners. Reliance was made to Affordable Homes Africa Ltd v Henderson & 2 others [2004] eKLR, Bugerere Coffee Growers Ltd v Seraduka & Anor. (1970) EA 147 which was quoted in East African Portland Cement Ltd v Capital Markets Authority & 4 others (2014) eKLR, Bactlab Limited v. Bactlabs East Africa Limited & 5 Others [2012] eKLR among others.

127. The 3rd Respondent, however, conceded that the Petitioners had addressed the objection in their submissions to the Petition and contended that an authority can be ratified at any time. Reliance was on the case of Leo Investments Ltd vs. Trident Insurance Company ltd (2014) eKLR.

128. To the 3rd Respondent, that contention achieves little to nothing. That in the Leo Investments Ltd (Supra) the judge referred to the holding of in Assla Pharmaceuticals v Nairobi Veterinary Centre ltd HCCC No. 391 of 2000, as well as associating himself to the observations in the case of Republic v Registrar General& 13 Others (2005) eKLR where the Court found that a resolution of the Board Directors of a company may be filed at any time before the suit is fixed for hearing.

129. In that regard, the 3rd Respondent submitted that the Petitioners had a chance to rectify their mistakes and provide an authority that accorded with the provisions of Section 37 of the *Companies Act* before the matter was fixed for hearing.

130. The 3rd Respondent vehemently argued that the chance elapsed the moment this instant matter was fixed for hearing. Further, that even in invoking Article 22 of *the Constitution* would not save the fatally defective pleadings since the objection was not founded on the procedural technicalities.

131. In respect to the main Petition, the 3rd Respondent made the following submissions.

132. On the first issue, the 3rd Respondent submitted that the Petitioners conceded under Paragraph 48 of the Petition that the quality of raw and intermediate materials produced locally are of lower quality. Thus, that the responsible supervisory and regulatory body had to take measures to improve the same.

133. The 3rd Respondent claimed that the Petition was filed on the misconception that the 3rd Respondent lacked the legal mandate to enact the impugned Regulations. It was submitted that Section 40 of the *Crops Act* mandates the 2nd Respondent to come up with regulations in effecting the Act and done in consultation with the 3rd Respondent and County Governments. As such, it was argued that the 3rd Respondent, therefore, conducted its statutory mandate when it developed the hereby impugned regulations.

134. On the second issue, the 3rd Respondent asserted that the allegations that public participation was never conducted in formulating the Regulations, was without grounds.

135. In complying with Article 10 of *the Constitution* and Section 5 of the *Statutory Instruments Act*, the 3rd Respondent submitted that it ensured members of the public participated in the development of the impugned Regulations, by facilitating collections of their views. Reliance was placed on the South African case of Doctors for Life International vs. The Speaker of the National Assembly & Others which was quoted in Republic v Independent Electoral and Boundaries Commission (I.EB.C) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR.

136. The 3rd Respondent maintained that the Petitioners were given a platform to present their views before the Regulations were enacted. They reiterate the steps taken in public participation as deposed in the 3rd Respondent's Replying Affidavit. They further relied on Francis Chachu Ganya & 4 Others V Attorney General & Another [2013] eKLR.

137. It was alluded that a report was prepared, indicating the comments made by stakeholders on different fora, the actions taken and the concluding remarks. That, it was argued, demonstrated how far the 2nd and 3rd Respondents went to ensure that public participation was afforded to all stakeholders including the Petitioners.

138. Further, the Regulations were approved by the National Assembly before enactment. Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, where the Court enumerated the requirements that must be met for public participation to meet the threshold of constitutionality, was referenced.

139. On the third issue, 3rd Respondent submitted that the Petitioners failed to demonstrate the manner in which *the Constitution* was violated. Instead, they alluded how the 3rd Respondent allegedly usurped the quality assurance role of Kenya Bureau of Standards.

140. The 3rd Respondent argued that even the above contention was false. Citing Section 3 as read with Sections 18 and 32 of the *Crops Act*, it was argued that the regulation of the growth and development of the agricultural crops was within the exclusive domain of the 3rd Respondent. That, Section 32 (l) of the *Crops Act* empowered the Cabinet Secretary responsible for agriculture to impose levies on scheduled crops, which include nuts and oil crops produce and products, in consultation with the 3rd Respondent.

141. Further, Section 18 of the *Crops Act* mandated the Nuts and Oil Crops Directorate to regulate the issuance of manufacturing licences.

142. On whether the 3rd Respondent would exercise quality control under the *Crops Act*, Section 40 (1), (k), (n) and (t) were referred to which provides the different standards the Regulations made under the Act should address.

143. It was submitted that in light of the foregoing, the 3rd Respondent was within its right to undertake quality assurance in the Nuts and Oil sub-sector and in harmony with the *Standards Act*.

144. The 3rd Respondent pleads to this Court to reject the claim that KEBS has an exclusive mandate in regulating the scheduled crops and to be persuaded by the decision in Daniel lngida Aluvaala and another vs Council of Legal Education & Another.

145. On the fourth issue, the 3rd Respondent averred that the Petitioners were attempting to distort the law and stretch the functions of KEPHIS beyond their legally permissible limit. It argued that the role of KEPHIS was stipulated under Section 5 of the KEPHIS Act, which role is very different from that provided under Regulation 11 of the Regulations.

146. Furthermore, that the 3rd Respondent was the only body charged with the mandate of implementing food safety controls vide Section 4 of *Agriculture and Food Authority Act*. As such, it was improper for the Petitioners to claim a constitutional violation when the 3rd Respondent is acting within its legal mandate.

147. Additionally, that the Petitioner's allegations were untenable and constituted a misapprehension of the law since the National Environmental Management Authority issues licences with regard to emissions while the 3rd Respondent issues licences upon satisfaction that an applicant has complied with quality standards in the manufacturing facility and procured the relevant licensing documents.

148. It was the 3rd Respondents submission that Petitioners' allegation that there is overlap between the levies imposed by the Nuts and Oil Regulations and Regulation 5 of the Food, Drugs, and Chemical Substances (General) Regulations, 1978, which imposes Kshs. 1,000.00 for taking out licences blatantly lacked legal support.

149. On the fifth issue that the introduction of the import levy and other fees will drive the cost of living and make locally manufactured products uncompetitive, the 3rd Respondent submitted that the claim fell short of proof. The Court of Appeal decision in Charterhouse Bank Limited (Under Statutory Management vs. Frank N. Kamau (2016) eKLR was referred to.

150. The 3rd Respondent posited that the regulations were necessitated since there existed a disconnect between the local demand and consumption of nuts and oil products, where production is less than the domestic consumption. That, the introduction of the levies was aimed at spurring the growth of the nuts and oil crops subsector which was on a decline. For instance, Regulation 20(l) requires every person growing nuts and oils to procure seeds and planting materials from approved government agencies. That, the Regulation sought to address the Petitioners' claim that the nuts produced locally are of lower quality. That also, Regulation 22 addresses the skewed power matrix between growers and manufacturers by providing rules governing contracts between the parties.

151. Additionally, that issuing commercial nursery licenses after ascertaining whether a manufacturer has complied with the quality standards set out in the Fourth Schedule goes a long way into ensuring the citizens achieve the highest attainable standard of health as required under Article 43 of *the constitution*.

152. On whether the Regulations were discriminatory, the 3rd Respondent maintained that the Petitioners fell short of proving as much. The case of John Harun Mwau v. Independent Electoral and Boundaries Commission & Another was referred to.

153. It was submitted that a party alleging discrimination is duty bound to not only show that it was treated differently, but also demonstrate that the treatment was unfair. Petition 56, 58 & 59 of 2019 (Consolidated), Nubian Rights Forum & 2 others v Attorney General & 6 others: Child Welfare Society & 9 others (Interested Parties) [2020] eKLR was referenced.

154. It was further argued that even in the unlikely event that the Regulations are found to differentiate the Petitioners from other individuals, that alone does not amount to discrimination as was discussed in Federation of Women Lawyers Kenya (FIDA-K) & 5 Others vs. Attorney General & Another (2011) eKLR.

155. The 3rd Respondent asserted that taxes are a form of raising revenue sanctioned by the law. That accordingly, the Petitioners were misguided in asking the 3rd Respondent to stop exercising its legal mandate because the East African Customs Management Act, 2004 granted tax rebates. That, the *Crops Act* and the EAC Customs Management Act have different objectives, and each Act exercises its function within its legal limits.

156. On the sixth issue as to whether the imposition of the taxes and levies were arbitrary, it was argued that the imposition of a levy is only deemed arbitrary if the citizens do not know in advance the legal consequences that will flow from it. The case of Black-Clawson International Ltd vs. Papierwerke Waldhof-Aschaffenberg AG quoted in the case of Law Society of Kenya V Kenya Revenue Authority & another (2017) eKLR was referred to in support.

157. On whether the taxes and levies were irrational, it was argued that the reasons for each levy was given in the Explanatory Memorandum during the development of the Regulations. The 3rd Respondent heeded to the rationality as examined by the South African Court in Trinity Broadcasting (Ciskel) v ICA SA 2004(3) SA 346 (SCA) at 354H- 3554 which was quoted in Republic v Commissioner of Domestic Taxes Ex parte Sony Holdings Limited [2019] eKLR.

158. Moreover, that the Petitioners claim that the import levy was tantamount to double taxation, was not supported with facts. That, the Black's Law Dictionary 5th Edition, 1979, noted that "to constitute double taxation the tax must be imposed on the same property by same governing body during same taxing period and for same taxing purpose."

159. The 3rd Respondent affirmed that the Petitioners failed to illustrate how the import levy and the levies imposed under the EAC Customs Management Act are for the same taxing purpose. That the purpose of the EAC Customs Management Act is to ensure economic, social, and political integration of the East African region whereas the *Crops Act* seeks to provide for the growth and development of agricultural crops. Therefore, as per the 3rd Respondent, any levies imposed under the two Acts cannot be said to be for the same taxing purpose.

160. Further, that the 3rd Respondent claimed that the Petitioners' assertions failed, because the 3rd Respondent and the Directorate of Customs under the EAC Customs Management Act are different bodies imposing levies on the scheduled crops. Also, that it is erroneous for the Petitioners to claim that the Nuts and Oil Regulations will reverse the gains made from the rebates granted under EAC Customs Management Act since these are two different bodies with different objectives.

161. Resultantly, that the 3rd Respondent was under no duty to suspend its legal mandate to support the objectives of the East African Community. The tax imposed by the Regulations and the East African Customs Management Act are for different intents and purposes, hence such taxation is not tantamount to double taxation, it was argued.

162. The 3rd Respondent posited that the Petitioners did not furnish sufficient evidence to support their assertion that the impugned levies led to double taxation and which would be economically punitive.

163. Conversely, it was argued, that even in the unlikely event that the Petitioners' assertion regarding the levies resulting in double taxation were found to be valid, that would not automatically oust the 3rd

Respondents' right to impose the levies. That, the Court would still have to examine the relevant legal instruments and determine which one has exceeded its legal mandate.

164. That to that end, the 3rd Respondent argued that its right to impose levies and duties on the scheduled crops was not in violation of *the Constitution* since regulating the scheduled crops is within the exclusive mandate of the Agriculture and Food Authority.

165. Finally, on the seventh issue, the 3rd Respondent submitted that the Petitioners' prayer for a declaratory relief should not be issued since declaratory reliefs are only issued where a party demonstrated that a legal controversy existed for which it must be determined. However, that in this case, the Petitioners had neither tendered sufficient evidence to demonstrate that the Regulations were passed in violation of *the Constitution*.

166. Affirmatively, the 3rd Respondent posited that the presumption of constitutionality required statutes to be presumed as being constitutional until the contrary is proved and the burden is on the person alleging constitutional invalidity to prove the allegation. That, however, the Petitioners had not rebutted the presumption of constitutionality enjoyed by the impugned provision. Further, that they had failed to sufficiently demonstrate the manner in which the impugned Regulations had denied, violated, infringed and threatened the constitutional rights.

167. In the end, the 3rd Respondent prayed for the Petition and the application to be dismissed with costs.

Analysis:

168. From the reading of the material before Court, the following issues arise for discussion: -

i. Preliminary jurisdictional issues.

ii. The principles of constitutional and statutory interpretation.

iii. Whether the impugned Regulations contravened Articles 10 and 201(a) of *the Constitution* for want of public participation and stakeholders' engagement.

iv. Whether the impugned Regulations contravened Articles 43 and 201 of *the Constitution* for not fairly sharing the tax burden and amounted to double taxation thereby raising the costs of living, hence, infringing on the economic and social rights of the citizens.

v. Whether Section 18 of the *Crops Act* as read with Regulation 8 of the impugned Regulations contravened Articles 94(6) and 209(5) of *the Constitution*.

vi. Whether Regulations 30, 34 and 35 of the impugned Regulations contravene Articles 2(2) and 10 of *the Constitution* in usurping the powers of quality control entities created under various statutes.

169. The Court will now deal with each of the issues in seriatim.

a. Preliminary issues:

170. There are three sub-issues which are preliminary and jurisdictional in nature, and which, in their very nature, ought to be dealt with in the first instance.

171. The sub-issues are as follows: -

i. The competency of the Notice of Preliminary Objection.

ii. Whether this Court has the jurisdiction to deal with the Petition in light of Articles 94 and 95 of *the Constitution*.

iii. Whether the 3rd Respondent has the powers to make the impugned Regulations.

172. A look at the above follows.

The competency of the Notice of Preliminary Objection:

173. The validity of a preliminary objection is considered on the basis that it conforms with the long-standing legal principle that it is raised on a platform of agreed set of facts, it raises pure points of law and is capable of wholly determining the matter.

174. To that end, the locus classicus decision in Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd (1969) E.A 696. At page 700, comes to the fore. In that case, the Court defined a preliminary objection and discussed its operation in the following eloquent manner: -

> ...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.
>
> ...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

175. The Supreme Court weighed in on the issue in Aviation & Allied Workers Union Kenya -vs- Kenya Airways Ltd & 3 Others [2015] eKLR and stated thus: -

> .... Thus, a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

176. Ojwang J, as he then was, emphasized the finding in Mukisa Biscuit -vs- West End Distributors case (supra) in Civil Suit No. 85 of 1992, Oraro -vs- Mbaja [2005] 1 KLR 141 when he observed as follows: -

> ..... I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed....

177. In John Musakali -vs- Speaker County of Bungoma & 4 others (2015) eKLR the validity of a preliminary objection was considered in the following manner: -

> .... The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law....

178. Finally, in Omondi -vs- National Bank of Kenya Ltd & Others {2001} KLR 579; [2001] 1 EA 177, guidance was given on what Courts ought to consider in determining the validity of preliminary objections. It was observed: -

> ... In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion....

179. On whether the issue of jurisdiction is a pure point of law, the Supreme Court in Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, [2014] eKLR, stated that 'jurisdiction is a pure question of law' and should be resolved on priority basis.

180. The foregoing is the law on preliminary objections.

181. This Court has carefully considered the objection. It is centred on the issue of lack of resolutions of the Boards of Directors of the individual Petitioners in authorising the institution of the instant Petition. To that end, the 3rd Respondent contended that the Petition was a non-starter and ought to fall by the way side.

182. The objection is factually based. In dealing with the objection, this Court is called upon to ascertain whether the said resolutions were passed by the respective Petitioners and if so, whether by the right persons further to whether they complied with the law in the manner in which they were arrived at.

183. The issue of resolutions of Companies is dependent on the entity's constituting instruments. In this case, the instruments are the Memorandum and Articles of Association.

184. Therefore, in determining the objection, this Court will have to interrogate the constituting instruments and ascertain compliance. To this Court, that calling is not within the confines of a preliminary objection. The issues to be interrogated are factual and not pure points of law.

185. The 3rd Respondent, hence, ought to have raised the issues in a proper manner and not through a preliminary objection. The 3rd Respondent had two avenues. First, by way of a formal application, and, two, through the Replying Affidavit sworn on behalf of the 3rd Respondent.

186. There is no formal application on the aspect filed in the matter. Further, the two Replying Affidavits sworn by Rosemary Owino, the 3rd Respondent's Director of Nuts and Oils Directorate, on 7th February, 2022 did not encompass the issues in the objection.

187. The Supreme Court in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR dealt with the manner in which factual issues ought to be raised in constitutional Petitions. In that case, a plea of res judicata had been raised through Grounds of Opposition and also in the Replying Affidavit.

188. An attack was raised to the manner in which the plea of res judicata had been raised. It was argued that since the issue called for the interrogation of evidence, then a formal application ought to have been instead filed.

189. In dismissing the attack, the Supreme Court had the following to say: -

> (53) Instead, and contrary to the Appellants submissions, the plea of res judicata was raised through both grounds of opposition and replying affidavits in response to the Appellants application. It is also evident that through the Replying Affidavits of the 3rd and 4th Respondents, evidence by way of the Judgment of JR No. 130 of 2011 was introduced through an affidavit to bolster the plea of res judicata.

190. It was evident that had the plea of res judicata been raised purely by way of Grounds of Opposition, the Supreme Court would have sustained the attack.

191. That is the current position in this matter. The factual-based objection was only raised by way of a Notice of Preliminary Objection.

192. The Notice of Preliminary Objection, therefore, denied the Petitioners an opportunity to respond to the issues raised. How would the Petitioners respond to factual issues raised through a Notice of Preliminary Objection?

193. The Notice of Preliminary Objection did not, hence, meet the threshold of a pure point of law and cannot be sustained as a valid objection in law.

194. Ultimately, the Notice of Preliminary Objection is for rejection and is hereby struck out.

> Whether this Court has the jurisdiction to deal with the Petition in light of Articles 94 and 95 of *the Constitution*:

195. The 1st Respondent majorly contended that it is only Parliament which has the exclusive mandate to formulate national legislation under Articles 94 and 95 of *the Constitution*, and that, the Petition seeks to overstep the Court's jurisdiction and offend the doctrine of separation of powers.

196. This subject has been severally dealt with by Courts. The Supreme Court in Petition 32 of 2014, Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR referred to its earlier decision in Reference No. 2 of 2013 Speaker of the Senate & Another v. Attorney General & 4 Others, where the Learned Judges observed as follows: -

> (59) Also quite relevant is this Court's decision in Speaker of the Senate & Another v. Attorney General & 4 Others, Reference No. 2 of 2013; [2013] eKLR. The Court, in that case, signalled that it would be reluctant to question parliamentary procedures, as long as they did not breach *the Constitution*. In reference to Article 109 of *the Constitution*, which recognizes that Parliament is guided by both *the Constitution* and the Standing Orders in its legislative process, the Court thus held [paragraphs 49 and 55]:
>
> Upon considering certain discrepancies in the cases cited, as regards the respective claims to legitimacy by the judicial power and the legislative policy – each of these claims harping on the separation-of-powers concept – we came to the conclusion that it is a debate with no answer; and this Court in addressing actual disputes of urgency, must begin from the terms and intent of *the Constitution*. Our perception of the separation-of-powers concept must take into account the context, design and purpose of *the Constitution*; the values and principles enshrined in *the Constitution*; the vision and ideals reflected in *the Constitution*...

197. The Apex Court made further reference to its other earlier decision in In Re the Matter of the Interim Independent Electoral Commission [2011] eKLR, where the rule of law was discussed to be intricately intertwined with the principle of separation of powers in the following way: -

> The effect of *the Constitution*'s detailed provision for the rule of law in the processes of governance, is that the legality of executive or administrative actions is to be determined by the Courts, which are independent of the Executive branch.
>
> The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several governmental organs functions in splendid isolation.

198. In Petition 381 & 430 of 2014 (Consolidated) Council of Governors & 3 others v Senate & 53 others [2015] eKLR the Court dismissed the argument that Courts did not have jurisdiction over matters which were pending determination of Petitions before Parliament.

199. The Learned Judges referred to an earlier decision in The Council of Governors and Others vs. The Senate Petition No. 413 of 2014 and made the following emphatic remarks: -

.... It is also incumbent on the Court to consider its jurisdiction in relation to the present matter, which revolves around the functions and distribution of powers between the national and county governments. This is in light of the argument by the AG that the petitioner should have approached Parliament if it was dissatisfied with the provisions of the CGAA, implying that the court has no jurisdiction to deal with this matter and that any dispute with regard to its provisions should be addressed to Parliament.

This argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this Court. At Article 165(3)(d)(i), this Court is given the jurisdiction to determine the question whether any law is inconsistent with or in contravention of *the Constitution*. The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of *the Constitution*, which pronounces its supremacy at Article 2 by proclaiming, at Article 2(4), that "Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."

Similarly, the general provisions of *the Constitution*, which are set out in Article 258 contain the express right to every person to "... institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention." As this Court held in The Council of Governors and Others vs. The Senate (supra):

> We are duly guided and this Court vested with the power to interpret *the Constitution* and to safeguard, protect and promote its provisions as provided for under Article 165(3) of *the Constitution*, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that *the Constitution* has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of *the Constitution* by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of *the Constitution*. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court".

200. In Council of Governors & 3 others v Senate & 53 others [2015] eKLR the Learned Judges interpreted the right to Petition Parliament under Article 119 and whether it took away the right to approach the High Court as follows: -

... The question is whether this provision is intended to take away the right of a party to question the constitutionality of an Act of Parliament, or indeed any action taken by the legislature, guaranteed under Articles 22 and 258. Further, whether it can also be taken as ousting the jurisdiction of the Court under Article 165(3)(d) to determine any question respecting the interpretation of *the Constitution*, including "the question whether any law is inconsistent with or in contravention of" *the Constitution*, or under Article 165(3)(d)(iii), to determine 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"?

In our view, the answer must be in the negative. Doubtless, Article 119(i) will serve a useful purpose in allowing citizens to petition Parliament to consider matters of concern to them that are within the purview of Parliament, including the repeal or amendment of legislation. It appears to us, however, that Article 119 is not intended to cover situations such as is presently before this Court.

It would therefore be, in our view, for the Court to abdicate its responsibility under *the Constitution* to hold that a party who considers that legislation enacted by Parliament in any way violates *the Constitution* is bound to first petition Parliament with respect to the said legislation. The constitutional mandate to consider the constitutionality of legislation is vested in the High Court, and Articles 2(4) and 165(3(d)(i) mandate this Court to invalidate any law, act or omission that is inconsistent with *the Constitution*. This is in harmony with the mandate of the courts to be the final custodian of *the Constitution*.

This Court appreciates that where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Article 3(1) of *the Constitution* enjoins every person to respect, uphold and defend *the Constitution*. Similarly, Article 258(1) thereof donates the power to every person to institute court proceedings claiming that *the Constitution* has been contravened, or is threatened with contravention. If this Court were to shirk its constitutional duty under Article 165(3)(d), it would have failed in carrying out its mandate as the temple of justice and constitutionalism and the last frontier of the rule of law. In the circumstances, the argument that the petitioner should have approached Parliament under Article 119(1) is without merit.

201. In Petition No. 28 of 2021 (Consolidated with Petition Nos. E549 of 2021, E077 of 2022, E037 of 2021 and No. E065 of 2021)Paul Macharia Wambui & 10 Others vs. The Speaker of the National Assembly & 6 Others (2022) eKLR, the High Court in agreeing with the above position added that: -

> 80. I am in agreement with the above. I, however, wish to add that the power of Parliament under Article 119 of *the Constitution* to enact, amend or repeal any legislation is not in any way curtailed by the High Court's exercise of its jurisdiction under Article 165(3) of *the Constitution*. Whereas Parliament has the preserve to enact, amend or repeal any legislation, Courts have the duty to ensure that Parliament inter alia keeps within the constitutional borders while discharging its mandate. That is where the difference lies. As such, the Court's exercise of its jurisdiction in determining whether Parliament acted within *the Constitution* in coming up with the impugned law cannot be seen as an affront

to the doctrine of separation of powers. The two are distinct mandates under *the Constitution*.

202. The instant Petition variously challenges the constitutionality of the *Crops Act* and the Regulations made thereunder. Article 165(3)(d)(i) of *the Constitution* accords the High Court the jurisdiction to hear any question in respect to the interpretation of *the Constitution* including the determination of question whether any law is inconsistent with or in contravention of *the Constitution*.

203. The High Court is, therefore, firmly within its lane in dealing with questions on whether certain provisions of the law are in line with *the Constitution*.

204. This Court, therefore, finds that the objection that the Petition tends to usurp the powers of Parliament has no legal leg to stand on and is hereby dismissed.

Whether the 3rd Respondent has the powers to make the impugned Regulations:

205. The Preamble of the *Crops Act* states as follows: -

> An Act of Parliament to consolidate and repeal various statutes relating to crops; to provide for the growth and development of agricultural crops and for connected purposes.

206. Section 3 is on the objects and purposes of the *Crops Act*. It provides as follows: -

> 3. Objects and purposes of the Act
> The objective of this Act is to accelerate the growth and development of agriculture in general, enhance productivity and incomes of farmers and the rural population, improve investment climate and efficiency of agribusiness and develop agricultural crops as export crops that will augment the foreign exchange earnings of the country, through promotion of the production, processing, marketing, and distribution of crops in suitable areas of the country and in particular to-
>
> (a) circumvent unnecessary regulatory bureaucracy in the crops subsector;
>
> (b) reduce unnecessary levies, taxes or other barriers to free movement of crop products and provide for a rationalized taxation system;
>
> (c) reduce unnecessary regulation or over-regulation of the crops subsector;
>
> (d) reduce duplication and overlap of functions among institutions involved in the regulation of crop agriculture;
>
> (e) promote competitiveness in the crops subsector and to develop diversified crop products and market outlets; and
>
> (f) attract and promote private investment in crop agriculture.

207. On the application of the *Crops Act*, Section 5 states that the Act is to apply to all scheduled crops specified in the First Schedule and to all agricultural land whether privately or communally held as well as to farmers, farmers' organizations, co-operatives and community associations.

208. It is Section 40 of the *Crops Act* which donates the power to formulate regulations as follows: -

> 40. Regulations

(1) The Cabinet Secretary may, in consultation with the Authority and the County Governments, make regulations for the better carrying into effect of the provisions of this Act, or for prescribing anything which is to be prescribed under this Act.

(2) Without prejudice to the generality of the foregoing, regulations made under this section may provide for—

(a) declaration and regulation of a scheduled crop including production, distribution and marketing;

(b) the areas outside which a scheduled crop may not be cultivated, and regulating and controlling the variety, the cultural conditions, the method of production and grading of a specified crop;

(c) regulations on the appropriate seeds and planting materials for export and import;

(d) administration of plant breeder's rights in line with the existing international conventions to which Kenya is a signatory;

(e) the control of crop pests and diseases;

(f) standards, testing and certification of seeds and planting materials;

(g) licensing and regulation of dealers in farm inputs;

(h) regulation and controlling the method of blending, packaging and labelling of specified crops for purposes of traceability;

(i) the periods for which licences and registration certificates shall be issued;

(j) the forms and fees to be paid for anything to be done under this Act;

(k) rules for ensuring food safety including handling, transportation, processing and market standards of food crops and crop products;

(l) rules and regulations of any organization dealing with crops and crop products, made by any such organization to be in conformity with the provisions of this Act;

(m) the submission of returns and reports by the holders of licences and permits under this Act;

(n) standards, and the manner of grading and classification of various crop products under this Act;

(o) measures of maintaining soil fertility including soil testing and regulation of soil salination, chemical degradation and toxic levels in plants;

(p) developing guidelines for public education on safe use of agro-chemicals;

(q) the procedure for processing of toxic crops;

(r) the relationship between farmers and other dealers in crops;

(s) the formula for the pricing of scheduled crops; and

(t) the regulation of standard industry agreements.

209. The impugned Regulations herein are the Crops (Nuts and Oil Crops) Regulations, 2020. According to Legal Notice 164 of 2020, the impugned Regulations were made by the Cabinet Secretary for Agriculture, Livestock, Fisheries and Co-operatives in consultation with the 3rd Respondent herein and the County Governments.

210. The impugned Regulations are on nuts and oils. Various nuts and oils are classified as Scheduled Crops in the *Crops Act*.

211. Section 2 of the *Crops Act* defines a "scheduled crop" to mean any of the crops listed under the First Schedule and includes such other crop as the Cabinet Secretary, on the advice of the 3rd Respondent may declare to be a scheduled crop under section 7.

212. Regulation 4 is on the purpose of the Regulations. The main purpose of the Regulations is to guide the development, promotion and regulation of scheduled nuts and oil crops for the benefit of the growers and other stakeholders in the nuts and oil crops industry.

213. Towards attaining the main purpose, the Regulations may inter alia provide for the following: -

(a) a) the production, harvesting, processing and marketing of nuts and oil crops;

b. promotion of best practices in the sub sector;

(c) registration and licensing of all players along the value chain;

(d) the recommendation of general industry agreements or contracts;

(e) the development and enforcement of quality and safety standards for compliance;

(f) the collection, collation, maintenance and management of statistical data related to the sub sector;

(g) the imposition and administration of levies; and

(h) regulation of the sub sector.

214. The Regulations contain 4 parts. Part I comprises of the preliminary matters. Part II is on the Registration and Licensing. Part III is on Production, Processing and Marketing and Part IV is on general provisions.

215. The Regulations are, therefore, in tandem with the purpose of the *Crops Act*.

216. It has, however, been contended that the 3rd Respondent has no power to come up with the Regulations.

217. This Court wholly agrees with the said contention. The position in law is that the power to make any of the regulations contemplated under Section 40 of the *Crops Act* is only vested on the Cabinet Secretary. However, in coming up with the regulations, the Secretary is not only enjoined to consult with the 3rd Respondent and the County Governments, but must consult in accordance with *the Constitution* and the law.

218. On the basis of the above, this Court finds the contention by the Petitioners to be rather misplaced since the impugned Regulations in this matter were formulated by the Cabinet Secretary and the converse has not been demonstrated.

219. Having disposed of the preliminary issues and since the Petition still survives, the Court will deal with the rest of the issues.

(b) The principles of constitutional and statutory interpretation:

220. The purpose of this issue is to lay the basis for consideration of the rest of the issues. It is an endeavour to guide the Court on the interlink between *the Constitution* and the statutes.

221. In Nairobi High Court Constitutional Petitions No. 33 and 42 of 2018 (Consolidated) Okiya Omtatah Okoiti vs. Public Service Commission & 73 Others (2021) eKLR, this Court discussed the principles of constitutional interpretation at length. It observed as follows: -

> 54. As regards the interpretation of *the Constitution*, suffice to say that *the Constitution* itself gives guidelines on how it ought to be interpreted. That is in Articles 20(4) and 259(1).
>
> 55. Article 20(4) requires Courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command Courts to interpret *the Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.
>
> 56. Courts have also rendered how *the Constitution* ought to be interpreted. The Supreme Court in a ruling rendered on 21st December, 2011in In the Matter of Interim Independent Electoral Commission [2011] eKLR discussed the need for Courts, while interpreting *the Constitution*, to favour a purposive approach as opposed to formalism. The Court stated as under: -
>
> (86) .... The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles20 (4) and 259(1)). *The Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. *The Constitution* has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.

(87) In Article 259(1) *the Constitution* lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

(88) ..... Article 10 states clearly the values and principles of *the Constitution*, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

(89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting *the Constitution*, is a task distinct from interpreting the ordinary law. The very style of *the Constitution* compels a broad and flexible approach to interpretation.

57. On the principle of holistic interpretation of *the Constitution*, the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] eKLR affirmed the holistic interpretation principle by stating that:

This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that *the Constitution* should be interpreted in a holistic manner, within its context, and in its spirit.

58. The meaning of holistic interpretation of *the Constitution* was addressed by the Supreme Court in In the Matter of the Kenya National Human Rights Commission, Sup. Ct. Advisory Opinion Reference No. 1 of 2012; [2014] eKLR. The Court at paragraph 26 stated as follows: -

...But what is meant by a holistic interpretation of *the Constitution*? It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.

59. In a Ugandan case in Tinyefuza v Attorney General, [1997] UGCC 3 (25 April 1997) the Court was of the firm position that *the Constitution* should be read as an integrated whole. The Court observed as follows: -

.... the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.....

SUBPARA 60.

In Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR, the Court of Appeal summarized the various principles of constitutional interpretation as follows:

> (21) .... Before the High Court embarked on the interpretation of the contentious provisions of *the Constitution*, it restated the relevant principles of interpretation of *the Constitution* as extracted from case law thus: -
>
> · that as provided by Article 259 *the Constitution* should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.
>
> · that the spirit and tenor of *the Constitution* must preside and permeate the process of judicial interpretation and judicial discretion.
>
> · that *the Constitution* must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism.
>
> · that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).
>
> These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of *the Constitution* has fidelity to *the Constitution* and has to be guided by the letter and spirit of *the Constitution*.
>
> 63. In Advisory Opinion Application No. 2 of 2012, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR, the Supreme Court spoke to purposive interpretation of *the Constitution*. It had the following to say: -

...The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of *the Constitution*.

64. The Court went ahead and gave further meaning of the term purposive by making reference to the decision in the Supreme Court of Canada in R -vs- Drug Mart (1985) when it made the following remarks: -

The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.

65. The Supreme Court, while referring to the South African Constitutional decision in Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC), went further and stated that a purposive approach is 'a generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.'

66. The Learned Judges of the Supreme Court further agreed with the South African Constitutional Court in S -vs- Zuma (CCT5/94) 1995 when it stated that in taking a purposive approach in interpretation, regard must be paid to the legal history, traditions and usages of the country concerned.

67. The Supreme Court embellished the need to pay attention to legal history while interpreting not only *the Constitution* but also statutes. It observed as follows: -

8. 11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting *the Constitution*, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.

68. The Court of Appeal while dealing with holistic interpretation of *the Constitution* in Civil Appeal 74 & 82 of 2012, Centre for Rights Education and Awareness & Another v John Harun Mwau & 6 others [2012] eKLR stated that the entire Constitution must be read as an integrated whole and no one particular provision destroying the other so as to effectuate harmonization principle.

222. In discussing how constitutionality of impugned Acts of Parliament ought to be interpreted against the constitutional muster, the High Court in Petition No. 71 of 2014, Institute of Social Accountability & Another vs National Assembly & 4 Others [2015] eKLR remarked as follows: -

> [I]n determining whether a statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011]eKLR, Samuel G. Momanyi v Attorney General and Another (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 enunciated this principle as follows: -

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.

223. In Petition No. E327 of 2020 Law Society of Kenya vs. The Attorney General and Another (2021) eKLR this Court in furthering the discussion on the constitutionality of a statute expressed itself as follows: -

> 110. I will also look at the decision in R. vs. Oakes. The brief facts are that the Respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the Narcotic Control Act, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that the Respondent was in possession of a narcotic, the Respondent brought a motion challenging the constitutional validity of s. 8 of the Narcotic Control Act. That section provides that if the Court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he or she must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the Crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s. 11(d) of the Canadian Charter of Rights and Freedoms. The Crown appealed and a constitutional question was stated as to whether s. 8 of the Narcotic Control Act violated s. 11(d) of the Charter and was therefore of no force and effect. Inherent in this question, given a finding that s. 11(d) of the Charter had been violated, was the issue of whether or not s. 8 of the Narcotic Control Act was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s. 1 of the Charter.
>
> 110. The appeal was dismissed and the constitutional question answered in the affirmative. In so holding, the Supreme Court of Canada, then presided by the Chief Justice in a Seven-Judge bench discussed the criteria in ascertaining the manner in which a limitation to a right or fundamental freedom may be justified. The Court came up with a three-pronged criteria. First, the objective which the limitation is designed to serve. Second, the means chosen to attain the objective must be reasonable and demonstrably justified. This is the proportionality test. Third, the effect of the limitation.
>
> 110. On the objective test, the Supreme Court stated as follows: -
>
> 67. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, ... the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug Mart Ltd., supra, at p. 352. The standard

must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

110. On the proportionality test, the Supreme Court stated that: -

70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R. v. Big M Drug Mart Ltd., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

110. On the third test, that is the effect of the limitation, the Supreme Court stated that: -

71. With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

224. Lastly, the Court of Appeal in John Harun Mwau v Independent Electoral & Boundaries Commission & Attorney General [2019] eKLR had the following to say on the constitutionality of statutes: -

27. Here the question we have to answer is whether the learned Judge erred by not declaring Section 10 of the *Political Parties Act* unconstitutional? The cardinal rule in interpretation of statute is to check whether it complies with the constitutional mandate. This is a rule that has gained traction in several jurisdictions as stated in the case of, U.S v. Butler, (supra) which was relied on by the appellant. It was held that a duty of a court in determining the constitutionality of a provision of a statute should take the following as a guidance: -

When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of *the Constitution* which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of *the Constitution*; and, having done that, its duty ends.

Also in The Queen v. Big M. Drug Mart Ltd, 1986 LRC (Const.) 332, the Supreme Court of Canada stated that;

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity.

28. Bearing in mind the above principles we are of the view that although *the Constitution* does not make any provisions for political mergers or coalitions, Parliament is mandated under Article 92 to make Legislation to provide inter alia for the regulation of political parties, the roles and functions of political parties and other matters necessary for their management thereto. We are cognisant of the fact that enactment of legislation involves a lengthy process that involves people's representative as well as public participation. A party seeking to strike a provision of a statute must demonstrate how the particular enactment is unfair, irrational and patently against the values or the spirit of *the Constitution*.....

225. Having had a detailed discussion in the manner in which Courts ought to deal with the interpretation of *the Constitution* and the constitutionality of statutes, and as said, that discourse now lays a basis for the consideration of the rest of the issues.

226. The Court will now consider the other issues.

c. Whether the impugned Regulations contravene Articles 10 and 201(a) of *the Constitution* for want of public participation and stakeholders' engagement:

227. Participation of the people is a national value and principle of governance that was introduced in Kenya by Article 10 of *the Constitution*. The said Article provides as follows: -

> (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them––
>
> (a) applies or interprets this Constitution;
>
> (b) enacts, applies or interprets any law; or
>
> (c) makes or implements public policy decisions.
>
> (2) The national values and principles of governance include––
>
> (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
>
> (b) human dignity, equity, social justice, inclusiveness, equality,
>
> (c) good governance, integrity, transparency and accountability;
>
> and
>
> (d) sustainable development.

228. In Petitions 210 & 214 of 2019 (Consolidated), Simon Mbugua & another v Central Bank of Kenya & 2 others [2019] eKLR a three-judge bench defined public participation, and in reference to a South African decision, spoke to its significance in the new constitutional dispensation in the following manner: -

> 128. The Black's Law Dictionary 10th Edition, Thomas Reuters, at page 1294 defines participation as "the act of taking part in something, such as partnership....". The South African Constitutional Court in Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) defined public participation as follows:
>
> The active involvement of members of a community or organization in decisions which affect them.... According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something.....
>
> 129. The centrality of public participation was underscored in Matatiele Municipality v President of the Republic of South Africa (2) (CCT73/05A) quoted with approval by the Court of Appeals of Quebec, Canada, in Caron v R 20 Q.A.C. 45 [1988] R.J.Q. 2333 thus:
>
> A commitment to a right to...public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect....
>
> 130. Locally, the High Court in 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 developed the following six principles to be taken into account whenever the application of the doctrine of public participation comes into issue:

First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or public official who is to craft the modalities of public participation but in so doing the government agency or public official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.

Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:

Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them....

Fourth, public participation does not dictate that everyone must give their views on the issue at hand. 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, must, however, show intentional 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 the views received as part of public participation programme. The government agency 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.

229. In Doctors for Life International -vs- Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC), Ngcobo, J who delivered

the leading majority judgment spoke to participation of the public in law making process and the importance thereof as follows: -

> The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.....The international law right to political participation reflects a shared notion that a nation's sovereign authority is one that belongs to its citizens, who 'themselves should participate in government – though their participation may vary in degree.'.....This notion is expressed in the preamble of *the Constitution*, which states that *the Constitution* lays "the foundations for a democratic and open society in which government is based on the will of the people." It is also expressed in constitutional provisions that require national and provincial legislatures to facilitate public involvement in their processes. Through these provisions, the people of South Africa reserved for themselves part of the sovereign legislative authority that they otherwise delegated to the representative bodies they created.....The very first provision of our Constitution, which establishes the founding values of our constitutional democracy, includes as part of those values "a multi-party system of democratic government, to ensure accountability, responsiveness and openness." Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the preamble of *the Constitution* that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process.....

230. In Petition 532 of 2013 & 12, 35, 36, 42, & 72 of 2014 & Judicial Review Miscellaneous Application 61 of 2014 (consolidated) the adequacy of public participation was discussed as follows: -

> .... In my view to huddle a few people in a 5 star hotel on one day cannot by any stretch of imagination be termed as public participation for the purposes of meeting constitutional and legislative threshold. Whereas the magnitude of the publicity required may depend from one action to another a one day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation. As was held in Doctors for Life International vs. Speaker of the National Assembly and Others (supra):
>
> > Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process. Thus, Parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the opportunities for participation that are available. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens.... [the Assembly] should create conditions that are conducive to the effective exercise of the right to participate in the law-making process. This can be realised in various ways,

including through road shows, regional workshops, radio programs and publications aimed at educating and informing the public about ways to influence Parliament, to mention a few.....It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that *the Constitution* values public participation in the lawmaking process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that *the Constitution* contemplates that the public will participate in the law-making process.....In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable."

231. In Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC), Ngcobo, J discussed at length the modalities of public participation and held that: -

.... the provincial legislatures have broad discretion to choose the mechanisms that, in their view, would best facilitate public involvement in their processes. This may include providing transportation to and from hearings or hosting radio programs in multiple languages on an important bill, and may well go beyond any formulaic requirement of notice or hearing. In addition, the nature of the legislation and its effect on the provinces undoubtedly plays a role in determining the degree of facilitation that is reasonable and the mechanisms that are most appropriate to achieve public involvement. Thus, contrary to the submission by the government, it is not enough to point to standing rules of the legislature that provide generally for public involvement as evidence that public involvement took place; what matters is that the legislature acted reasonably in the manner that it facilitated public involvement in the particular circumstances of a given case. The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say. In addition, in evaluating the reasonableness of the conduct of the provincial legislatures, the Court will have regard to what the legislatures themselves considered to be appropriate in fulfilling the obligation to facilitate public participation in the light of the content, importance and urgency of the legislation.....The purpose of permitting public participation in the law making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers

to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.

232. This Court has patiently considered the aspect of public participation in this matter.

233. From the record, there is no difficulty in finding that there was indeed adequate and satisfactory public and stakeholder engagement over the Regulations.

234. The Petitioners affirm that they sent their written memorandum on the Regulations. The Respondents averred that they considered all the matters submitted during the process and eventually came up with the Regulations. Further, the input of the Hon. Attorney General and the Kenya Law Reform Commission was sought on the Regulations.

235. The Parliament also dealt with the aspect of public engagement under the *Statutory Instruments Act*. It was satisfied that the Respondents had undertaken sufficient public participation.

236. From the foregoing, it appears that the Petitioners are dissatisfied with the Regulations partly because their proposals did not carry the day. That cannot be a basis for challenging the Regulations. Whereas the entity undertaking public engagement is under a duty to consider all the proposals made, it is not under any obligation to accept and adopt specific proposals.

237. The essence of public participation is to accord the public an opportunity to participate in the process. The process is a means to an end and it is not the end by itself.

238. Without much ado, this Court finds that there was adequate public participation and stakeholders' engagement in the process leading to the enactment of the impugned Regulations.

d. Whether the impugned Regulations contravene Articles 43 and 201 of *the Constitution* for not fairly sharing the tax burden and amounted to double taxation thereby raising the costs of living, hence, infringing on the economic and social rights of the citizens:

239. The parties' rival positions on the issue have been well captured earlier in this judgment.

240. It has been contended that the levies and taxes imposed by the Regulations amount to unfair sharing of tax burden by imposing double taxation and thereby raising the cost of living.

241. The Court will, in the first instance, deal with the aspect of double taxation. Again, the parties have, rightly so, referred to various decisions on the aspect.

242. The baseline is that for a tax to constitute double taxation, the tax must be imposed on the same property by same governing body during same taxing period and for same taxing purpose.

243. In paragraph 10 of the Affidavit of Rajan Malde in support of the Petition and the application, it was deposed that the taxes and levies under the Third Schedule of the Regulations were the very same taxes which the Petitioners also pay under the East African Community External Tariff, 2017.

244. By placing the ingredients of double taxation and the facts in this matter, side by side, it appears that the prevailing status quo does not support the contention that the levies and taxes under the Third Schedule of the Regulations amount to double taxation.

245. The taxes and levies are levied by different governing bodies. Whereas on one part there is the local taxing regime, the other part constitutes taxation under an international entity. Further, the purpose of the taxes at both levels is again definitely different. Whereas one may argue that it is a general legal

principle in international law that where there is a conflict between a municipal law and international law or treaty, the international law prevails, that is so, but such is subject to *the Constitution*. In this case, it is *the Constitution* which has sanctioned the levy of taxes locally and as said, the taxes are for different purposes. The instant scenario, therefore, defeats the argument on double taxation.

246. On the aspect of the levies and taxes under the Regulations amounting to unfair sharing of tax burden and thereby raising the cost of living and infringing the economic and social rights under Article 43 of *the Constitution*, this Court takes the position that the matter is technical and called for appropriate proof.

247. The social and economic rights provided for in Article 43 of *the Constitution* include the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and to education. *The Constitution* further provides that a person is not to be denied emergency medical treatment and enjoins the State to provide appropriate social security to persons who are unable to support themselves and their dependants.

248. It is worth-noting that the Petitioners in their pleadings and arguments did not allege that there was infringement of the specific rights provided for in Article 43 of *the Constitution*, but instead focused on the contention that the Regulations amounted to unfair sharing of tax burden and thereby raising the cost of living, as forming the basis for the infringement of the rights in Article 43.

249. In Petition No. 159 of 2018 (Consolidated with Petition No. 201 of 2019 William Odhiambo Ramogi & 3 Others vs. Hon. Attorney General & 4 Others (2020) eKLR, a Multi-Judge Bench of the High Court discussed the economic and social rights under Article 43 of *the Constitution* in the context of the the right to work and earn a livelihood as follows: -

> 195. The interconnection between the right to work and earn a livelihood and social and economic rights was considered in Joseph Letuya and Others vs The Attorney General and Others, ELC No 81 of 2012 (O.S) where the Court stated as follows in this regard:
>
> This Court recognizes that the right to livelihood neither has an established definition nor recognition as a human right at the national or international level. However, the right to a livelihood is a concept that is increasingly being discussed in the context of human rights. This concept has mention in various international human rights treaties which are now part of Kenyan law by virtue of Article 2(6) of the Kenyan Constitution. Article 25 of the Universal Declaration of Human Rights (UHDR) does mention livelihood in relation to social security and states that:
>
> "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food...and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."
>
> In addition, Article 6(1) of the International Covenant on Economic, Social and Cultural Right (ICESCR) states that the States Parties "recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts." The right to adequate standard of living as defined under Article 11 of ICESCR

includes right to food, clothing, right to adequate housing, right to water and sanitation with an obligation to progressively improve living conditions.

These rights are also now expressly provided in the directive principles and Bill of Rights in the Kenyan Constitution. The Preamble to *the Constitution*, which directs this Court as to the considerations to be taken into account when interpreting this Constitution, proclaims that the people of Kenya, when making *the Constitution* were committed to nurturing and protecting the well-being of the individual, the family, communities and the nation. Likewise, the national values and principles that bind this Court when interpreting *the Constitution* under Article 10 of *the Constitution* include human dignity, equity, social justice, human rights, non-discrimination, protection of the marginalized and sustainable development.

Article 28 provides for the right of inherent dignity of every person and the right to have that dignity respected and protected. Lastly, Article 43(1) of *the Constitution* expressly provides for economic and social rights as follows:

"(1) Every person has the right—

a. to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

b. to accessible and adequate housing, and to reasonable standards of sanitation;

c. to be free from hunger, and to have adequate food of acceptable quality;

d. to clean and safe water in adequate quantities;

e. to social security; and

f. to education."

It is therefore evident from the foregoing provisions that their purpose is to ensure that persons to whom they apply attain a reasonable livelihood.

196. It is evident from the foregoing that the right to life and dignity on the one hand, and economic and social rights on the other hand, are all inter-connected and indivisible, and it cannot be said that one set of rights is more important than the other. All these rights must, of necessity, be respected, protected, promoted and fulfilled for a person to attain a reasonable livelihood. However, while the right to a livelihood may be rightly considered to be a pre-condition and indivisible from the rights provided for in Article 43, there is a nuanced difference between the two sets of rights when it comes to the nature of the State's and State actors obligations as regards their observance. While the right to work and earn a livelihood is a negative right in the sense that it imposes a duty on the State not to act in certain ways that will infringe on the said rights; the social and economic rights provided for in Article 43 are positive rights, which impose obligations on the State to do as much as it can to secure for its citizens a core minimum of the social and economic rights specified in the Article.

250. For the Petitioners to, therefore, succeed on this claim, they needed to prove how the tax burden in Kenya was unfairly placed on the Petitioners and, further, how that had the effect of raising the cost of living.

251. The legal burden of proof is provided under sections 107(1), (2) and 109 of the *Evidence Act* as follows: -

> 1. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

> 109. Proof of particular fact
> The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

252. The issue of the burden of proof on a Petitioner in a Constitutional petition was also addressed by the Supreme Court in Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR as follows: -

> Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

253. The Petitioners in this respect filed a document titled Economic Survey 2020 Food Balanced Sheet by the Kenya National Bureau of Statistics. They also relied on some Tables of Exports and Imports of Nut and Oil Crop Products in Kenya, 2019 as per the ITC Trade Map.

254. The practice and procedure in constitutional Petitions is further provided for under *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter referred to as 'the Mutunga Rules').

255. Rule 20(1) of the Mutunga Rules is on the manner in which constitutional Petitions ought to be heard. Such Petitions may be heard by way of affidavits or written submissions or oral evidence. Rule 20(3) of the Mutunga Rules provide that a Court may upon application or on its own motion direct that the Petition or part thereof be heard by oral evidence. Rule 20(4) and (5) of the Mutunga Rules provide for the summoning and examination of witnesses.

256. In this case, the Petition was heard on reliance of affidavit evidence and written submissions.

257. The *Evidence Act* is also clear on its application to constitutional petitions and affidavits in section 2 thereof, and provides as follows:

> 1. This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi's Court, but not to proceedings before an arbitrator.

2. Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.

258. The Court will now examine the probative value of the said Economic Report in this matter.

259. Order 19 Rule 1 of the Civil Procedure Rules provides matters to which affidavits should be confined as "to such facts as the deponent is able of his own knowledge to prove, provided that in interlocutory proceedings, or by leave of the Court, an affidavit may contain statements of information and belief showing the sources and grounds thereof". Therefore, the sources of information and grounds of belief are primarily essential for the purpose of veracity of an affidavit, and consequently a failure by the deponent to disclose with particularity the sources of the information he has deposed to, has the effect of weakening the probative value of the information, and may even render it worthless. In A N Phakey vs. World-Wide Agencies Ltd (1948) 15 EACA 1, it was held that an affidavit drawn on information and belief is worthless without disclosing the source and ought not to be received in evidence.

260. In addition, where the testimony of a witness by affidavit is direct in terms of what the witness actually saw, heard or touched, that evidence has probative value where it is definite and supported by the testimony of others.

261. The testimony by the Petitioners in the affidavit was however not direct. Instead, it relied mainly on circumstantial documents from which the facts sought to be proved were meant to be logically or reasonably inferred.

262. The rules as regards production of and admissibility of documentary evidence are, in this respect, set out in Section 35 of the *Evidence Act*, which provides as follows: -

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say–

(a) if the maker of the statement either–

i. had personal knowledge of the matters dealt with by the statement; or

ii. where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable.

263. The Economic Survey Report in this matter is a copy. It is also not complete. It only covers the cover page, pages (iii), 136 and 138. Annexed to it are some tables of some statistics in respect to various crops.

264. The Petitioners did not lay any basis for annexing only two pages of a report which, seemingly, was voluminous. Further, the said pages are not certified as true copies of the report.

265. There is, however, a further challenge. The tables annexed to the Report seem not to be part of the Report. They are in different styles and fonts and they are not paginated.

266. In respect to the Tables of Exports and Imports of Nut and Oil Crop Products in Kenya, 2019 as per the ITC Trade Map appearing in the Supporting Affidavit, the sources are problematic. One of the tables was indicated as ITC Trade Map. Nothing more was said of the source. Further, the original tables or copies thereof were not produced.

267. Apart from the authenticity challenges of the Report and the tables, as alluded to above, there are some substantive challenges as well.

268. As currently presented, it is not possible to determine what probative value to assign to the expert opinions allegedly presented in the report and the table. This is because, the expertise of the authors is not established in the report and tables. Neither is an attempt made to justify the scientific basis of the methodology deployed in generating the data for the report and tables or the specific methods used to collect the data.

269. The Report and the tables are also inept in demonstrating the various tax burdens in Kenya. Further, there is no comparative data provided. This matter principally called for evidence on how the various taxes are levied in Kenya. That is missing. One, therefore, wonders how the unfairness in sharing the tax burden will be ascertained in such circumstances.

270. On an equal footing, the Petitioners did not render any evidence to demonstrate the manner in which the cost of living in Kenya is rising on the basis of the taxes and levies under the impugned Regulations.

271. Without all this information missing, it is impossible to assess the credibility of the methods used to collect and analyze the data as well as the conclusions reached by the authors. In short, the report and the tables have little, if any, probative value.

272. The Court in the William Odhiambo Ramogi & 3 Others case (supra) summed up the foregoing in the following manner: -

> 220. We must emphasize the importance of adherence to the rules of evidence – both in terms of presentation (authenticity and foundation) and quality of evidence (credibility and probative value) required to establish violations of fundamental rights and freedoms especially in Public Interest or Strategic Litigation. The rules of evidence apply with equal force to this species of litigation as they do in run-of-the-mill litigation. This is especially true for cases where claimed violations are most appropriately proved by empirical evidence. Such evidence and data are often generated by experts and must be presented in adherence with the rules on presentation of expert evidence. Of course, reliance on empirical data does not detract from the need, in appropriate cases, to present direct evidence of the lived realities of the affected people on whose behalf the Public Interest Litigation has been filed.

273. In the end, the issue is unproved and fails.

e. Whether Section 18 of the *Crops Act* as read with Regulation 8 of the impugned Regulations contravene Articles 94(6) and 209(5) of *the Constitution*:

274. To be able to deal with this issue pronto, there is need to reproduce the various provisions verbatim.

275. Section 18 of the *Crops Act* is on manufacturing licences. It states as follows: -

> (1) A person shall not manufacture or process a scheduled crop product for sale except under and in accordance with a licence issued under this Act.
>
> (2) An application for a licence under this section shall be in writing and in the prescribed form and shall be accompanied by the prescribed fee.
>
> (3) The licensing authority may, after consultation with the county executive—
>
> (a) issue a manufacturing licence, in accordance with this Act;
>
> (b) refuse to issue the licence on any ground which may appear to the licensing authority to be sufficient and inform the applicant in writing of the reasons thereof;
>
> (c) cancel, vary or suspend any licence if in the findings of the licensing authority, the licensee is found to have contravened the regulations made under this Act for the operation of manufacturing or processing entities.
>
> (4) A manufacturing licence issued under this section shall, in addition to authorizing the holder to carry on the business set out in subsection (1), also authorize the holder to carry out the business of packing and blending a crop product.

276. Regulation 8 is on issuance of commercial nursery license. It provides as under: -

> (1) The Authority shall issue a licence to a successful applicant in Form C2 set out in the Second Schedule within thirty days, upon payment of fee set out in Third Schedule.
>
> (2) The Authority shall, before issuing the licence under sub regulation (1), satisfy itself that the applicant has met all the requirements as set out in the Part A of the Fourth Schedule.
>
> (3) An unsuccessful applicant shall be notified in writing within seven days of the decision, of the reasons for the rejection of the application.
>
> (4) The applicant under sub regulation (2) may re-apply for registration upon fulfilment of all the necessary requirements.
>
> (5) A person who contravenes the provisions of this regulation commits an offence.

277. Therefore, Section 18 of the *Crops Act* deals with manufacturing licenses whereas Regulation 8 is onissuance of licence for establishing commercial nurseries.

278. Articles 94(6) and 209(5) of *the Constitution* respectively states as follows: -

> 94(6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that

authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.

209(5) The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.

279. As discussed in the preceding issues in this judgment, the purpose of the *Crops Act* as well as the Regulations are well captured in the *Crops Act* and the Regulations respectively. The same are in fact reproduced in full. To that end, Section 18 of the *Crops Act* and Regulation 8 are in harmony with Article 94(6) of *the Constitution*.

280. On whether Section 18 of the *Crops Act* and Regulation 8 contravene Article 209(5) of *the Constitution*, suffice to state that the impugned Regulations are made pursuant to a national legislation and not a county legislation. As such, Article 209(5), which specifically deals with county legislations, does not apply in the circumstances of this matter.

281. In the end, this issue is also answered in the negative.

f. Whether Regulations 30, 34 and 35 of the impugned Regulations contravene Articles 2(2) and 10 of *the Constitution* in usurping the powers of quality control entities created under various statutes:

282. The contention in this issue is whether standardization and quality assurance of products in Kenya is the preserve of the Kenya Bureau of Standards.

283. In the Preamble, the *Standards Act*, Cap. 496 of the Laws of Kenya, states that it is a An Act of Parliament to promote the standardisation of the specification of commodities, and to provide for the standardisation of commodities and codes of practice; to establish a Kenya Bureau of Standards, to define its functions and provide for its management and control; and for matters incidental to, and connected with, the foregoing.

284. Section 3 thereof establishes the Kenya Bureau of Standards as a body corporate with perpetual succession and a common seal.

285. The purpose of the Kenya Bureau of Standards is provided in Section 4 as under: -

(a) to promote standardization in industry and commerce;

(b) to make arrangements or provide facilities for the testing and calibration of precision instruments, gauges and scientific apparatus, for the determination of their degree of accuracy by comparison with standards approved by the Minister on the recommendation of the Council, and for the issue of certificates in regard thereto;

(c) to make arrangements or provide facilities for the examination and testing of commodities and any material or substance from or with which and the manner in which they may be manufactured, produced, processed or treated;

(d) to control, in accordance with the provisions of this Act, the use of standardization marks and distinctive marks;

(e) to prepare, frame, modify or amend specifications and codes of practice;

(f) to encourage or undertake educational work in connexion with standardization;

(g) to assist the Government or any local authority or other public body or any other person in the preparation and framing of any specifications or codes of practice;

(h) to provide for co-operation with the Government or the representatives of any industry or with any local authority or other public body or any other person, with a view to securing the adoption and practical application of standards;

(i) to provide for the testing at the request of the Minister, and on behalf of the Government, of locally manufactured and imported commodities with a view to determining whether such commodities comply with the provisions of this Act or any other law dealing with standards of quality or description.

286. Regulation 30 provides for inspection of fields and manufacturing facilities. It states as follows: -

(1) 1) The Authority and county government together with other government agencies responsible for ensuring quality produce and products may conduct field inspection of nuts and oil crops grown to ascertain quality control during production.

(2) The Authority shall conduct the first inspection of newly established manufacturing facility upon payment of fee as set out in Third schedule, to ensure compliance with national, regional and international standards on food safety and good manufacturing practices.

3. The Authority shall conduct quarterly inspections, upon payment of fees as set out in Third schedule, on existing manufacturing plants to ensure conformity to standards.

287. Regulation 34 is on compliance with quality standards. Ity provides as follows: -

All nuts and oil crops produce or products offered for sale shall comply with relevant national, regional and international standards and where applicable food safety and hygiene requirements and phytosanitary requirements.

288. Regulation 35 is on sampling and testing of produce and products. It is tailored as under: -

(1) The Authority in collaboration with other government agencies shall randomly sample, test and analyze different nuts and oil crops produce and products in collection centers, warehouses, markets and manufacturing facilities to ensure conformity to food safety and quality standards as provided for in national, regional, international and any other relevant laws.

(2) The Authority shall issue an annual standards conformity certificate to a buyer, warehouseman, transporter, importer and exporter.

(3) The Authority shall seize or remove at the cost of the owner any produce or product that does not conform to food safety, quality and any other requirement in the Regulations.

(4) The Authority shall immediately liaise with other relevant government agencies for disposal or destruction of the seized or removed product or produce.

289. It is evident that the duty to standardize and ensure quality assurance of products in the nuts and oils sub-sector is vested in both the Kenya Bureau of Standards under the *Standards Act* and also under the 3rd Respondent and the County Governments under the *Crops Act* and the Regulations thereunder.

290. To this Court, that is not a constitutional issue calling for determination by this Court. The issue is very simple. It relates to two statutes creating different entities to discharge similar duties.

291. Such are the issues which are contemplated to be easily resolved by petitioning Parliament under Article 119 of *the Constitution*.

292. Be that as it may, a copy of this judgment shall be served upon the Speakers of Parliament.

293. Deriving from the above, this Court declines the invitation that Regulations 30, 34 and 35 contravene Articles 2(2) and 10 of *the Constitution* in usurping the powers of quality control entities created under various statutes.

294. Again, the issue is answered in the negative.

Conclusion:

295. There are several findings and conclusions made in the course of the discussion. They include: -

i. That the High Court has jurisdiction under Article 165(3) of *the Constitution*, to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that *the Constitution* has either been violated or threatened with violation.

ii. The Agriculture and Food Authority has no jurisdiction to make any regulations under the *Crops Act*. That is the preserve of the Cabinet Secretary responsible for matters relating to agriculture.

iii. There was adequate public participation and stakeholders' engagement in the making of the Crops (Nuts and Oil Crops) Regulations, 2020. As such, the Regulations do not contravene Articles 10 and 201(a) of *the Constitution*.

iv. The Crops (Nuts and Oil Crops) Regulations, 2020 do not contravene Articles 43 and 201 of *the Constitution*. There was no evidence that the taxes and levies under the Regulations amounted to unfair sharing of the tax burden, were tantamount to double taxation and that they led to the raising of the costs of living for Kenyans.

v. Section 18 of the *Crops Act* as read with Regulation 8 do not contravene Articles 94(6) and 209(5) of *the Constitution*.

vi. Where two or more statutes establish different entities with similar functions and powers, the best way to deal with such is to petition Parliament under Article 119 of *the Constitution*.

Disposition:

296. On consideration of the discussion in the matter, this Court makes the following final orders: -

a. The Petition and the Notice of Motion dated 22nd November, 2021 be and are hereby dismissed.

b. Being a public interest litigation, each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **KITALE** this **16th** day of **December, 2022.**

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:__

Mr. Okwatch and Miss. Lutta, Learned Counsel for the Petitioner.

Mr. Mwendwa, Learned Counsel for the 1st Respondent.

Mr. Makhanu, Learned Counsel for the 3rd Respondent.

Kirong/Benard – Court Assistants.