REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E263 OF 2020

1. RICHARD OWUOR

2. JOB OMONDI OKOK

3. MADESTER ODHIAMBO OFWARE *(suing on behalf of*

***Busia Sugarcane Importers Association*).....PETITIONER**

VERSUS

THE CABINET SECRETARY,

MINISTRY OF AGRICULTURE,

LIVESTOCK, FISHERIES & COOPERATIVES.....1ST RESPONDENT

AGRICULTURE AND FOOD AUTHORITY.....2ND RESPONDENT

KENYA PLANT HEALTH

SERVICES INSPECTORATE SERVICES.....3RD RESPONDENT

THE COMMISSIONER GENERAL

KENYA REVENUE AUTHORITY.....4TH RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....5TH RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF INDUSTRALIZATION,

TRADE AND URBAN DEVELOPMENT.....6TH RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF EAST AFRICAN COMMUNITY

AND REGIONAL DEVELOPMENT.....7TH RESPONDENT

THE ATTORNEY-GENERAL.....8TH RESPONDENT

JUDGMENT

Introduction:

1. On 2nd July, 2020, the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Co-operatives issued a Press Statement on the Government's position on the importation of raw and processed sugar. In the statement, the Cabinet Secretary announced various initiatives towards reviving the sugar sector in Kenya. One of the remedial measures was the prohibition of importation of raw cane with immediate effect.

2. The Petitioner was aggrieved by the decision to stop the importation of raw cane. It variously engaged the said Cabinet Secretary with a view of reversing the decision to impose the ban. When the reversal of the ban was not forthcoming, the Petitioner filed the Petition subject of this judgment. The Petition is dated 1st September, 2020.

3. The Petition is opposed.

The Petition:

4. The Petitioner describes itself as an umbrella body of farmers and traders engaged in the sugarcane importation business for several sugar milling factories around the country and more specifically within the Western Kenya sugar belt which includes the Counties of Siaya, Kisumu, Vihiga, Busia, Kakamega, Bungoma, Trans Nzoia among others.

5. The Petitioner posits that it is charged with championing of the rights, welfare and wellbeing of the sugarcane traders in Kenya.

6. The Petitioner challenges the decision to prohibit the importation of raw cane from Uganda for infringing Articles 10, 40, 43 and 47 of the Constitution.

7. In the main, the Petition seeks the following prayers: -

> *1. A Declaration that A declaration that the 1st respondent's directive banning the importation of raw sugarcane as conveyed vide a press statement release on 2nd July 2020 is unconstitutional and therefore is null and void;*
>
> *2. A declaration that the decision of the Respondent's herein banning the importation of raw sugarcane contravened and violated the Petitioner and Petitioner's members fundamental rights and freedoms as enshrined under Articles 40, 43 and 47 of the Constitution of Kenya (2010);*
>
> *3. An order of MANDAMUS directed to the Respondents mandating them to undertake the required lawful process and procedures including but not limited to undertaking public participation prior to taking administrative actions including the banning of importation of raw sugarcane;*
>
> *4. An order of PROHIBITION directed to the 2nd respondents their agents, officers, undisclosed principals and any other persons acting on their behalf or instructions from barring the Petitioners or any of their members from importation of raw sugarcane without following due process or in pursuance of a lawful directive and or decision;*
>
> *5. A conservatory order in the nature of a permanent injunction directed towards the Respondents restricting/prohibiting the Respondents, their agents, officers and any person acting under them from banning the importation of raw sugarcane into the Republic of Kenya prior to the formulation of necessary regulations to govern the import and exportation of raw sugarcane through a process that conforms with the dictates of the Constitution;*
>
> *6. An order of MANDAMUS directed to the Respondents to jointly and severally compensate the Petitioners and the Petitioners members for the losses incurred as a result of the ban on importation of sugarcane as communicated through the 1st Respondent's press statement dated 2nd July 2020;*
>
> *7. Any other orders and directions as this Honourable Court may consider appropriate in the circumstances;*
>
> *8. Costs of this Petition.*

8. The Petition is supported by the affidavit sworn by Richard Owuor, the Chairman of the Petitioner, on 1st September, 2020.

9. The Petitioners also filed written submissions and Supplementary submissions dated 11th September, 2020 and 10th November, 2020 respectively.

The Responses:

10. The Petition is opposed by the Respondents. The Honourable Attorney General appeared for all the Respondents save the 4th Respondent. The Attorney General relied on Grounds of Opposition dated 1st October, 2020, a Replying Affidavit sworn by one Rosemary A. Owino, the Interim Head of the Sugar Directorate of the 2nd Respondent, on 10th November, 2020 and written submissions dated 25th November, 2020.

11. The 4th Respondent filed a Replying Affidavit sworn one *Philip Koech,* a Customs & Border Control Officer stationed at the Busia

Customs O.S.B.P., on 5th October, 2020. It also filed written submissions dated 28th October, 2020.

Issues for Determination:

12. On careful reading of the material presented before Court by the parties including the submissions and the decisions referred to, I discern the following issues for determination: -

(a) Whether the threshold for seeking redress through a Constitutional Petition has been attained;

(b) Whether the decision by the 1st Respondent to prohibit the importation of raw cane is arbitrary and contravenes Articles 40 and 43 of the Constitution;

(c) Whether the decision by the 1st Respondent to prohibit the importation of raw cane contravenes Articles10 and 47 of the Constitution for want of public participation, stakeholder consultations and administratively fair procedures;

(d) Whether the Petitioners are entitled to any remedies.

13. I will deal with the issues in *seriatim*.

(a) Whether the threshold for seeking redress through a Constitutional Petition has been attained:

14. The Respondents contend that the Petitioner has failed to plead in a precise manner the constitutional provisions alleged to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. It is also alleged that the Petitioner has failed to state and particularize the instances on how their rights and fundamental freedoms under the Constitution were violated by the ban.

15. The Respondents refereed to the decisions in ***Anarita Karimi Njeru vs. Republic (No. 1) – (1979) KLR 154, Mumo Matemu vs. Trusted Society of Human Rights Alliance and Others*** among others in support of the submission.

16. The Petitioner submits that the Petition conforms to the requirements of a constitutional petition as it has stated in clarity the provisions of the Constitution and the manner they are infringed. Of particular emphasis is Article 10 of the Constitution which the Petitioner avers is alone capable of sustaining the Petition.

17. Due to the unique nature of Constitutional Petitions, Courts, since the pre-2010 constitutional era, have variously emphasized the need for clarity of pleadings. I echo the position. *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (commonly referred to as '***the Mutunga Rules'***) also provide for the contents of Petitions. Rule 10 thereof provides seven key contents of a Petition as follows: -

Form of petition.

10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

2) The petition shall disclose the following—

(a) the petitioner's name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

18. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of petitions. They provide as follows: -

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.

19. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.

20. The Supreme Court in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR*** had the following on Constitutional Petitions: -

> *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.*

21. A perusal of the Petition in this case will no doubt reveal that the Petition fully complied with Rule 10(1) and (2) of the Mutunga Rules as well as the requirements in ***Communications Commission case*** (supra). (See paragraphs 34 to 38 of the Petition). The Petitioner stated with clarity the Articles of the Constitution it alleges to have been violated. It also stated the manner in which the said provisions were violated. The Petitioner has also demonstrated that it has interests in the sugar sector hence concerned with the ban of the importation of raw cane.

22. It must be clearly understood that the manner in which a Petition is presented or drafted is different from the manner in which such a Petition ought to be proved. Proof of the contents of a Petition is a completely different legal regime.

23. I, therefore, find and hold, which I hereby do, that the submission that the Petition is devoid of clarity and fail the legal test to be sustained as a constitutional petition cannot be maintained. The same is for rejection.

24. The issue is hence answered in the negative.

(b) Whether the decision by the 1st Respondent to prohibit the importation of raw cane is arbitrary and contravenes Articles 40 and 43 of the Constitution:

25. The Petitioner pleads that the impugned decision is arbitrary and violates the Petitioner's right to protection of property under Articles 40 and 43 of the Constitution.

26. On the basis of ***Salim Seif Ambunya Andanje & Another vs. Alex Jepkoech Yano & Another (2019) eKLR***, the Respondents submits that *'…. in order to protect the right to property, a party must establish a proprietary right or interest in land as the Constitution does not itself create these rights or interests'.*

27. It is contended that the contention of infringement of the right to property is based on heresay. It is submitted that the Petitioner has not availed any evidence of the property upon which it seeks the Court's protection and neither has any loss been proved. It is further submitted that there is no evidence of the alleged 500 trucks loaded with raw harvested cane at the Busia border. This Court is urged to be alive to the fact the 4th Respondent who has its officers stationed at the border point has deponed that no such trucks are at the border.

28. I will begin with determining whether the decision by the 1st Respondent is arbitrary.

29. This Court recently discussed the doctrine of arbitrariness in ***Nairobi High Court Constitutional Petition No. E283 of 2020 Law Society of Kenya vs. The Attorney General & Others*** (unreported). This is what I stated: -

> *116. The Court of Appeal in **Malindi Civil Appeal 56 of 2014 Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR** made reference to the **Black's Law Dictionary 8th Edition** that defined arbitrariness in the following manner: -*
>
> in it connotes a decision or an action that is based on individual discretion, informed by prejudice or preference, rather than reason or facts.
>
> *117. The High Court in **Civil Suit No. 3 of 2006 Kasimu Sharifu Mohamed vs. Timbi Limited [2011] eKLR** referred to Oxford Advanced Learner's Dictionary A. S. Horby Sixth Edition Edited by Sally Wehmeiner which defines the term 'arbitrary in the following way: -*
>
> the term arbitrary in the ordinary English language means an action or decision not seeming to be based on a reason, system and sometimes, seeming unfair.
>
> *118. The Supreme Court of China in **Sharma Transport vs. Government of A. Palso (2002) 2 SCC 188** had the occasion to interrogate the meaning and import of the term 'arbitrarily'. The Court observed as follows: -*
>
> > The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.
>
> *119. The term 'arbitrariness' had earlier on been defined by the Court (Supreme Court of China) in **Shrilekha Vidyarthi vs. State of U.P (1991) 1 SCC 212** when it comprehensively observed as follows;*

> The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you'. This is what men in power must remember, always.

30. I have carefully read the Press Statement by the 1st Respondent which contained the impugned decision. The statement is part of the affidavit sworn on behalf of the Petitioner. It is annexture 'RO4'. The statement laid a good basis for the decision to prohibit further importation of raw cane. The decision intends to protect the local farmers who have perennially suffered in the hands of scrupulous business people who bring into the country tons of imported sugars and related products. Such trend has led to the collapse of local sugar milling industries and has brought untold suffering to the local farmers. There is no doubt that any Government which is mindful of its citizens will definitely intervene in such circumstances. The 1st Respondent did so.

31. Subjecting the foregoing to the concept of arbitrariness, I find that the decision by the 1st Respondent is not arbitrary.

32. I will now deal with the proof of infringement of the right to property and the economic and social rights under Articles 40 and 43 of the Constitution respectively.

33. Article 40 of the Constitution states as follows: -

> *(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—*
>
> *(a) of any description; and*
>
> *(b) in any part of Kenya.*
>
> *(2) Parliament shall not enact a law that permits the State or any person—*
>
> *(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or*
>
> *(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).*
>
> *(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—*
>
> *(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or*
>
> *(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—*
>
> *(i) requires prompt payment in full, of just compensation to the person; and*
>
> *(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.*
>
> *(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.*
>
> *(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.*
>
> *(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."*

34. For the Petitioner to succeed under this claim it must prove its proprietary rights and how the Respondents have caused harm or injury to or the omission to take reasonable steps to prevent such harm and injury.

35. That is the burden of proof provided under sections 107(1) (2) and 109 of the Evidence Act. The provisions state 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.

36. As said above, the issue of the burden of proof on a Petitioner in a Constitutional petition was aptly addressed by the Supreme Court in ***Communications Commission of Kenya & 5 Others*** (supra). In essence a Petitioner must establish '*… the ….. link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and* ***the manifestation of contravention or infringement****.'*

37. In proof thereof, the Petitioner filed the supporting affidavit sworn by Richard Owuor. In it, the Petitioner deponed that subsequent to the meeting held between the Respondents and stakeholders with a view to aid the sugar milling factories acquire sufficient raw cane from the neighbouring countries, the Petitioner '*sought for authorization from the 2nd Respondent for purposes of the importation of sugarcane'*. However, the Petitioner posits that that authorization was to be done through specific sugar milling companies. It then annexed the 2nd Respondent's Letter of No Objection dated 30th March, 2020 to Busia Sugar Limited (hereinafter referred to as '***the BSL'***).

38. The Petitioner further deponed that upon complying with all the requirements in the said Letter of No Objection it *'… entered into various agreements with the cane farmers in Uganda and secured raw cane.'* The Petitioner also deponed that it *'…. then proceeded to contract transporters who would transport the harvested cane from Uganda to Kenya….'*

39. The High Court in a 5-Judge Bench in ***Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 Others vs. The Attorney General & Others (2020) eKLR*** dealt with the concept of proof in constitutional petitions as follows: -

> *200. It is notable in this respect that the hearing of petitions filed under Article 22 of the Constitution are also regulated by Rule 20 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013, which provides that such hearing shall be either by way of affidavits, written submissions or oral evidence, or as the Court may direct. 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.*

201. On the probative value of the Petitioners affidavits, the applicable law is Order 19 of the Civil Procedure Rules. Rule 1 thereof 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.*

202. 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. The testimony by the Petitioners in their affidavits 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.

203. 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.*

40. I have carefully perused the Affidavit in support of the Petition. The tenor of the affidavit is that the Petitioner was at the centre of the process of acquiring the Letter of No Objection from the 2nd Respondent and that it indeed obtained one and further that it dealt with the farmers in Uganda. However, the Petitioner failed to adduce evidence in support of such averments. The Letter of No Objection was addressed to BSL and not the Petitioner. The letter made no reference to the Petitioner or at all. There is no evidence whatsoever to show the nexus between the Petitioner and BSL. All what the Petitioner did is to place itself at the centre of the matter as the most aggrieved party. Infact, it is the 1st Respondent who clearly deponed on the possible relationship between the Petitioner and BSL. That disposition was not rebutted.

41. Given the nature of the Petitioner's disposition and the undisputed evidence by the 1st Respondent, it may be possible that the Petitioner entered into an arrangement with BSL, upon BSL obtaining the Letter of No Objection, that the Petitioner will procure the raw cane from Uganda on behalf of BSL. However, that is not the position taken by the Petitioner. The Petitioner, therefore, failed to adduce evidence to prove the averments it made in the affidavit.

42. Further, the agreements with farmers the Petitioner annexed to the affidavit do not indicate that the raw cane which the sellers purchased from Uganda was to be delivered to BSL. There is, as well, no evidence that BSL contracted the Petitioner or its members to avail the cane to it from Uganda. There is another important issue that arises from the agreements. The agreements are to the effect that the parties had agreed that the buyer shall buy the cane which was still standing in the seller's land at an agreed amount. The agreements, however, fall short of confirming that the buyers actually harvested the cane and took possession thereof. Also, apart from indicating that the amounts of money the buyers were to pay for the cane, the agreements fall short of confirming that the money was actually paid to the sellers. In other words, there is no evidence that the consideration was duly settled.

43. Closely related to the foregoing is the fact that the allegation that the Petitioner had contracted over 500 trucks to carry the harvested cane remain unproved. There is also no evidence that there are around 200 trucks loaded with harvested cane at the Busia border awaiting clearance into Kenya. Lastly, the Petitioner, for unknown reasons, did not enjoin BSL as a party in the proceedings despite evidence that BSL protested the ban.

44. There is also the contention by the Respondents that the Petitioner is dealing in the cane crop which is a scheduled crop contrary to the provisions of the Crops Act and that it is indeed committing offences. The Petitioner did not respond to that issue.

45. It is clear that the Petitioner's members variously engaged in commercial transactions with the farmers in Uganda. Such transactions are not proved to have any relation to the permission granted to BSL by the 2nd Respondent to obtain raw cane from Uganda. As such, the probative value of the contents of the affidavit in respect to the issue at hand is highly wanting. The Petitioner has failed to prove that it has any proprietary rights and interests in the circumstances of this matter, which ought to be protected by this Court. The Petitioner has also failed to prove how such alleged rights and interests were contravened by the Respondents.

46. As I come to the end of this discussion, the Court in ***Mombasa High Court Constitutional Petition No. 159 of 2018*** summed it all as follows: -

> *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.*

47. The Petitioner has, therefore, failed to prove its claim on Article 40 of the Constitution. Consequently, since its claim under Article 43 of the Constitution was pegged on the claim under Article 40 of the Constitution, then the claim under Article 43 of the Constitution cannot stand. It equally fails. In sum, the issue is answered in the negative.

(c) Whether the decision by the 1st Respondent to prohibit the importation of raw cane contravenes Articles 10 and 47 of the Constitution for want of public participation, stakeholder consultations and <u>administratively fair procedures:</u>

48. This issue is at the core of the Petitioners' complaint. To be able to comprehensively deal with it, it is imperative that the parties' cases be stated out.

49. As said, the Petitioners filed the Petition for and on behalf of sugarcane traders who are engaged in the importation and exportation of commodities in Kenya. The commodities include dealing in raw cane. The Petitioner described itself as duly registered under the Societies Act.

50. It is the Petitioner's case that since 2018 due to a myriad of challenges, including bad weather, farmers generally opted not to grow sugarcane. As such, the country was plunged into an acute shortage of sugarcane which is the primary raw material for the manufacture of sugar.

51. There was, hence, an increase of importation of brown sugar into the country. That led to the collapse of several sugar milling factories. In mitigation thereof, a consultative meeting was called upon by the sugar industry stakeholders in the Western Kenya region. That was in early 2020. They included the Petitioner, the 1st and 2nd Respondents, the Governors of the counties around the Western and Nyanza region and sugar millers.

52. The Petitioners aver that the meeting resolved that cane farmers and traders would be allowed to import raw cane from the neighbouring countries in the spirit of the Treaty Establishing the East African Community. Resulting therefrom, the Petitioner's members contracted farmers in Uganda for purposes of importation of the raw sugarcane.

53. It is posited by the Petitioner that the issue of importation of raw sugarcane from Uganda into Kenya was subject of and was approved by the Parliament of Uganda.

54. In order to effect the importation of the raw sugarcane into Kenya, the Petitioners state that various Government agencies including the Respondents were engaged in the process.

55. The Petitioner aver that it sought for authorization from the 2nd Respondent for the importation of the raw sugarcane from Uganda. The authorization was conditional to, *inter alia*, being granted only through specific milling companies.

56. On 30th March, 2020, the 2nd Respondent issued a Letter of No Objection to BSL. The Petitioner alleges that upon compliance with all the requirements in the Letter of No Objection it entered into various agreements with cane farmers in Uganda and secured raw cane. It also contracted around 500 transporters who would transport the harvested cane from Uganda to Kenya. That, translated to creation of over 5000 jobs to drivers, turn boys, loaders, cane cutters among others. The Petitioner contends that it then commenced the importation business and complied with all the legal requirements.

57. The Petitioner further avers that all went on so well until the 2nd July, 2020 when the 1st Respondent unilaterally and without any prior warning issued the Press Statement and directive banning the importation of raw sugarcane into Kenya with immediate effect. The decision was duly implemented by the other Respondents.

58. According to the Petitioner, the ban was implemented impartially since even after its issuance still traders dealing with importation of brown sugar were allowed to, and shipped into Kenya thousands of tons of brown sugar.

59. On its part, the Petitioner aver that it reached out to the Respondents with a view to amicably resolve the issue in vain. The obtaining position is that there is no sufficient raw sugarcane for the milling factories in Kenya and the factories are operating under 50% capacity. On their part, the traders who entered into purchase agreements with their counterparts in Uganda are now starring at losses running into billions of shillings.

60. The Petitioner further avers that at the time the ban was effected, there were many trailers which were loaded with raw sugarcane for transportation into Kenya and as a result all those trailers are stranded at the Kenya border at Busia. The trucks are about 300 including those which are still being loaded with the raw cane in the farms.

61. The ban is also seen as an economic threat to peace and harmony between Kenya and Uganda. The Petitioner further contend that the ban continues to deny the Petitioner and its members a source of livelihood in contravention of their constitutional rights.

62. In its submissions, the Petitioner posit that the decision to ban the importation ought to have been preceded by public participation. Relying on the Statutory Instruments Act, No. 23 of 2013, the Petitioner submits that the process provided therein ought to have been properly followed. It is argued that Article 10 of the Constitution was, as well, infringed. The decisions in ***Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others (2013) eKLR*** and ***Independent Electoral and Boundaries Commission & Others vs. The National Super Alliance & Others*** were cited in buttressing the position.

63. The Petitioner submit that the 1st Respondent had never formulated any regulatory framework on the importation of raw cane. As a result, the decisions to allow the importation of raw cane was always reached upon consultations with the stakeholders including the Petitioner. The Petitioner further avers that even the decision to ban the importation of the raw cane was equally supposed to be subjected to the stakeholders' consultation.

64. Responding to the submission by the Respondents that the 1st Respondent made an executive public policy decision which needed no public participation, the Petitioner took the contrary view. It submits that even such policy decisions which affect the rights and interests of the public must be subject to public scrutiny.

65. The Petitioner also submits that the 2nd Respondent has since published *The Crops (Sugar)(General) Regulations* and *The Crops (Sugar) (Imports, Exports & By-Products) Regulations* which all do not bar the importation of raw cane.

66. The 1st, 2nd, 3rd, 5th, 6th, 7th and 8th Respondents gave their version of how the importation of the raw cane was allowed. It is contended that the Petition is centred on the events surrounding the permission granted to BSL to import raw cane from Uganda.

67. The Respondents aver that due to sustained inability by BSL to develop its own cane farms, a stakeholders' meeting was held on 8th August, 2019 at the BSL's Boardroom where the issue of the deficit of cane was discussed. In the meeting it was agreed that a Letter of No Objection to import raw cane, for a limited period, be issued to BSL in order to mitigate on its prolonged deficits and as BSL engaged best practises to boost its own cane production. The Letter was conditional.

68. The Respondents posit that the letter was eventually issued and BSL contracted the Petitioner for the cane supply. The Respondents deny any dealing with the Petitioner or at all and contends that there has never been any legal relationship between the Petitioner and the Respondents over the issue of cane importation by BSL.

69. On further consultation, the permission granted to BSL to import raw cane was extended for a further 3 months' period, that is from 30th March, 2020 to 30th June, 2020.

70. According to the Respondents, the Petitioner or any of its members have never been registered under the Crops Act as dealers, or agents of the cane crop which is a scheduled crop. They are henceforth in conflict with Section 19(1)(b) of the Crops Act and are infact committing offences.

71. It is averred that the ban was imposed to allow for market stabilization due to the annual deficit vis-à-vis local production.

72. The Respondents submit that the impugned decision was purely an internal executive and administrative one which did not call for public participation. Further, allowing Courts to be at the centre-stage of every decision-making process will be detrimental to the principle of separation of powers. The decision in ***Speaker of the Senate & Another vs. Attorney General & 4 Others Advisory Opinion Reference No. 2 of 2013 (2013) eKLR*** among other decisions were referred to in support of the position.

73. The 4th Respondent posit that it did not infringe any constitutional provision in discharging its legal mandate in the matter. It referred to the decision in ***Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR*** in buttressing its submission.

74. The concept of public participation and stakeholders' consultation was discussed in great detail in ***Mombasa High Court Constitutional Petition No. 159 of 2018*** (supra). The Court stated as follows: -

> 116. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements any public policy decisions.
>
> 117. The Constitution also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -
>
> > *Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution***.**
>
> 118. Expounding on Article 10 of the Constitution, the Court of Appeal in ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal No. 224 of 2017; [2017] eKLR*** held that:
>
> > *In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.*
> >
> > *Consequently, in this appeal, we make a firm determination that Article 10 (2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.*
>
> 119. Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in ***Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR*** while referring to the South African decision in ***Doctors for Life International vs. Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC*)** adopted the following definition of public participation: -
>
> > *According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process***.**
>
> 120. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The **Black's Law Dictionary** 10th Edition defines '*consultation*' as follows: -
>
> > *The act of asking the advice or opinion of someone. A meeting in which parties consult or confer***.**
>
> 121. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as

stakeholders' engagement. Speaking on consultation the Court of Appeal in ***Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR*** quoted with approval Ngcobo J 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)*** as follows: -

> ***……****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….*

122. In a Three-Judge bench the High Court in consolidated ***Constitutional Petition Nos. 305 of 2012, 34 of 2013*** *and* ***12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR*** the Court addressed the concept of consultation in the following manner: -

> ***….*** *A public participation programme, must…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.*

(emphasis added)

123. Consultation or stakeholders' engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a Government agency or a public officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.

124. The importance of public participation cannot be gainsaid. The Court of Appeal in ***Legal Advice Centre & 2 others v County Government of Mombasa & 4 others*** *(*supra) while dealing with the aspect of public participation in lawmaking process stated as followed: -

> *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****.***

125. In ***Matatiele Municipality v President of the Republic of South Africa (2) (CCT73/05A),*** the South African Constitutional Court stated as follows: -

> *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…*

126. The South African Constitutional Court in ***Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others, CCT 86/08 [2010] ZACC 5*** discussed the importance of public participation as follows: -

> ***….****engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision****.***

127. Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in ***Legal Advice Centre & 2 others v County Government of Mombasa & 4 others*** (supra) referred to ***Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others [2017] eKLR*** stated as follows: -

> *the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1st respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party.*

128. In ***Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others*** (supra) the Court enumerated the following practical principles in ascertaining whether a reasonable threshold was reached in facilitating public participation: -

> *a) 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.*

b) 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.

c) 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."*

d) 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.

e) 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.

*f) 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***.**

75. I will now consider whether the decision to ban the importation of raw cane by the Cabinet Secretary for Agriculture, Livestock, Fisheries and Irrigation ought to have been subjected to public participation and/or stakeholders' consultations. In doing so, I will address the issue raised by the Respondents to the effect that the impugned decision is an executive decision and Courts are restrained by the doctrine of separation of powers from intruding thereto.

76. The extent to which Courts may deal with decisions made by the executive arm of Government has been dealt with in ***Mombasa High Court Constitutional Petition No. 159 of 2018*** (supra) and recently in ***Nairobi High Court Constitutional Petition No. E283 of 2020 Law Society of Kenya vs. The Attorney General & Others*** (unreported).

77. In ***Mombasa High Court Constitutional Petition No. 159 of 2018*** *(supra)* the Court dealt with the manner in which a state corporation ought to exercise statutory power. The Court defined the requisite threshold as follows: -

133. The manner in which a public body exercises its statutory powers is largely dependent on the resultant effect. This yields two scenarios. The first scenario is when the exercise of the statutory authority only impacts on the normal and ordinary day-to-day operations of the entity. We shall refer to such as the 'internal operational decisions concept'. The second scenario is when the effect of the exercise of the statutory power transcends the borders of the entity into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public.

134. Subjecting the first scenario to public participation is undesirable and will, without a doubt, result to more harm than any intended good. The harm is that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions. It would likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.

135. The issue is not foreign to our Courts. In ***Commission for Human Rights & Justice v Board of Directors, Kenya Ports Authority & 2 Others; Dock Workers Union (Interested Party) [2020] eKLR,*** *the Petitioner claimed that public participation was ignored in the recruitment of the Managing Director of Kenya Ports Authority. In a rejoinder, the Respondents argued that Section 5(1) of the KPA Act mandated the Kenya Ports Authority to appoint the Managing Director. They further argued that Boards of Directors of State corporations are independent and that their decisions are only fettered by the law. It was also argued that public participation had been conducted through representation of board members who were involved in the recruitment process.* ***Rika, J,*** *expressed himself as follows: -*

> Should the process of appointment of the Managing Director of the KPA, be equated to the process of making legislation or regulations in public entities? The High Court, in Robert N. Gakuru& Others v. Governor Kiambu County & 3 others [2014] eKLR, held that it behoves County Assemblies, in enacting legislation, to do whatever is reasonable, to ensure that many of their constituents are aware of the intention to enact legislation. The constituents must be exhorted to give their input. Should the level of public participation be the same, in appointment of the Managing Director of a State Corporation? Should the Respondents exhort Kenyans to participate in the process of appointment of the Managing Director? In the respectful view of this Court, appointment of the Managing Director, KPA, is a highly specialized undertaking, which is best discharged by the technocrats comprising the Board, assisted by human resource expert committees as the Board deems fit

to appoint. The existing law governing the process of appointment of the Managing Director KPA leans in favour of technocratic decision-making. Democratic decision-making, involving full-blown public participation may be suitable in the processes of legislation and related political processes, such as the Makueni County Experiment and the BBI, subject matter of Dr. Mutunga's case studies. But technocratic decision-making suits the appointment of CEOs of State Corporations. Even as we promote democratic [people-centric] decision-making processes, we must at the same time promote technocracy, giving some space to those with the skills and expertise to lead the processes, and trusting them to provide technical solutions to society's problems. The Board and the Committees involved in the process are in the view of the Court, well - equipped to give the Country a rational outcome. The Court agrees with the Respondents, that the 1st Respondent is sufficiently representative of stakeholders of the KPA, and the appointment of the Managing Director, is more of a technocratic decision-making process, than a democratic- decision making process. It need not totally open itself up, to the scrutiny of every person. The public is aided by public watchdogs – DCI, EACC, CRB, KRA and HELB – in assessing the antecedents of the applicants. The State Corporations Inspector General is part of the ad hoc committee set up by the 1st Respondent, to evaluate and shortlist applicants. Interviews shall be carried out by the full Board, face to face with the candidates. There are adequate measures taken by the 1st Respondent to ensure the process meets the demands of transparency and accountability to the public.

136. We agree with the Learned Judge. We further find that requiring an entity to subject its internal operational decisions to public participation is unreasonable. It is a tall order which shall definitely forestall the operations of such entity. That could not have, by any standard, been the constitutional desired-effect under Articles 10 and 47.

137. While, as aforesaid, it is imprudent to subject internal operational decisions of a public body to the public policy requirement of Article 10 of the Constitution, the opposite is true of decisions involved in the second scenario: these are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. There is, clearly, ample justification in subjecting the exercise of the statutory power in this scenario to public participation. The primary reason is that the resultant decisions have significant impact on the public and/or stakeholders.

78. The Court in ***Nairobi High Court Constitutional Petition No. E283 of 2020*** dealt with the manner in which the President ought to **re-assign** ministerial responsibility from one Ministry to another. The Court, building up on the position in ***Mombasa High Court Constitutional Petition No. 159 of 2018*** *(supra)* had the following to say: -

130. Whereas the above decision dealt with a state corporation exercising statutory power, the threshold adopted by the Court apply in the circumstances of this case in equal measure. In other words, a decision taken in exercise of executive authority may have to be subjected to public participation or not depending on its resultant effect. As held in the above case, if the decision 'only impacts on the normal and ordinary day-to-day operations of the entity……Subjecting …. to public participation is undesirable and will, without a doubt, result to more harm than any intended good. The harm is that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions. It would likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.'

131. The converse is also correct. As held 'the opposite is true of decisions involved in the second scenario: these are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. There is, clearly, ample justification in subjecting the exercise of the statutory power in this scenario to public participation. The primary reason is that the resultant decisions have significant impact on the public and/or stakeholders.'

132. There is further justification to the position that executive decisions which transcends into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public ought to be subjected to Article 10 of the Constitution. The justification finds refuge in Article 132(3)(c) of the Constitution which requires that any assignment of ministerial responsibility to a Cabinet Secretary ought ***not to be inconsistent with any Act of Parliament****. Therefore, the exercise of the executive power under Article 132(3)(c) of the Constitution is not absolute. The exercise of such authority is subject to the law.*

133. I see another justification. It borrows from the argument which I developed on the concept of ministerial responsibility by Constitution or statute. In the discussion, I settled for the position that if the Constitution or a statute assigns ministerial responsibility to a specific Cabinet Secretary then any re-assignment of such responsibility to another Cabinet Secretary must be preceded by appropriate amendments to the Constitution or statute.

134. The position is fortified in that any amendment to the Constitution or statute must be preceded by public participation. Indeed, Courts have variously held that Parliament and County Assemblies must carry out elaborate public participation as the case may require. It also depends on the nature of the matter under consideration.

135. The Court of Appeal in ***Nairobi Civil Appeal 200 of 2014 Kiambu County Government & 3 others -vs- Robert N. Gakuru & Others [2017] eKLR*** *approved the findings in High Court Civil Case No. 532 of 2013 Consolidated with Petition Nos. 12, 35, 36, 42 & 72 of 2014 And J.R. Misc. Appln. No. 61 of 2013 where the High Court rejected the contention that '****the people had elected their representatives in the County Assembly and therefore there was no need for further consultations with them'****.*

136. The Court of Appeal highlighted the place of public participation in the following manner: -

[20]. The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions,

highlights public participation as one of the ideals and aspirations of our democratic nation, but does not define or say how it should be implemented. In Article 196, it commands County Assemblies to, inter alia, facilitate public participation and involvement in the legislative and other business of the Assembly and its committees, but again does not say how.

[23.] The bottom line is that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation.

*137. Therefore, if any re-assignment of ministerial responsibility provided for by the Constitution or a statute must be subjected to public participation, as the case may be, then even in instances where the Constitution or the law is silent on the assignment of ministerial responsibility, any **re-assignment** of such responsibility must as well be preceded by public participation. The element of public participation must, therefore, be undertaken in any decision re-assigning ministerial responsibility. I say so because re-assigning ministerial responsibility affects an earlier decision which assigned the responsibility to another Cabinet Secretary. The re-assignment cannot hence be done unilaterally. It must be preceded by public participation.*

138. The decision to re-assign ministerial responsibility is one which transcends the borders of internal operational decisions in exercise of the executive authority into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. For instance, if a decision deals with reshuffling of the Cabinet, renaming of ministries and state departments, among like others, then such a decision is purely a decision on the internal operations of the executive and need not to be subjected to public participation.

139. In this case the decision to re-assign the responsibility affected the operations of the Ministry of Agriculture, Livestock, Fisheries and Irrigation. There is evidence that the re-assignment caused the transfer of budgets from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence. Further, the Commission is a State Corporation by dint of Section 2 of the Corporations Act. Section 4(1) of the KMC Act provides that the Commission is a body corporate having perpetual succession and a common seal, and shall have all the powers conferred by the Act. The Commission has a Board of Directors. It has a Chairman and 16 other Board members. The affairs of the Commission are, hence, undertaken in compliance with the Constitution, the KMC Act and any other appropriate laws. The decision on re-assignment did not seek the input of the Commission or at all. It is reasonably expected that, at least, the Commission and any other major stakeholder, ought to be consulted before the making of the decision.

140. There are various stakeholders involved in the livestock sector. They include the farmers. Those farmers were also not consulted. The stakeholders have all along dealt with the Ministry of Agriculture, Livestock, Fisheries and Irrigation as the parent ministry. They ought to be made aware of any change that affects the ministerial responsibility of the parent ministry.

141. There is no evidence to the effect that there was any attempt to subject the decision to re-assign the ministerial responsibility to the Ministry of Defence to public participation in any way. A decision to re-assign ministerial responsibility from one Ministry to another involves several processes and impacts, not only on the stakeholders but the public at large. Prior to making such a decision, there is need to at least carry out due consultations, if the change is not sanctioned by the Constitution or any statutory amendments like in this case. The decision did not, therefore, pass the test in Article 10 of the Constitution on public participation.

142. From the foregoing, I find and hold that, the decision to re-assign ministerial responsibility over the Commission from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence ought to have been preceded by public participation given that an initial assignment of the responsibility was made to the Ministry of Agriculture, Livestock, Fisheries and Irrigation and that the KMC Act does not vest the ministerial responsibility over the Commission on any Cabinet Secretary.

79. The above decisions sufficiently settled the aspect of the threshold required to subject executive decisions to public participation. Whereas not all executive decisions ought to be subjected to public participation, there are those decisions which transcend the ambit of internal operational decisions of the executive into the arena of public purview. Such are the decisions which must be subjected to public participation.

80. In this case, the disputed decision *inter alia* prohibited any further importation of raw cane into the country. There is no doubt that the importation of raw cane involves several sector players. The decision, no doubt, affected the public and more particularly those licensed to import raw cane and, of course, all the third parties involved.

81. The case at hand shows that a miller, BSL, was licensed to import raw cane from Uganda. In turn, BSL may have contracted other third parties in order for the cane to be delivered to it. There is, however, no such evidence.

82. The nature of the decision made by the 1st Respondent was, therefore, not an internal operational one. It transcended the borders of a purely internal decision into the public arena. Such a decision ought to have been preceded by public participation or stakeholders' engagement at the very least.

83. In sum, the manner in which the decision to prohibit any further importation of raw cane into the country was made by the 1st Respondent impugned Article 10 of the Constitution for want of public participation and/or stakeholder consultations.

84. The impugned decision is, also, for the same reasons, a violation of Article 47 of the Constitution. By the Respondents' own admission, no efforts whatsoever were taken to ensure compliance with Article 47 of the Constitution and the Fair Administrative Actions Act.

85. Article 47 of the Constitution. Sub-articles (1), (2) and (3) states that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

86. The legislation that was contemplated under Article 47(3) is the Fair

Administrative Actions Act. Section 5(1) thereof provides that: -

(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall—

(a) issue a public notice of the proposed administrative action inviting public views in that regard;

(b) consider all views submitted in relation to the matter before taking the administrative action;

(c) consider all relevant and materials facts; and

(d) where the administrator proceeds to take the administrative action proposed in the notice—

(i) give reasons for the decision of administrative action as taken;

(ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and

(iii) specify the manner and period within which such appeal shall be lodged.

87. Section 2 of the Fair Administrative Actions Act defines an '*administrative action'* and an '*administrator*' as follows: -

'*administrative action' includes –*

(i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

'*administrator' means 'a person who takes an administrative action or who makes an administrative decision'*.

88. The Court of Appeal in ***Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR*** addressed itself to Article 47 of the Constitution as follows: -

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

89. In South Africa, the Constitutional Court in ***President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1*** ring-fenced the importance of fair administrative action as a constitutional right. The Court referred to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution. The Court expressed itself as under: -

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that

where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…

90. The High Court in ***Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti [2018] eKLR*** added its voice on the issue, and, as follows: -

25. In John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano[39] *the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.*

These are: -

a. ***Illegality*** *- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.*

b. ***Fairness*** *- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.*

c. ***Irrationality and proportionality*** *- The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality" or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in* ***Associated Provincial Picture Houses Ltd vs Wednesbury Corporation****: -*

> If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...

91. Going by the above discussion, there is no doubt that the impugned decision is an administrative action. I say so because it affected the legal rights and interests of those involved in the importation of raw cane into the country. Therefore, the decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

92. As demonstrated above, the decision did not conform to the requirements of Article 47 of the Constitution and Fair Administrative Actions Act. At the very minimum and in order to meet the constitutional and statutory threshold, the 1st Respondent had to do the following:

a. Give notice of the intended decision to all those involved in the importation of raw cane into the country;

b. Afford an opportunity for to all those involved in the importation of raw cane into the country to be heard on the question; and

c. Give reasons for the decision made.

93. The Respondents never undertook any of the foregoing. The decision, therefore, infringed Article 47 of the Constitution as well as the Fair Administrative Actions Act.

94. In the end, the issue is answered in the affirmative.

(d) Remedies:

95. The Petition partly succeeds. It is only sustained on the strength of the failure by the 1st Respondent to, in the first instance, subject the impugned decision to public participation, stakeholder consultations and administratively fair procedures.

96. I must, however, make it clear that the success of the Petition is not a *carte blanche* order or '*an open cheque'* for those engaged in the business of importing raw cane to purport to import the said raw cane solely on the basis of this decision. Whereas the decision expunges the directive to ban the importation of raw cane into Kenya, any importer of such raw cane must comply with all legal requirements in place. Such include those contained in the Letter of No Objection. Further, such parties must also comply with the provisions of the Crops Act and all regulations in place since sugarcane is a scheduled crop.

97. It is of equal importance to also note that this decision only deals with the ban on importation of the raw cane into Kenya. The Petitioner did not attempt to challenge the entire Press Statement made by the Cabinet Secretary for Agriculture, Livestock, Fisheries and Irrigation on 2nd July, 2020. The judgment is hence limited to that extent.

Disposition:

98. From the above findings and conclusions, the disposition of the Petition dated 1st September, 2020 is as follows: -

(a) The claim that the Petition does not meet the threshold of constitutional petitions fails and is dismissed.

(b) The claim that decision to ban the importation of raw cane into Kenya is arbitrary and contravenes Articles 40 and 43 of the Constitution fails and is dismissed.

(c) The claim that the decision to ban the importation of raw cane into Kenya is in violation of Articles 10 and 47 of the Constitution for want of public participation, stakeholders' engagement and administrative fair procedures succeeds. This Court declares the said decision constitutionally infirm. Therefore, the decision by the Cabinet Secretary for Agriculture, Livestock, Fisheries and Irrigation to unilaterally ban importation of raw cane into Kenya made on 2nd July, 2020 is hereby quashed.

(d) As the Petition has partly succeeded, each party will bear its own costs.

141. Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **25th** day of **February 2021.**

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Charles Madowo, Learned Counsel for the Petitioner.

Miss Omuom, Learned Senior State Counsel instructed by the Honourable Attorney General for the 1st, 2nd, 3rd, 5th, 6th, 7th and 8th Respondents.

Miss. Sega, Learned Counsel for the 4th Respondent.

Elizabeth Wamboi – Court Assistant.