



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 181 OF 2020

RWAMA FARMERS CO-OPERATIVE SOCIETY LTD.....1ST PETITIONER

GITWE FARMERS CO-OPERATIVE SOCIETY LTD.....2ND PETITIONER

IYEGO FARMERS CO-OPERATIVE SOCIETY LTD.....3RD PETITIONER

THIRIKWA FARMERS CO-OPERATIVE SOCIETY LTD.....4TH PETITIONER

VERSUS

THE CABINET SECRETARY, MINISTRY OF AGRICULTURE,

LIVESTOCK AND FISHERIES.....1ST RESPONDENT

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

THE SPEAKER OF THE NATIONAL ASSEMBLY

OF THE REPUBLIC OF KENYA.....3RD RESPONDENT

THE SPEAKER, THE SENATE OF THE REPUBLIC OF KENYA.....4TH RESPONDENT

JUDGEMENT

1. Rwama Farmers Co-operative Society Ltd., Gitwe Farmers Co-operative Society Ltd, Iyego Farmers Co-operative Society Ltd, and Thirikwa Farmers Co-operative Society Ltd being the respective 1st to 4th petitioners are all co-operative societies registered under the provisions of the Co-operative Societies Act, Cap. 490. The petitioners operate in the counties of Kirinyaga and Kiambu.

2. The 1st Respondent is the Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries whereas the 2nd Respondent is the Agriculture and Food Authority (AFA). The 3rd Respondent is the Speaker of the National Assembly of the Republic of Kenya and the Speaker of the Senate of the Republic of Kenya is the 4th Respondent.

3. The petitioners through their petition dated 26th May, 2020 allege that the Crops (Coffee) General Regulations, 2019 (hereinafter simply referred to as the 2019 Coffee Regulations) violate various constitutional and statutory provisions as well as international legal instruments.

4. The factual background of the petitioners' case, as disclosed in their pleadings, is that on 4th March, 2016 the President of the Republic of Kenya appointed a National Task Force on Coffee Sub-Sector Reforms (hereinafter simply referred to as the Coffee Task Force) with the mandate of reviewing the entire coffee value chain and identifying areas requiring interventions such as production, processing and marketing of coffee; examination of the existing policy, institutional, legislative and administrative structures and systems in the coffee industry; and recommendation of comprehensive reforms.

5. One of the recommendations of the Coffee Task Force in its report submitted to the President on 10th June, 2016 was the need to undertake review of the existing coffee industry laws so as to align them to the Crops Act, 2013 and the Constitution. This resulted in the publication of the Crop (Coffee) (General) Regulations, 2016 (hereinafter simply referred to as the 2016 Coffee Regulations) through Legal Notice No. 120 in Kenya Gazette Supplement No. 105 of 27th June, 2016.

6. The Council of County Governors and the New National Farmers' Association subsequently challenged the constitutionality of those regulations in **Republic v Cabinet Secretary, Ministry of Agriculture, Livestock Fisheries & 4 others Ex parte Council of County Governors & another [2017] eKLR** (hereinafter simply referred to as the **Council of County Governors case**) resulting in the quashing of the 2016 Coffee Regulations.

7. The petitioners contend that the enactment of the 2019 Coffee Regulations which were gazetted on 1st July, 2019 violated Section 11 of the Statutory Instruments Act, 2013 ('S. I. Act') as they were forwarded to the Clerk of the National Assembly on 21st August, 2019 in violation of the cited provisions which require the instrument to be forwarded to the Clerk of the relevant House by the regulation-making authority within seven days of their publication. Further, that the petitioners were not given an opportunity to give their views in regard to the regulations. According to the petitioners, even if they were given an opportunity to present their concerns, their views were not taken into account.

8. It is the petitioners' case that the National Assembly's Committee on Delegated Legislation did not afford the petitioners and their members an opportunity to present their views and recommendations in regard to the 2019 Coffee Regulations. Further, that the failure to forward the regulations to the Senate for consideration and approval violated the Fourth Schedule of the Constitution which lists agriculture as a devolved function. Additionally, that the regulations have provisions that adversely affect co-operative societies which is also a devolved function.

9. It is also the petitioners' averment that the 2019 Coffee Regulations violate sections 31, 33, 34 and 42 of the Co-operative Societies Act, Cap. 490 and sections 14(1)(a) & 43 of the Crops Act, 2013. The petitioners contend that the regulations also contravene Section 31(b) of the Interpretation and General Provisions Act, Cap. 2 which requires that no subsidiary legislation shall be inconsistent with the provisions of an Act of Parliament. It is additionally alleged that the regulations violate various principles provided in Section 13 of the S. I. Act which are meant to guide the Committee on Delegated Legislation of the National Assembly or the relevant committee of the Senate when scrutinising a proposed statutory instrument.

10. The petitioners state that the preamble to the 2019 Coffee Regulations indicate that the 1st Respondent only consulted the 2nd Respondent and county governments and Article 10 of the Constitution was therefore violated as the petitioners who represent thousands of coffee farmers were not involved in the enactment of the statutory instrument.

11. The petitioners aver that their right to property as protected under Article 40 of the Constitution is at risk of violation for the reasons that the rules will lead to high costs in coffee growing, processing and marketing. Further, that no regulatory impact statement was made pursuant to Part III of the S. I. Act.

12. It is additionally the petitioners' case that the 2019 Coffee Regulations are not expedient, lawful, efficient, reasonably fair and procedurally fair as required under Article 47(1) of the Constitution, as they are not pegged on any policy document, are self-contradictory, require approval by multiple regulatory authorities, conflict with the Law of Contract Act, Cap. 23, and allow unregistered associations to be involved in coffee management.

13. The petitioners claim that various identified provisions of the 2019 Coffee Regulations violate Articles 26, 40 and 43 of the Constitution; Articles 14 and 21 of the African (Banjul) Charter on Human and People's Rights ("Banjul Charter"); and Articles 6(1) and 11(1) of the International Covenant on Economic, Social and Cultural Rights ("ICESCR").

14. On their assertion that the 2019 Coffee Regulations violate Articles 10, 73, 118 and 201 of the Constitution, the petitioners depose that they were not given an opportunity to give their views in regard to the regulations prior to their gazetting; that the regulations contravened public policy and the rule of law as they were premised on the quashed report of the Coffee Task Force; and, that the National Assembly did not grant them an opportunity to present their views before approving the regulations.

15. It is additionally the petitioners' case that the 2019 Coffee Regulations violate Articles 96, 110, 111, 112, 209, 27, 47 and 36 of the Constitution and various provisions of international legal instruments for the reasons already stated.

16. Finally, the petitioners aver that the 2019 Coffee Regulations are hostile to the growth of co-operative societies as they exclude them from some businesses which they have previously been carrying out thereby violating the rights of members to associate and form co-operative societies to advance their economic growth. It is the petitioners' case that to the extent that the 2019 Coffee Regulations limit the scope of the operations of co-operative societies and their relationship with their members as set out under the Co-operative Societies Act and regulations infringe on the members' constitutional right of association.

17. The Court is consequently urged to grant the following orders:

a) A declaration that in gazetting and approving the Crops (Coffee) (General) Regulations 2019, the Respondents violated Articles 26, 40 and 43 of the Constitution of Kenya; Articles 4, 14 and 21 of the African (Banjul) Charter on Human and Peoples' Rights and Articles 6(1) and 11(1) of the International Covenant on Economic, Social and Cultural Rights.

b) A declaration that in gazetting and approving the Crops (Coffee) (General) Regulations 2019, the Respondents violated Articles 10, 73, 118 and 201 of the Constitution of Kenya.

c) A declaration that in gazetting and approving the Crops (Coffee) (General) Regulations 2019, the Respondents violated Articles 96, 110, 111, 112, 113, 209 of the Constitution and the Fourth Schedule of the Constitution.

d) A declaration that in gazetting and approving the Crops (Coffee) (General) Regulations 2019, the Respondents violated

Articles 27 and 47 of the Constitution of Kenya: Articles 3 and 1 of the African (Banjul) Charter on Human and Peoples' Rights and Articles 2 and 26 of the International Covenant on Civil and Political Rights.

e) A declaration that in gazetting and approving the Crops (Coffee) (General) Regulations 2019, the Respondents violated Article 36 of the Constitution of Kenya; Article 10 of the African (Banjul) Charter on Human and Peoples' Rights; and Article 22 of the International Covenant on Civil and Political Rights.

f) A declaration that the Crops (Coffee) (General) Regulations 2019, are unconstitutional, null and void.

g) Costs of the petition.

18. The 1st Respondent filed grounds of opposition dated 8th July, 2020 and opposed the petition as follows:

(a) That whereas the substratum of this petition is the decision made in the High Court in Nairobi Judicial Review Misc. Application No. 291 and 31 of 2016 Republic –vs- Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries & 4 others ex parte Council of County Governors & another the same is a Court of concurrent jurisdiction, and its decision and judgment in that matter is not binding to this Court which can come up with its own independent decision and findings on all issues raised in the original petition.

(b) That the constitutional petition is misconceived and should be dismissed since it is based on the wrong principles of constitutional interpretation in that Bills of Parliament and the procedure of their enactment into law is similar to that of enactment of Statutory Instruments.

(c) That [the] Constitutional Petition should be dismissed since it is based on an erroneous and false premise that the impugned Crops (Coffee) (General) Regulations 2019 is a Bill concerning counties and thus the involvement of the Senate was mandatory in its enactment without offering any express constitutional or statutory provision for that requirement.

(d) That the Constitution Petition should be dismissed in its entirety since the Principle of Public Participation as enunciated at Article 10 of the Constitution does not necessarily mean that the petitioners' views must prevail in the enactment of the impugned regulations and it is only sufficient that the views are taken into consideration together with any other factors in deciding on the content of impugned regulations and what really matters is whether an opportunity to present views was given to the general public.

(e) That the Constitutional Petition and the orders set therein fail to recognise that agriculture is [a] function within the concurrent jurisdiction of both the National and County Governments and that the impugned coffee regulations are not limited to co-operatives dealing with the coffee but regulate cross-cutting crucial aspects in coffee cultivation, processing, value addition and marketing including but not limited to international trade and inter-county trade in coffee thus Article 191 of the Constitution requires enactment of uniform regulations.

19. The 2nd Respondent opposed the petition through a replying affidavit sworn on 19th June, 2020 by Isabella Nkonge, the Director in Charge of the Coffee Directorate.

20. As part of the introduction of the 2nd Respondent's case, Ms Nkonge avers that the present petition is not about the 2016 Coffee Regulations as those regulations were conclusively addressed in the **Council of County Governors case**; that the decision in the **Council of County Governors case** was not appealed; that the petitioners cannot re-litigate the **Council of County Governors case** through this petition; that the report of the Coffee Task Force was not declared unlawful; and that the petitioners have not challenged the existence, mandate, activities and resultant report of the Coffee Task Force.

21. It is further the 2nd Respondent's deposition that the 2019 Coffee Regulations were made as a result of further input by the Coffee Sub-Sector Implementation Committee ('CSI Committee') which was established after the Court's decision in the **Council of County Governors case**; that the Court in the **Council of County Governors case** mandated the promulgation of lawful regulations which culminated in the 2019 Coffee Regulations; and that the mandate of the Coffee Task Force and the CSI Committee goes beyond the regulations as it is a platform for all the stakeholders in the coffee sub-sector.

22. The petitioners' claim that the 2019 Coffee Regulations violate Section 11 of S. I. Act as they were published on 1st July, 2019 and forwarded to the National Assembly on 21st August, 2019 is denied. The 2nd Respondent's position is that although the regulations are dated 1st July, 2019, they were actually published on 12th July, 2019 and forwarded to the National Assembly on the same date. It is asserted that the regulations were not forwarded to the National Assembly on 21st August, 2019 as alleged by the petitioners but they were instead tabled in the National Assembly on that date. Further, that the 2019 Coffee Regulations were duly received by the National Assembly and approved in compliance with the Constitution, the Crops Act and the S. I. Act as confirmed by the letter dated 18th September, 2019.

23. On the alleged lack of public participation in the enactment of the 2019 Coffee Regulations, it is averred that all the necessary stakeholders were afforded adequate opportunity to share their views through the CSI Committee which sent invitations through the State Department of Co-operatives, press releases and media advertisements. According to the 2nd Respondent, a total of 23 consultative meetings with 2087 participants from 31 coffee growing regions were held on different days and at different venues as set out in the exhibited report on Coffee Stakeholders' Consultative Meetings on the Proposed Coffee Regulations dated October, 2018. It is additionally averred that in any event the petitioners concede that they gave their views in the context of the Coffee Task Force report which is still valid and in place.

24. On the petitioners' claim that the National Assembly did not seek their views prior to the enactment of the impugned statutory instrument, the 2nd Respondent deposed that it had no control over the activities of the National Assembly or its Committee on Delegated Legislation in regard to public participation over the 2019 Coffee Regulations.

25. On the petitioners' assertion that the 2019 Coffee Regulations ought to have been forwarded to the Senate and that they go against provisions of the Co-operative Societies Act; the Interpretation and General Provisions Act, Cap. 2; and the S. I. Act, the 2nd Respondent replies that there is no obligation on the 2nd Respondent to forward regulations to the National Assembly or the Senate as the regulations can only be published and forwarded by the 1st Respondent under Section 40 of the Crops Act. Further, that Article 96(2) of the Constitution expressly contemplates the involvement of the Senate in debating a Bill concerning counties and not regulations.

26. It is additionally the 2nd Respondent's case that the 2019 Coffee Regulations were made with the input of the Directorate of Co-operatives which is a regulator of the petitioners and any alleged inconsistency between the regulations and the Co-operative Societies Act is legally sanctioned and is permissible; that the regulations were made with the input of the National Coffee Co-operatives Union Limited which represents interests of co-operatives such as the petitioners; that Section 39 of the Crops Act legislates that the provisions of the Act shall prevail, on matters related to scheduled crops such as coffee, in the event of any inconsistency or conflict between the Act and any other Act; and that the 2nd Respondent acted on its mandate under the Crops Act and is not in a position to comment on the provisions of the Co-operative Societies Act which are beyond its scope.

27. It is further the 2nd Respondent's case that the forwarding of the 2019 Coffee Regulations to the Senate could only be done by the National Assembly through its own mechanisms; that the 2nd Respondent is not aware of the existence of a committee on delegated legislation in the Senate to deal with regulations; that in any event there was engagement with the Senate's Standing Committee on Agriculture, Livestock and Fisheries on 5th July, 2018 during stakeholder engagement; that the regulations were made with the approval and legal advice of the Attorney General; and, that the regulations are consistent with the provisions of Section 14(1)(a) & (3) of the Crops Act as regards the contemplated obligations of the farmers.

28. In response to the petitioners' contention that the 2019 Coffee Regulations violate Articles 40 and 47 of the Constitution, the 2nd Respondent avers that a regulatory impact statement was made under Part III of the S. I. Act with the help of Tegemeo Institute of Agricultural Policy and Development of Egerton University. According to the 2nd Respondent, some of the issues raised by the petitioners like increased costs, lack of a policy document and participation of unregistered associations in the coffee sector are all administrative issues relating to implementation and the concerns can be addressed through the mechanism for monitoring the implementation of the regulations.

29. The 2nd Respondent rejects the allegation by the petitioners that the 2019 Coffee Regulations violate Articles 26, 40 and 43 of the Constitution; Articles 4, 14 and 21 of the Banjul Charter; and, Articles 6(1) and 11(1) of the ICESCR. It is the petitioners' case that the particulars of the violation of the petitioners' right to life under Article 26 of the Constitution are not stated. Further, that the overriding objective of the regulations is to help the farmers directly thereby promoting their right to property, and economic and social rights.

30. According to the 2nd Respondent, the concerns over various provisions in the schedules to the 2019 Coffee Regulations were taken into account and considered alongside the views of other stakeholders as indicated in the report on Coffee Stakeholders Consultative Meetings on the Proposed Coffee Regulations dated October, 2018. Further, that the petitioners' concerns are not pleaded with the requisite specificity as to how the regulations violate the Constitution and international legal instruments; that the petitioners' concerns are founded on their subjective and erroneous interpretation of the regulations, the Constitution and applicable statutes; that the petitioners' contestations relate to only ten specific provisions of the 2019 Coffee Regulations and that cannot justify the invalidation of the entire instrument; that the petitioners have not demonstrated the applicability of the cited provisions of international instruments to their situation; and, that the petitioners are aware of the existing administrative and other channels of engagement as stakeholders in the coffee sub-sector and drastic court action is not necessary.

31. It is additionally the 2nd Respondent's case that the representatives of the 1st, 3rd and 4th petitioners attended stakeholders meetings in respect of the regulations; that the petitioners have not pleaded with specificity how the provisions of Article 201 were violated; that the Constitution permits levying of charges by way of legislation including regulations; that there is no constitutional or legal requirement that regulations must originate from a policy document; that Article 36 of the Constitution is not violated as farmers are allowed to join co-operative societies and exit from them; and that regulation of any sector is done in the public interest as provided under Agriculture and Food Authority Act and the Crops Act as administered by the 2nd Respondent and the same comprise permitted limitations of individual rights under the Constitution.

32. The 2nd Respondent consequently terms the petition an abuse of the court process and prays for its dismissal with costs.

33. The 3rd Respondent opposed the petition through grounds of opposition and a replying affidavit sworn by its Clerk, Michael Sialai.

34. Mr. Sialai's averment is that by a letter dated 12th July, 2019 the 1st Respondent wrote to him submitting copies of the 2019 Coffee Regulations dated 1st July, 2019 together with accompanying explanatory memorandum. According to Mr. Sialai, the regulations had been published vide a Special Issue of Kenya Gazette L. N. No. 100 of 2019 on 1st July, 2019 and had been made pursuant to Section 40 of the Crops Act, 2013 by the 1st Respondent in consultation with the 2nd Respondent and the county governments.

35. It is Mr. Sialai's deposition that the main objective of the 2019 Coffee Regulations is to provide for the regulation, promotion and development of the coffee industry in Kenya and specifically provide for regulation of the coffee industry players along the entire value chain.

36. Mr. Sialai identifies the claims against the National Assembly as:

“(a) The Crop (Coffee) (General) Regulations, 2019 were gazetted on 1st July, 2019 and forwarded to the Clerk of the National Assembly on 21st August, 2019. Under Section 11 of the Statutory Instruments Act No. 23 of 2013, the regulations ought to have been forwarded within 7 days of publication otherwise they ceased to have effect immediately after the last day.

(b) That the National Assembly’s Committee on Delegated Legislation did not afford the Petitioners and their members an opportunity to present their views and recommendations in regard to the Regulations.”

37. In response to the petitioners’ said averments, Mr. Sialai deposed that the 2019 Coffee Regulations were transmitted to the National Assembly within the statutory time provided under Section 11(1) of the S. I. Act. It is further the 3rd Respondent’s averment that the impugned statutory instrument was accompanied with an explanatory memorandum that met the requirements of Section 5 of the S. I. Act.

38. According to Mr. Sialai, after confirming that the statutory instrument had met the requirements of the S. I. Act, he registered it and scheduled it for tabling on 23rd July, 2019 before the National Assembly as required by Section 11(3). Thereafter, in accordance with Section 12 of the S. I. Act the National Assembly committed the impugned 2019 Coffee Regulations to the National Assembly Committee on Delegated Legislation for scrutiny and review.

39. Mr. Sialai averred that the Committee on Delegated Legislation embarked on its mandate in compliance with the requirements of sections 13 to 19 of the S. I. Act. He points to two meetings held in Mombasa between the Committee and the 1st and 2nd respondents to demonstrate that Section 16, which requires discussions with the regulation-making authority, was complied with.

40. It is the averment of Mr. Sialai that the Committee specifically observed that there was compliance with specific statutory requirements and resolved to approve the statutory instrument subject to rectification of the erroneously cited provisions by way of corrigenda.

41. According to the Clerk of the National Assembly, the communication to the 1st Respondent was made pursuant to the National Assembly Standing Order No. 210(4)(a) which requires that if the Committee on Delegated Legislation resolves that the statutory instrument be acceded to, the Clerk shall convey that resolution to the relevant State department or the authority that published the statutory instrument.

42. Mr. Sialai further deposed that the 2019 Coffee Regulations were also transmitted to the Senate for consideration pursuant to Section 11(1) of the S. I. Act by the 1st Respondent, and the Senate Sessional Committee on Delegated Legislation considered and approved them. It is Mr. Sialai’s averment that the Senate’s approval was communicated to the 1st Respondent through a letter dated 2nd August, 2019.

43. Turning to the grounds of opposition, Mr. Sialai contends that the process of parliamentary scrutiny of statutory instruments under Section 11 of the S. I. Act is a normative derivative of parliamentary oversight under the Constitution and the attempt to interfere or question the same will end up occasioning a violation of the Constitution. It is consequently the 3rd Respondent’s assertion that this Court lacks jurisdiction to hear and determine the petition.

44. The Clerk of the National Assembly additionally avers that the petitioners’ 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 under Articles 94, 95 and 109 of the Constitution and Part IV of the S. I. Act.

45. It is further the testimony of Mr. Sialai that where the Constitution has reposed specific functions in an institution or organ of State, the Court must give those 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. This averment is supported by reference to the decisions in **Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR**; **C. A. Civil Appeal No. 11 of 2018, Pevans East African Limited & another v Chairman; Betting Control and Licensing Board & 7 others**; and **Speaker of the Senate & another v Attorney General & 4 others [2013] eKLR**.

46. Referring to Section 12(2) of the Parliamentary Powers and Privileges Act, 2017 which states that no civil suit shall be commenced against the Speaker, the leader of majority party, the leader of minority party, chairpersons of committees and members for any act done or ordered by them in the discharge of the functions of their office, Mr. Sialai avers that parliamentary privilege underpins the independence of the legislature. The decision of Court of Appeal in **Civil Appeal No. 157 of 2009, John Harun Mwau v Dr. Andrew Mullei & others** is cited as affirming the principle of parliamentary privilege.

47. It is further averred that each of the three arms of government ought to be allowed to conduct their own affairs without undue interference from the other arms of government. It is therefore the 3rd Respondent’s view that this petition violates the principle of separation of powers as it seeks the Court’s interference in matters of the internal procedures of the legislature.

48. It is also the 3rd Respondent’s position that any person aggrieved by any contents of a report or decision adopted by the House of the National Assembly has the right in the first instance to appeal against the recommendations to the House. It is additionally stated that under Article 125 of the Constitution both the High Court and a House of Parliament or its committees have concurrent jurisdiction.

49. Mr. Sialai, however, conceded that the jurisdiction of this Court can be invoked where there is breach of the Constitution. He is, however, quick to point out that there is no violation of the Constitution in this case.

50. Finally, Mr. Sialai averred that the issues raised in the petition against the 3rd Respondent have been overtaken by time following the approval of Legal Notice No. 102 of 2019 by the Committee on Delegated Legislation. The Court is therefore asked to apply the principal of mootness to the matter. The decisions in **Samuel Muigai Nganga v The Minister for Justice, National Cohesion and Constitutional**

Affairs and Another [2013] eKLR; Zubeida Waziri v Speaker National Assembly & 4 others [2017] eKLR; and Daniel Kaminja & 3 others (suing as Westlands Environmental Caretaker Group) v County Government of Nairobi [2019] eKLR are cited as discussing and affirming the mootness doctrine.

51. Mr. Sialai consequently urged this Court to find that the petition is bad in law, baseless and an abuse of the court process and dismiss the same with costs to the 3rd Respondent.

52. The 4th Respondent opposed the petition through the replying affidavit of its Clerk, Jeremiah Nyegenye. The Clerk averred that the 2019 Coffee Regulations were tabled before the Senate on 16th July, 2019 and pursuant to Section 12 of the S. I. Act they were referred to the Senate Sessional Committee on Delegated Legislation.

53. Mr Nyegenye deposed that on 13th July, 2019 the Senate Sessional Committee on Delegated Legislation considered and approved the regulations. He communicated the approval to the 1st Respondent through a letter dated 2nd August, 2019.

54. It was Mr Nyegenye's averment that the Senate discharged its mandate under Article 96 of the Constitution and the S. I. Act by approving the 2019 Coffee Regulations and the petition should fail as it does not disclose any wrongdoing by the Senate.

55. The petitioners filed written submissions dated 24th June, 2020 and supplementary submissions dated 27th July, 2020. In the submissions dated 24th June, 2020 the petitioners state that they challenge both the 2019 Coffee Regulations and Circular No. 2/2020 dated 19th May, 2020 referenced AFA/CD/ADM/C/33. It is, however, noted that the petition dated 26th May, 2020 which has never been amended does not make any reference to Circular No. 2/2020. The prayers sought in the petition are only in respect of the 2019 Coffee Regulations. I will therefore proceed to ignore any reference to circular No. 2/2020 since litigation is founded on pleadings and not submissions.

56. It is the petitioners' case that the 2019 Coffee Regulations violate Articles 96, 109, 110, 111, 112, 113 and 118(1) of the Constitution. Their assertion is premised on the argument that Rule 7(6) of the Fourth Schedule of the Constitution places trade development and regulation of co-operative societies under county governments. Further, that under the same Schedule, agriculture is also a devolved function.

57. The petitioners submit that the impugned statutory instrument affected co-operative societies which are under county governments and any Bill or regulation affecting them must be considered by the Senate, which under Article 96 of the Constitution participates in the law-making functions of Parliament by considering, debating and approving Bills concerning counties as provided in Articles 109 and 113 of the Constitution.

58. It is urged that the failure to have the impugned legislation considered by the Senate rendered it unlawful, unconstitutional, null and void. This assertion is supported by the decisions in the **Council of County Governors case** and **Kenya Union of Savings and Credit Co-operatives Limited (KUSCCO) v Sacco Societies Regulations Authority (SASRA) [2019] eKLR**. The Court is therefore asked to reject the 2nd Respondent's averment that Article 96(2) of the Constitution expressly contemplates the involvement of the Senate in debating a Bill concerning counties and not the resultant regulations.

59. On their claim that the 2019 Coffee Regulations violate Articles 10, 73, 118 and 201 of the Constitution, the petitioners submit that they and their members were not given an opportunity to give their views prior to the gazettment of the regulations. They therefore hold the view that the gazetted regulations were devoid of transparency, and effective and reasonable public participation.

60. It is additionally the petitioners' contention that the impugned regulations are against public policy and the rule of law as they were made pursuant to the recommendations of the Coffee Task Force whose report was quashed in the **Council of County Governors case**.

61. Additionally, the petitioners submit that the National Assembly did not grant them, their members, and other stakeholders an opportunity to make their contributions before approving the statutory instrument. It is also contended that the preamble of the 2019 Coffee Regulations indicates that the 1st Respondent only consulted the 2nd Respondent and the county governments thereby excluding all other stakeholders.

62. According to the petitioners, the 2nd Respondent still holds the position that the report of the Coffee Task Force is still valid contrary to the obvious annulment of the same in the **Council of County Governors case**.

63. The petitioners assert that the evidence adduced by the 2nd Respondent in support of the averment that public participation was undertaken on the statutory instrument does not add up. An example is given of the Kirinyaga County Co-operative Union memorandum dated 27th July, 2016 at page 37 of the stakeholders' consultation report dated October, 2018 and submitted that the memorandum was submitted to the Coffee Task Force whose report was quashed in the **Council of County Governors case** on 28th July, 2017.

64. As for breach of sections 6, 7, 8, 9, 11 and 13 of the S. I. Act, it is submitted that Section 6 requires a regulatory impact statement to be prepared where a statutory instrument is likely to impose significant costs on the community. It is the petitioners' case that as pleaded in paragraphs 63(c), (d), (e), (h), (i), (k) and (l) of the petition, the regulations impose significant costs on the coffee sector players.

65. The petitioners contend that there is a disconnect between Gazette Notice No. 9973 of 6th October, 2017 and the final report on the draft 2019 Coffee Regulations which the 2nd Respondent is relying on to show compliance with the S. I. Act requirements.

66. The petitioners additionally submit that the final report on the draft 2019 Coffee Regulations does not satisfy the requirements of Section 7 of the S. I. Act as there is no statement of other practicable means of achieving the objectives of the regulations; there is lack of an

explanation as to why the other means of achieving the same objectives are not given; there is failure to set out all administration and compliance costs; and, there is lack of comparison between the costs under the previous regulations and the impugned regulations.

67. The petitioners submit that a compliant regulatory impact statement would have elicited informed comments and submissions from stakeholders and assist Parliament to consider the impugned regulations adequately as required under Section 13 of the S. I. Act. The petitioners contend that in any case no regulatory impact statement for the 2019 Coffee Regulations was notified in the Gazette and a newspaper as required under Section 8(1) of the S. I. Act.

68. The petitioners submit that Section 8(6) of the S. I. Act requires the responsible Cabinet Secretary, in this case the 1st Respondent, to ensure that all comments and submissions are considered before the statutory rule is made and a copy of all comments and submissions is given to the Committee on Delegated Legislation as soon as practicable after the statutory rule is tabled in the National Assembly.

69. It is the petitioners' case that the 1st Respondent did not issue a certificate under Section 7(4) of the S. I. Act specifying that the requirements relating to regulatory impact statements had been complied with. Further, that the final report on regulatory impact statement has not set out any comments and submissions by stakeholders hence their complaint that the regulatory impact statement was not gazetted or otherwise notified to the stakeholders is confirmed.

70. It is additionally the petitioners' submission that the report of the Coffee Task Force that was quashed in the **Council of County Governors case** is in the list of references annexed to the regulatory impact statement.

71. Turning to Section 11 of the S. I. Act, the petitioners contend that a statutory instrument that is not transmitted to the responsible Clerk within seven days of publication ceases to have effect immediately. The petitioners assert that the impugned regulations having been gazetted on 1st July, 2019 and forwarded to the National Assembly for approval on 12th July, 2019, eleven days after the gazetting, are null and void as they ceased having effect seven days after 1st July, 2019.

72. The petitioners dismiss the 2nd Respondent's averment that the impugned 2019 Coffee Regulations were gazetted on 12th July, 2019 as Legal Notice No. 100 of 2019. It is the petitioners' submission that their evidence and that of the 3rd Respondent confirm that the regulations were published as Legal Notice No. 102 of 2019 on 1st July, 2019. The petitioners state that further evidence in support of their assertion is found in Circular No. 2/2020 which indicate that the regulations were gazetted on 1st July, 2019.

73. In regard to their claim that the impugned statutory instrument violates Section 31(b) of the Interpretation and General Provisions Act, Cap. 2 and Section 13 of the S. I. Act, the petitioners contend that contrary to the cited provisions which provide that no subsidiary legislation shall be inconsistent with the Constitution or an Act of Parliament, the impugned statutory instrument conflict with the Law of Contract Act, Cap. 23 by taking away the right of the grower to enter into a sell agreement with the buyer without interference.

74. It is the petitioners' further submission that the impugned regulations, to the extent of allowing unregistered associations to be involved in coffee management, conflict with the Co-operative Societies Act and run the risk of killing the co-operative movement altogether.

75. The petitioners refer to an unspecified regulation and submit that it contravenes the provisions of sections 31 and 33 of the Co-operative Societies Act which give societies a first charge over debts owed by members for seeds, manure, agricultural implements and machinery among other items. They submit that the provision makes it difficult for the co-operative societies to recover loans advanced and the members stand the risk of not accessing credit from co-operative societies.

76. It is the petitioners' submission that Sub-Schedule B of the Third Schedule of the impugned regulations unreasonably and unlawfully interferes with the freedom of parties to enter into contracts by requiring long term contracts with millers to be approved by county governments and service contracts not to exceed three years. The petitioners assert that the provision is ambiguous as it does not disclose what it refers to as a long term contract since, as per the provision, no contract will be longer than three years. This provision, they assert, interferes with the right of parties to freely contract.

77. The petitioners contend that the impugned regulations violate Articles 26, 40 and 43 of the Constitution; Articles 4, 14 and 21 of the Banjul Charter; and Articles 6(1) and 11(1) of the ICESCR as they will increase the costs of operation and the process to be followed in coffee production, storage, pulping, milling and selling. Further, that they also interfere with parties' contractual freedom and adversely affect the processes of advancement and recovery of loans from members of co-operative societies. It is pointed out that the specific regulations which will adversely affect the petitioners' right to property are listed at paragraph 63 of the petition.

78. It is the petitioners' case that the fact that the impugned regulations are not pegged on any policy document developed by the government in relation to the coffee sector make them irrational, erratic and unreasonable; and that the multiple requirements to be set by multiple regulatory authorities will cause conflicts and confusion. The Court is therefore urged to allow the petition as prayed.

79. The 2nd Respondent filed written submissions dated 29th June, 2020. When the matter came up for highlighting of submissions on 29th June, 2020, the advocates on record for the 1st, 3rd and 4th respondents all indicated that they were adopting and relying on the submissions of the 2nd Respondent.

80. After giving a background to the 2019 Coffee Regulations, the 2nd Respondent submits that this petition is not a continuation of the proceedings in the **Council of County Governors case**. According to the 2nd Respondent, the said case did not preclude the 1st Respondent from ever coming up with regulations in the coffee sector.

81. It is the 2nd Respondent's case that the 2019 Coffee Regulations were informed by the report of October 2018 by the CSI Committee

which was appointed by the President on 30th September, 2016 and its mandate extended to 10th October, 2018 through Gazette Notice No. 9975 of 9th October, 2017.

82. The 2nd Respondent posits that the concerns raised on the merits of the impugned statutory instrument are not constitutional issues but rather challenges as perceived by the petitioners which can be addressed through administrative structures already in place. The decision in **Ledidi Ole Tauta & others v Attorney General & others [2015] eKLR** is cited in support of the assertion that the petition is premature as the petitioners have not exhausted existing procedures.

83. The 2nd Respondent submits that the petition as framed lacks specificity and reasonable precision on the alleged violations and breaches of constitutional provisions as to enable it to respond sufficiently. It is asserted that the petition is a blanket condemnation of the 2019 Coffee Regulations without any linkage to particular provisions of the Constitution. The decision in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** is cited as supporting the requirement for precision in constitutional pleadings. It also urged that the applicability of the cited international legal instruments to the impugned regulations has not been sufficiently addressed in the petitioners' pleadings.

84. On the allegation by the petitioners that there was no public participation prior to the promulgation of the impugned statutory instrument, the 2nd Respondent contends that the petitioners admit submitting their proposals to the Coffee Task Force although the 2016 Coffee Regulations were subsequently nullified. It is nevertheless, the 2nd Respondent's case that the CSI Committee, whose report led to the promulgation of the 2019 Coffee Regulations, conducted a public participation exercise which adopted various forms and venues, and incorporated a wide range of stakeholders including the petitioners and their category of co-operatives. Evidence of the engagement with the public is identified. It is specifically pointed out that three of the four deponents of the affidavit in support of the petition herein attended the consultative sessions.

85. The 2nd Respondent contends that the meetings were held after the term of the Coffee Task Force had lapsed and the 2016 Coffee Regulations had been nullified. It is urged that as was held in the **Council of County Governors case**, the mere fact that particular views have not been incorporated in the enactment does not justify the invalidation of the enactment in question.

86. The 2nd Respondent asserts that the petitioners' concerns as regard costs of coffee growing and handling, conditions of pulping stations, transportation and ferrying of coffee, direct payment settlement, lending or advance of credit by millers to growers, coffee trading, and sellable lots among other issues were all addressed. Further, that the report of the CSI Committee captures various concerns including those raised in the petition and how they were addressed.

87. On the alleged violation of the right to property, freedom of association and other rights, the 2nd Respondent submits that the 2019 Coffee Regulations actually promotes those rights. It is stated that the positive impact of the impugned statutory instrument on human rights including enhanced participation of more small-holder farmers, reduced exploitation of farmers and provision for small-holder farmers to opt out of co-operative societies and operate under alternative associations including provision of farmers to trade their coffee at the Nairobi Stock Exchange are captured at pages 111 – 112 of the report on the regulatory impact assessment. Further, that the impugned statutory instrument was assessed to be pro-grower as it will enable more people to participate in the coffee industry through enhanced access to licences for value addition and trading.

88. It is the 2nd Respondent's assertion that the 2019 Coffee Regulations complied with the S. I. Act. Three points are highlighted in support of this assertion.

89. Firstly, that the National Assembly and the Senate through their respective letters dated 18th September, 2019 and 2nd August, 2019 approved the regulations and it is inconceivable to suggest that when approving delegated legislation Parliament is not mindful of the S. I. Act, the Constitution or any other statute.

90. Secondly, that the regulations were contained in Supplement No. 100 which was published on 12th July, 2019 and not 1st July, 2019 as claimed by the petitioners.

91. Thirdly, that even if the impugned regulations were published on 1st July, 2019, Section 11(1) of the S. I. Act refers to transmission of statutory instruments within seven sitting days not calendar or working days. It is the 2nd Respondent's submission that between 1st July, 2019 and 12th July, 2019 there were only six sittings as Parliament sits thrice a week from Tuesday to Thursday, barring any special sitting.

92. On the need for a regulatory impact statement, the 2nd Respondent submits that the same was prepared by an expert, Tegemeo Institute of Agricultural Policy and Development of Egerton University, and formed the basis of the explanatory memorandum published with the 2019 Coffee Regulations.

93. On the claim that no regulatory impact statement was published as required by the S. I. Act, the 2nd Respondent submits that the Act does not put the obligation on the 1st Respondent or 2nd Respondent to publish the regulatory impact statement and does not state at what stage of the promulgation and enactment of the regulations that the publication should be done. Further, that the petitioners' case was about lack of a regulatory impact statement and not the failure to publish the same.

94. The 2nd Respondent submits that the regulatory impact statement addresses the costs associated with the impugned regulations and there was no obligation to undertake a comparison between the said regulations and previous regulations.

95. On the claim that the 2nd Respondent and the county governments were the only ones consulted, the 2nd Respondent submits that Section

40(1) is clear that the 1st Respondent may make regulations in consultation with the 2nd Respondent and the county governments, and therefore other stakeholders can only be engaged in the context of constitutional safeguards.

96. As regard the alleged inconsistency between the 2019 Coffee Regulations and the Co-operative Societies Act and the Law of Contract Act, the 2nd Respondent points to Section 39 of the Crops Act and submits that the provisions of the Crops Act will prevail where there is any conflict arising between its provisions and those of any other Act with respect to the development, management, marketing or regulation of a scheduled crop. Further, that the 2019 Coffee Regulations were promulgated with the full participation of the Directorate of Co-operatives and the petitioners' umbrella union.

97. In the supplementary submissions dated 27th July, 2020 the petitioners reject the 1st Respondent's reliance on the report of the Coffee Task Force stating that the same was quashed in the **Council of County Governors case**. The petitioners point out the contradictory position of the 1st Respondent as to whether the involvement of the Senate was necessary. The petitioners assert that some of the 1st Respondent's grounds of opposition are based on matters of fact not supported by any evidence.

98. Turning to the 3rd Respondent's case, the petitioners reject the assertion that they are intermeddling with its constitutional mandate and submit that as held in **Justus Kariuki Mate (supra)**, courts can intervene where an Act of Parliament is unconstitutional. They say that their petition is premised on the claim that the impugned statutory instrument is unconstitutional.

99. The petitioners urge the Court to note that there is no indication by the National Assembly that there was any public participation during the proceedings of the Committee on Delegated Legislation; that the affidavit of the 3rd Respondent is contradictory as to whether the 2019 Coffee Regulations were published through Legal Notice No. 100 of 2019 or Legal Notice No.102 of 2019; that the replying affidavit of the 3rd Respondent contradicts the 2nd Respondent's averment that the 2019 Coffee Regulations were in Legal Notice No. 100 of 2019 of 1st July, 2019 which was gazetted on 12th July, 2019; and that the proceedings before the 3rd Respondent do not show any referral of the impugned statutory instrument to the Senate as is required under Standing Order No. 210(4) of the National Assembly.

100. In respect of the 4th Respondent's replying affidavit, it is submitted the Hansard of the Senate for 16th July, 2019 shows that the document tabled for approval was the Coffee General Regulations 2019 which is a different document from the impugned 2019 Coffee Regulations. Further, that the Senate's letter to the 1st Respondent indicating approval of the regulations makes reference to the 1st Respondent's letter dated 15th May, 2019 which was written over one month prior to the gazetting of the impugned regulations on 1st July, 2019.

101. The Court is urged to find that the 2019 Coffee Regulations were never forwarded to the Senate for approval considering that the 4th Respondent did not avail the minutes of the committee which allegedly approved the statutory instrument. Further, that there is no assertion in the 4th Respondent's replying affidavit that public participation was facilitated as was expected under Article 118 of the Constitution.

102. The overarching issue in this petition is whether the 2019 Coffee Regulations should be invalidated for violating various constitutional and statutory provisions.

103. Before proceeding to consider the identified issue, I need to first address the 3rd Respondent's argument that this Court lacks jurisdiction to hear and determine this petition. The principles of parliamentary privilege, separation of powers, the legislative authority of Parliament, non-interference of functions of one arm of government by another arm, and mootness were identified as denying this Court jurisdiction to hear and determine this petition.

104. It is not necessary to individually consider each and every one of the principles relied upon by the 3rd Respondent. The law as I understand it is that the Constitution empowers the High Court to determine the question whether any law is inconsistent with or in contravention of the Constitution. The same Constitution mandates the High Court to determine the question whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of the Constitution. (See Article 165(d)(i) & (ii) of the Constitution).

105. It is additionally observed that a plethora of decided cases uphold the courts' authority to determine the constitutionality of the actions of the other arms of government. I will confine myself to the decisions cited by the 3rd Respondent.

106. The Supreme Court in the case of **In the Matter of the Speaker of the Senate & another [2013] eKLR** held that:

“[62] However, where a question arises as to the interpretation of the Constitution, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering this Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act.”

107. The same Supreme Court stated in *Justus Kariuki Mate & Another v Martin Nyaga Wambora & another* [2017] eKLR that:

“[62] A clear inference to be drawn is that, it was the Supreme Court’s stand that no arm of Government is above the law. This being a constitutional democracy, the Constitution is the guiding light for the operations of all State Organs. The Court’s mandate, where it applies, is for the purpose of averting any real danger of constitutional violation.”

108. The Court of Appeal in *Pevans East Africa Limited & another v Chairman, Betting Control & Licencing Board & 7 others* [2018] eKLR opined that:

“Where the Constitution had reposed specific functions in an institution or organs of State, the courts must give those institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the Constitution, the law or that their decisions are so perverse, so manifestly irrational that they cannot be allowed to stand under the principles and values of our Constitution. Courts must decline to intervene at will in the constitutional spheres of other organs, particularly when they are invited to substitute their judgment over that of the organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the courts do not normally have. We must accordingly shun invitation to dabble in matters of national economic policy, when what is placed before us are the views of only two players in one industry.”

109. In the case before this Court the petitioners question the constitutionality of the 2019 Coffee Regulations and their petition cannot be terminated on the basis that the Court lacks jurisdiction to entertain it. In short, I find and hold that this Court has jurisdiction to entertain the petitioners’ case. The statement I have just made does not, however, mean that the grounds of opposition presented by the respondents, and in particular the 3rd Respondent, are not legitimate defences against the petitioners’ case.

110. The petitioners’ case is that the impugned statutory instrument violates the Constitution and statutes both in the manner it was enacted and in its contents. I will start by considering the alleged violation of the procedure for making statutory instruments. The petitioners argue that the impugned statutory instrument was not subjected to public participation as required by Articles 10 and 118 of the Constitution. They also allege that various procedural requirements established in the S. I. Act were not complied with.

111. The law on public participation is now well established within our jurisdiction. The principles of public participation were summarised by Odunga, J in the *Council of County Governors* case as follows:

“98. However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case...”

103. I therefore hold that public participation must apply to all legislative enactments and policy decisions though the degree and form of such participation will depend on the peculiar circumstances of the case. However, public participation is not a mere cosmetic venture or a public relations exercise. In my view, whereas it is not to be expected that the legislature would be beholden to the public in a manner which enslaves it to the public, to contend that public views ought not to count at all in making a decision whether or not a draft bill ought to be enacted would be to negate the spirit of public participation as enshrined in the Constitution. In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public. In other words, the end product ought to be owned by the public...”

107. It is therefore clear that the Association was accorded an opportunity of presenting its views. The Association however laments that its views were never taken into consideration in compiling the final report. In *Minister of Health vs. New Clicks South Africa (PTY) Ltd* (supra) the Court was clear that what is necessary is that the nature of the concerns of different sectors of the public should be communicated to the law-maker and taken into account in formulating the regulations. It enables people who will be affected by the proposals to make representation to the lawmaker, so that those concerns can be taken into account in deciding whether changes need to be made to the draft. In other words public participation is not just a formality and the views gathered in the process ought not to be considered as irrelevant. Whereas the authority is not bound by them, serious considerations must be given to them and must not just be disregarded as being inconsequential. In other words the authority ought not to make a decision and then conduct public participation simply for the purposes of meeting the constitutional mandate.”

112. Whether or not a statutory instrument is a product of public participation is determined by the evidence adduced. In the case before this Court, the 2nd Respondent exhibited a Report on Coffee Stakeholders Consultative Meetings on the Proposed Coffee Regulations dated October, 2018. The report discloses that various stakeholders were met at different venues between 23rd October, 2017 and 29th September, 2018. The issues raised by the stakeholders are highlighted and it is stated how those issues were resolved.

113. The petitioners take issue with Annexure 3 to the report which shows that Kirinyaga County Co-operative Union submitted a memorandum dated 27th July, 2015. They point out that the memorandum must have been submitted in respect of the 2016 Coffee Regulations which were quashed in the *Council of County Governors* case. I have gone through the report and find that apart from Annexure 3 all the other attachments relate to the period after 20th July, 2017 when the judgment in the *Council of County Governors* case

was delivered.

114. There is indeed an unrebutted averment that Cyrus Muchiri, Julius Waweru and Samuel Nyamu being members of the 1st Petitioner attended a stakeholders' engagement meeting on 3rd May, 2018. Mwangi Maina, B. Ndegwa and Rowlands Ndegwa represented the 3rd Petitioner at a similar meeting on 8th May, 2018. Peter Nyaga and James N. Gitari attended a stakeholders meeting on behalf of the 4th Petitioner on 3rd May, 2018. The 2nd Respondent's deposition is backed by the attachments to the report on the engagement of stakeholders.

115. The petitioners' claim therefore that there was no stakeholder engagement is not correct since the evidence adduced by the 2nd Respondent shows otherwise. There was sufficient engagement with stakeholders in the coffee sector, including the petitioners, and the 2019 Coffee Regulations cannot be invalidated on the ground of want of public participation. The exhibits placed before this Court by the 2nd Respondent shows that the issues raised by the stakeholders were addressed, and where necessary, incorporated in the final document.

116. The petitioners' claim of lack of public participation does not terminate at the doors of the 1st and 2nd respondents. They argue that the 3rd and 4th respondents also needed to have engaged the public before approving the impugned statutory instrument. The respondents did not reply to this argument. In my view, the answer to the petitioners' assertion that the 3rd and 4th respondents ought to have facilitated public participation and involvement before approving the regulations is very simple. The impugned 2019 Coffee Regulations had already been subjected to public participation by the 1st and 2nd respondents and the 3rd and 4th respondents were under no obligation to subject the document to public opinion once more. That was an unnecessary expense.

117. Indeed, the impugned statutory instrument was made by the 1st and 2nd respondents and as can be seen by the provisions of the S. I. Act the role of Parliament is only to ensure that the Constitution and the laws of the land have been complied with in the generation of regulations. There is therefore no merit in the petitioners' argument that the 2019 Coffee Regulations should be put to the sword for failure by Parliament to engage the public before approving them.

118. Connected to the issue of lack of public participation is whether the impugned statutory instrument met the requirements of the provisions of the S. I. Act.

119. There was an argument by the 2nd Respondent that regulations touching on the functions of counties do not require the seal of approval by the Senate. Although the 2nd Respondent appeared to have abandoned this position in the submissions, it is important to state the position of the law on this issue.

120. I spoke to this issue in **Kenya Union of Savings & Credit Co-operatives Limited (KUSCCO) v Sacco Societies Regulatory Authority (SASRA) [2019] eKLR** as follows:

“60. A statutory instrument is therefore a legislation. Therefore, the suggestion by the Respondent that the work of the Senate ends at the approval of Bills concerning county governments and does not extend to the approval of statutory instruments gives the Constitution a restricted and narrow interpretation. Such an interpretation will result in the ouster of the Senate's constitutional role in the enactment of legislation. As such, I reject the Respondent's submission that the Senate had no role to play in the enactment of the impugned Order.”

121. Odunga, J had in the **Council of County Governors case** stated that:

“In this case, since agriculture is a devolved function, it is my view that the regulations ought to have been placed before the Senate and not merely before the National Assembly since a reading of the relevant provisions of the Constitution places the subject regulations squarely within the purview of those instruments that touch on the Counties...It therefore follows that the instant regulations are subsidiary legislation that must be considered by the Senate too since they happen to touch on counties as they deal with agriculture which is a devolved function...I therefore agree the failure to submit the Regulations to Parliament (Senate and National Assembly) for scrutiny and approval would be fatal to the same where the regulations are required to be laid before both Houses.”

122. It is therefore my view that statutory instruments arising out of Acts of Parliament related to the functions of counties ought to obtain the approval of the Senate in addition to the approval of the National Assembly.

123. The question therefore is whether the 2019 Coffee Regulations received both the approval of the National Assembly and the Senate. There was confusion as to the document that was presented to the National Assembly and the Senate. The petitioners were firm that the 2019 Coffee Regulations are found in Legal Notice No. 102 of 2019 gazetted on 1st July, 2019.

124. The 2nd Respondent submitted that the 2019 Coffee Regulations are found in Supplement No. 100 dated 1st July, 2019 but published in the Kenya Gazette of 12th July, 2019. On its part, the Senate through its letter dated 2nd August, 2019 informing the 1st Respondent that the 2019 Coffee Regulations had been approved indicated that it was responding to the 1st Respondent's letter dated 15th May, 2019. This would mean that the 2019 Coffee Regulations were forwarded to the 3rd Respondent in May 2019 before they were published in July, 2019.

125. The Clerk of the National Assembly, Mr. Sialai averred at paragraph 11 of his replying affidavit that the 2019 Coffee Regulations were **“published vide a special issue of Kenya Gazette L. N. No.100 of 2019 on the 1st of July, 2019”**.

126. I have perused the pleadings and the attachments thereto and I find that although the 2019 Coffee Regulations are found in Legal Notice

No. 102 of the Special Issue of Kenya Gazette Supplement No. 100 (Legislative Supplement No. 31) of 1st July, 2019, they were also published as Legal Notice No. 100 in the Kenya Gazette of 12th July, 2019. The parties did not make any submissions as to which of the two dates is the date of publication of the statutory instrument. It is therefore difficult for this Court to make a definitive finding on the issue of the date of the publication of the impugned regulations.

127. This Court must, nevertheless, answer the question as to whether Section 11(1) of the S. I. Act was complied with. The provision states:

“Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament.”

128. The provision should be read with Sub-Section (4) of the same Section which provides that:

“If a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.”

129. The petitioners hold the view that the 2019 Coffee Regulations ceased to have effect seven days after 1st July, 2019 as they were not transmitted to Parliament within seven days of their publication. The 2nd Respondent is of the opinion that even if the date of publication is 1st July, 2019, the transmission of the regulations to Parliament still occurred within the statutory period.

130. It is clear from the evidence on record that the 1st Respondent forwarded the 2019 Coffee Regulations to the Clerk of the National Assembly on 12th July, 2019 and to the Clerk of the Senate on 16th July, 2019. Section 11(1) of the S. I. Act provides that the transmission by the Cabinet Secretary to the Clerk of the relevant House should be done within seven sitting days. It follows therefore that the activity must occur within seven sitting days of Parliament and not seven working days or calendar days.

131. It was therefore necessary for the petitioners to demonstrate by way of evidence that 12th July, 2019 in respect of the National Assembly and 16th July, 2019 in regard to the Senate fell outside seven sitting days from 1st July, 2019. The calendar of Parliament is in the public domain and the petitioners having alleged that the two days fell outside seven sitting days from 1st July, 2019 ought to have adduced evidence in support of their averment. They did not do so.

132. The 2nd Respondent additionally submitted that the National Assembly hold sittings between Tuesday and Thursday of the week and 12th July, 2019 was within seven sitting days from 1st July, 2019. In view of the submission of the 2nd Respondent, I am satisfied that the impugned statutory instrument was laid before both Houses of Parliament by the 1st Respondent within seven days from 1st July, 2019. Section 11(1) & (4) of the S. I. Act was therefore not violated.

133. Another reason for which the petitioners impugn the 2019 Coffee Regulations is that the same were never forwarded to the Senate for approval. The petitioners support their position by stating that the letter of approval refer to regulations forwarded to the Senate on 15th May, 2019 prior to the publication of the 2019 Coffee Regulations on 1st July, 2019. Further, that the Clerk of the Senate did not exhibit the minutes of the committee that approved the regulations. The petitioners additionally assert that the impugned statutory instrument was not transmitted to the Senate by the National Assembly as required by the Standing Orders of both Houses.

134. The argument by the petitioners that the procedure for passing Bills and statutory instruments from one House to the other was not followed is indeed correct. It is the House in which the Bill originates that passes the Bill to the other House. The passage of regulations is, however, unique as the generation of regulations is delegated to a regulation-making authority.

135. I am aware that Section 11(1) of the S. I. Act requires the Cabinet Secretary responsible for a regulation-making authority to transmit the regulations to the responsible Clerk for tabling before Parliament. However, I do not think that regulations should be nullified where the Cabinet Secretary decides to simultaneously transmit to the two Clerks regulations that require concurrence of both Houses. It would, nevertheless, be neater to lodge the regulations with one House so that the Chamber in which the statutory instrument is first lodged can pass the approved document to the other House. Such a mode of transmission will result in a harmonised document as the comments and changes of the House in which the regulations are first lodged will be taken into account by the other Chamber.

136. In any case, if the procedure used in submitting the 2019 Coffee Regulations to the 3rd and 4th respondents for approval violated the parliamentary standing orders, then I would term it a minor infraction that should not lead to the invalidation of the impugned statutory instrument. The statement of the Supreme Court in the advisory opinion of **In the Matter of Speaker of the Senate & another [2013] eKLR** that courts **“will not question each and every procedural infraction that may occur in either of the Houses of Parliament”** is applicable to this minor oversight in the procedure for transmitting regulations from one Chamber of Parliament to the other.

137. The petitioners' claim that the 2019 Coffee Regulations were never taken to the Senate for approval fails when the replying affidavit of the Clerk of the Senate is taken into account. At paragraph 7 of the replying affidavit Mr Nyegenye avers that the regulations were tabled in the Senate on 16th July, 2019 and stood referred to the Senate Sessional Committee on Delegated Legislation. He supports this averment by annexing the Hansard for the Senate Sitting on that date. The Clerk also exhibited a letter dated 2nd August, 2019 indicating that the regulations were approved on 31st July, 2019 by the Senate Sessional Committee on Delegated Legislation.

138. Although the letter dated 2nd August, 2019 suggests that the regulations were forwarded to the Senate on 15th May, 2019, I suspect that

the correct date for forwarding the regulations to the Senate was 15th July, 2019 which explains the tabling on 16th July, 2019. I would therefore conclude that reference to 15th May, 2019 was just in error. I do not find any reason to make me reach the conclusion that the averment by the Clerk of the Senate that the 2019 Coffee Regulations were approved by a Committee of the Senate is not true.

139. There were others grounds raised by the petitioners as to why the 2019 Coffee Regulations should be quashed. One of them was the alleged lack of a regulatory impact statement as required by Section 8 of the S. I. Act. The petitioners were silenced after the 2nd Respondent unleashed a copy of the Final Report on Regulatory Impact Assessment of the Draft 2019 Coffee Regulations.

140. The petitioners also submitted that the regulatory impact statement did not meet the provisions of the S. I. Act. By doing so the petitioners are shifting goalposts. Their case was premised on the lack of a regulatory impact statement and not its inadequacy. In any event, Mr. Sialai averred that National Assembly's Committee on Delegated Legislation was satisfied that all the requirements of the S. I. Act had been met. There is no evidence on record for the Court to arrive at a different opinion. It cannot be assumed, without any evidence, that Parliament abdicated its responsibility under the S. I. Act.

141. The Final Report on the Regulatory Impact Assessment of the Draft 2019 Coffee Regulations also takes care of the petitioners' complaints about increased costs for coffee farmers. This Court cannot in the absence of cogent evidence from the petitioners find that the 2019 Coffee Regulations will burden farmers with more expenses.

142. On the alleged conflicts and contradictions in the 2019 Coffee Regulations, I state that the regulations, like any other regulations are subject to the interpretation of the courts and will be harmonised by the courts.

143. There was the allegation that some of the regulations violate the Constitution. As submitted by the respondents, this averment was too general as no particular regulation was linked to a particular provision of the Constitution. The same position applies to alleged conflict with the Law of Contract Act and the Co-operative Societies Act. The petitioners simply stated that the regulations contravened the said Acts of Parliament without specifying which provision of any of the Acts was violated by which particular regulation.

144. There was an attempt to link this petition with the report of the Coffee Task Force that was quashed in the **Council of County Governors case**. The respondents and in particular the 2nd Respondent successfully demonstrated that the CSI Committee survived the **Council of County Governors case** and came up with the 2019 Coffee Regulations which were enacted in compliance with the Constitution and the S. I. Act.

145. For the reasons stated in this judgement, I reach the conclusion that this petition is without merit. The petition is therefore dismissed.

146. Considering that the petition is in the nature of public interest litigation, I direct parties to meet their own costs of the proceedings.

Dated, signed and delivered virtually at Nairobi this 11th day of February, 2021.

W. Korir,

Judge of the High Court