**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW NO. 250 OF 2019**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**MINISTRY FOR AGRICULTURE, LIVESTOCK,**

**FISHERIES AND IRRIGATION.....RESPONDENT**

**AND**

**AGRICULTURE AND FOOD AUTHORITY.....1ST INTERESTED PARTY**

**COUNTY GOVERNMENT OF NAKURU.....2ND INTERESTED PARTY**

***ex parte:***

**SUSAN WANJIKU & 80 OTHERS**

**JUDGMENT**

Sometimes in April 2019, the Cabinet Secretary in the Ministry of Agriculture, Livestock, Fisheries and Irrigation gazetted The Crops (Irish Potato) Regulations, 2019 (hereinafter, 'the Regulations'). The application and purpose of the Regulations are captured in Regulations 3 and 4 respectively; the two Regulations state as follows:

> ***3. (1) These Regulations shall apply with respect to irish potatoes produced and marketed in Kenya and imported into and exported out of Kenya.***
>
> ***(2) Without prejudice to the generality of paragraph (1) the purpose of these regulations is to provide for-***
>
> ***(a) registration of growers, grower associations, dealers and irish potato collection centres;***
>
> ***(b) registration of processors, warehouses, importers and exporters of irish potatoes;***
>
> ***(c) quality assurance and marketing of irish potatoes;***
>
> ***(d) establishment and enforcement of standards in grading, sampling and inspection, tests and analysis, specifications, units of measurement, code of practice and packaging, preservation, conservation and transportation of crops to ensure health and proper trading;***
>
> ***(e) Packaging and sale of irish potatoes; and***
>
> ***(f) promotion of best practices in the irish potato sector***.

The applicants were aggrieved by these Regulations and, for that reason, they have moved this Honourable Court by way of a motion dated 27th September, 2019 seeking judicial review orders of certiorari and prohibition; the prayers for these orders have been framed as follows:

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

As will become obvious in due course, the applicants must have been referring to both the respondent and the 1st Interested Party in prayer 3 of their motion. Besides these prayers, they also sought for the order on costs.

The application is supported by the affidavit of Susan Wanjiku Kariuki sworn in verification of the facts in the Statutory Statement. She has sworn the affidavit on her own behalf and on behalf of eighty other applicants most of whom, I gather, hail from the County of Nakuru.

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

While elucidating further on the question public participation the learned counsel for the applicant relied on the decision in the **South African case of Doctors for Life International vs. Speaker of the National Assembly de Others (CCT/2/05) [2006] ZACC I; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC)** where the court defined public participation as follows;

> ***"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."***

And in Kenyan legislation, the concept of public participation is embodied in our Constitution more specifically in Article 10 (2) thereof. It was applied **in Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) vs. Salaries and Remuneration Commission, Petition No. 294 of 2013** where the Court observed:

> ***"Public participation as a national value is recognized under Article 10 of the Constitution. The Constitution at Article 94 has vested legislative authority of the people of Kenya in Parliament and Article 118 has provided for public participation and involvement in the legislative business."***

According to the applicants, there was no adequate public participation with all stakeholders in the making of the impugned regulations. Again the regulations were contrary to section 5 of the Statutory Instruments Act, 2013 which provides that before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to have a direct, or a substantial indirect effect on business; or restrict competition; the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.

Section 5 (2) of that Act states that for consultation to be considered adequate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument and ought to have ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed contents.

The applicants urged that the 1st Interested Party failed in the second limb of the test since it failed to ensure that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed contents. The one advertisement placed in daily newspaper on the consultations was, in their view, not adequate.

While referring to **Robert N. Gakuru & others v Kiambu County Government & 3 others [2014] eKLR** the learned counsel for the applicant adopted the words of Odunga, J. that: -

> ***"Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates."***

He also invoked the words of the Court of Appeal in the same case, reported as **Kiambu County Government & 3 others v Robert N. Gakuru & Others [2017] eKLR** when it was escalated to that court. The court noted as follows:

> ***" ... 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…"***

Thus, the respondent and the interested parties ought to have made sure that all the stakeholders were reached and that every one of them either participated or was well represented.

The applicants submitted further that although the regulations may have been made for the benefit of irish potato farmers and other stake holders in the Irish potato sector, failure to involve them, particularly, the farmers deprived the regulations of legitimacy.

The applicants also pointed out certain provisions in the regulations which, in their view, are impracticable; for instance, Section 9 (1) provides that the selling and buying of Irish Potatoes for commercial purposes shall be done in collection centers and designated markets yet such centers or markets do not exist.

In any case, irish potatoes are meant for human consumption and are perishable. Therefore, the collection centers ought to meet hygienic storage standards and must also be secure as well. These measures, according to the applicants, have not been put in place.

While Section 9 (4) of the regulations provides that the selling and buying of Irish potatoes may only be done through a collection center, medium or designated market, the provision exposes small scale farmers to unscrupulous brokers and middlemen since the farmers have no sufficient means to transport their produce to those centers or markets.

Part III of the regulations gives guidelines on quality assurance, packaging and marketing. According to Section 20 (1), the management committee of the collection centers and dealers have to ensure that Irish Potatoes are sorted; graded; packaged; labelled; transported; and, stored following good practices prescribed by the Authority from time to time and in accordance with existing national, regional and international standards; that they are removed from any area after packaging in clean and intact food grade material that allows for aeration and maintenance of produce quality; they are packaged and clearly labeled indicating the Irish Potato variety, the date harvested, collection centre and county of origin. They can only be offered for sale in collection centers or markets designated by the county government; and stored in an inspected and registered facility. Yet the collection centres do not have this infrastructure.

The Regulations, it has been urged, limit the rights and fundamental freedoms, specifically economic and social rights of most of the stakeholders in irish potato farming contrary to provisions of Article 24 of the Constitution which provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors.

On the question whether the applicants have made out a case for grant of Judicial Review Orders, counsel for the Applicant referred to several cases for the argument that indeed the applicant deserved these orders. For instance, **Samuel Njoroge & 4 Others v Attorney General & another [2017] eKLR,** the Ugandan case of **Pastoli vs Kabale District Local Government Canal & Others (2008) 2EA 300** at pages 300-304 where it was held as follows:

> ***"In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or acts done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision - it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision.***

Following these decisions, the applicants urged that the impugned regulations are tainted with illegality, irrationality and procedural impropriety. They are Illegal because they were made without public participation and in total disregard to the rules of procedural fairness and the constitution of Kenya. They are also irrational since there is no infrastructure in place to ensure compliance. On procedural impropriety, once again the applicants urged that failure to involve all the stakeholders smacked of procedural impropriety; the core requirement of public participation was not met.

On behalf of the 1st Interested Party, it was submitted that the Applicant had not given any legal justification to warrant the quashing or prohibiting the implementation of the Crops (Irish Potatoes) Regulations, 2019.

On the question whether public participation was undertaken on the Crops (Irish Potatoes) Regulations, 2019, it was urged that the public was accorded adequate opportunity for participation in the making of the regulations in the 17 potato growing Counties across the Country in line with section 5 of the Statutory Instruments Act. The 1st Interested Party, it was submitted, mapped the key stakeholders likely to be affected by the regulations and invited them to the public workshops held in different Counties. Besides these workshops, the 1st Interested Party invited the public to a National Consultative forum at the Kenya Agriculture, Livestock Research Organization (KALRO) Headquarters. Again, the Respondent is said to have published the regulations, the Regulatory Impact Statement (RIS) on its website and invited comments from the public.

The learned counsel for the 1st Interested Party relied on the decision in **Nairobi Metropolitan Psv Saccos Union Limited &25; others v County of Nairobi Government & 3 others [2013] eKLR** where Lenaola, J. (as he then was) noted that all that is required in public participation is some reasonable level of participation. In saying so the learned judge agreed with Sachs, J. in **Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC)**where he noted that the forms of facilitating an appropriate degree of participation in the lawmaking process are capable of infinite variation. Of importance is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say and that what amounts to a reasonable opportunity will depend on the circumstances of each case.

It is after the consultative forums, the 1st Interested Party incorporated the comments and prepared a Regulatory Impact Statement (RIS) which stated the objectives of the regulations, the effects of the regulation on the public, private sector and on fundamental rights. The RIS also had a statement for cost benefit analysis of the regulations as envisaged under section 7 of the Statutory Instruments Act. The RIS was notified vide a gazette notice in compliance with section 8 of the Statutory Instruments Act and certificate of compliance issued in

accordance with the Act before the Regulations were presented for scrutiny by the Parliament. It was urged that ex-parte Applicants failure to attend the consultative workshops held for deliberation on the regulations cannot be used to fault the Respondent and the 1st Interested Party having carried out their due legal obligation to draft the regulations.

On the question of collection centers the 1st Interested Party submitted there exists 50 collection centers and warehouses for the implementation of the regulations.

On whether the applicants' application has met the test for grant of the judicial review orders it was submitted that Section 7(2) of the Fair Administrative Actions Act, 2015 provides for grounds upon which a court of law can review can administrative action and that the common grounds include grounds of unreasonableness and irrationality. The case of **Republic vs Inspector General of Police & Another ex parte Patrick Macharia Nderitu [2015] eKLR** was invoked where it was held that to succeed in an application for Judicial Review, an applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety. Neither of these grounds have been demonstrated to exist and, according to the 1st interested party, the application is brought in bad faith. Relying on this Court's decision in **Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR,** counsel for the 1st interested party urged that this court's role is supervisory. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter.

The learned counsel for the 2nd Interested party castigated the applicants for shifting positions in their quest for judicial review orders; first, although their application was based on the ground that no public participation was undertaken with respect to the impugned regulations, they later conceded that indeed public participation was conducted except that it was not adequate. Even then, lack of public participation was never raised in their statutory statement as one of the grounds upon which their application was based.

Referring to Order 53 rule 4 (1) of the Civil Procedure Rules and the care of R**epublic v County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR** where this provision of the law was applied, the learned counsel for the 2nd respondent urged that in an application for judicial review, no grounds, other than those set out in the statement can be relied upon. He therefore urged the court to disregard this particular ground. If anything, parties are bound by their pleadings and the court can only adjudicate on the issues pleaded by the parties. Counsel cited the case of **Lucy Wanjiru & another v Attorney General & another [2016] eKLR** for the position that reasonable steps had been taken towards engaging the stakeholders in the potato industry and the public at large.

As to whether the regulations violate fundamental rights and freedoms the 2nd Interested Party submitted that like the previous ground of public participation, this particular ground was not included in the statement of facts and therefore considering it would be contrary to Order 53 r. 4 (1) of the Civil Procedure Rules. And even if it was to be pleaded as one of the grounds, it has not been substantiated; all the applicants have done is to merely quoted Article 24 of the Constitution. Assuming the applicant's fundamental rights and freedoms had been infringed, it was argued that the proper course for them would have been to file a constitutional petition rather than an application for judicial review.

Contrary to the applicants' allegations, it was submitted that the regulations are meant to empower the potato farmers and do away middle men and brokers in the irish potato industry who have for a long time exploited farmers. The regulations will also benefit consumers since they will ensure proper packaging and storage, hygiene, high quality and proper use of pesticides. Thus, the regulations have the potential of advancing consumers' rights as envisaged by Article 46 of the Constitution rather than curtail them.

It is the 2nd Interested Party's humble submissions that the regulations are neither punitive nor unfair; to the contrary, they are fair, reasonable and have been made in good faith with sole purpose of benefitting farmers in the irish potato sector.

In conclusion, the learned counsel for the 2nd Interested Party urged that judicial review remedies are discretionary and in considering whether or not to grant them, this Honourable Court should take into account the effect of issuing such orders on third parties. Considering that the advantages these regulations are bound to bring to the Irish potato sector outweigh the teething problems in the infancy stages of implementation of the regulations, it was urged that the court should exercise its discretion and reject the applicant's application.

In determining the applicants' application, it is worth remembering that they have invoked this court's supervisory jurisdiction because that is what judicial review is all about; it is about judicial control over exercise of administrative action and, generally speaking, it is intended to impugn any unlawful decision. Traditionally, there are three grounds that provide the entry point for the court's intervention in an administrative action; they were enunciated by Lord Diplock in his classic dictum in **Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. The learned judge** set forth three heads which he referred to as *"the grounds upon which administrative action is subject to control by judicial review"*. These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> ***"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.***

***By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.***

***By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.***

***I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."***

The three traditional grounds by no means constitute and exhaustive list; Lord Diplock himself never suggested them to be; he was quick to point out that further development on a case-by-case basis may in course of time add further grounds. Perhaps for this reason, the "principle of proportionality" which he suggested as a further ground has gained sufficient notoriety over time that today it is acknowledged as one of the grounds upon which one may seek judicial review orders. Under section 7 (2) (l) of Fair Administrative Actions Act, 2015, a court or tribunal may review an administrative action if the administrative action or decision is not proportional to interests or rights affected. Thus in Kenya, the principle of proportionality is no longer a mere common law concept but has a statutory underpinning as well.

Turning back to the applicants' application The grounds upon which the reliefs are sought are stated as follows:

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

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

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

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

***c)Unlawful exercise of discretion***

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

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

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

In the affidavit sworn in reply to the applicant's motion by Leonard Kubok, the interim Head, Food Crops Directorate of the Agriculture and Food Authority, the respondent and the 1st Interested Party explained that that the regulations were necessary to address the exploitation of farmers by middlemen who, hitherto, have not adhered to measurement requirements leading to huge price difference of up to 1000% as a result of usage of extended bags of between 130 to 260 kilograms. The regulations also sought to address health and safety concerns in clean planting and improving farm productivity.

In coming up with the Regulations, the Cabinet Secretary for agriculture consulted the Agriculture and Food Authority together with other stakeholders to regulate dealings in the potato sector.

The regulations were also informed by the understanding that Irish potatoes is a scheduled crop that has not been regulated in the past. For this reason, there have been instances of breach of consumer rights particularly in areas of weight requirements of the Irish potatoes. There was, therefore, the need for the Agriculture Food Authority to move from the status quo and come up with regulations in exercise of its regulatory mandate.

Prior to the development of the regulations, the respondent and the 1st interested party conducted a regulatory impact assessment of the regulations. A report of this assessment was exhibited to the affidavit of Mr. Kubok; the report detailed, among other things, the reasons and objectives for the Regulations; their effects on both the public and private sectors and their effects on fundamental rights and freedoms. It also weighed the options of maintaining the status quo against the benefits that the potato sector is likely to enjoy as a result of the Regulations. Ultimately, they came to the conclusion that there is a compelling case for passing and implementation of the regulations.

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

As far as the ground of illegality is concerned, there does not appear to be any evidence that in developing and implementing the Regulations, the respondent and the 1st Interested Party fell afoul of the law from which they derive the mandate to make these regulations. On the contrary, the available evidence points to the fact that they understood correctly the law that regulates their decision-making power and gave effect to it.

To begin with it is clear, and it is not in dispute, that the Regulations are anchored in section 40 of the Crops Act, No. 16 of 2013 which specifically provides that the Cabinet Secretary may in consultation with the 1st interested Party and County Governments, such as the 2nd Interested Party, make regulations towards implementation of the Act; it provides as follows:

> ***40. Regulations***
>
> ***(1) The Cabinet Secretary may, in consultation with the Authority and the county governments, make regulations for the better carrying into effect of the provisions of this Act, or for prescribing anything which is to be prescribed under this Act.***
>
> ***(2) Without prejudice to the generality of the foregoing, regulations made under this section may provide for—***
>
> ***(a) declaration and regulation of a scheduled crop including production, distribution and marketing;***
>
> ***(b) the areas outside which a scheduled crop may not be cultivated, and regulating and controlling the variety, the cultural conditions, the method of production and grading of a specified crop;***
>
> ***(c) regulations on the appropriate seeds and planting materials for export and import;***
>
> ***(d) administration of plant breeder's rights in line with the existing international conventions to which Kenya is a signatory;***
>
> ***(e) the control of crop pests and diseases;***
>
> ***(f) standards, testing and certification of seeds and planting materials;***
>
> ***(g) licensing and regulation of dealers in farm inputs;***
>
> ***(h) regulation and controlling the method of blending, packaging and labelling of specified crops for purposes of traceability;***
>
> ***(i) the periods for which licences and registration certificates shall be issued;***
>
> ***(j) the forms and fees to be paid for anything to be done under this Act;***
>
> ***(k) rules for ensuring food safety including handling, transportation, processing and market standards of food crops and crop products;***
>
> ***(l) rules and regulations of any organization dealing with crops and crop products, made by any such organization to be in conformity with the provisions of this Act;***
>
> ***(m) the submission of returns and reports by the holders of licences and permits under this Act;***
>
> ***(n) standards, and the manner of grading and classification of various crop products under this Act;***
>
> ***(o) measures of maintaining soil fertility including soil testing and regulation of soil salination, chemical degradation and toxic levels in plants;***
>
> ***(p) developing guidelines for public education on safe use of agrochemicals;***
>
> ***(q) the procedure for processing of toxic crops;***
>
> ***(r) the relationship between farmers and other dealers in crops;***

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

***(t) the regulation of standard industry agreements.***

***(Emphasis added).***

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

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

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

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

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

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

***40. Participation of farmers***

***(1) For purposes of ensuring effective participation of farmers in the governance of the agricultural sector in Kenya, there shall be close consultation with all registered farmers' organisations in the development of policies or regulations and before the making of any major decision that has effect on the agricultural sector.***

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

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

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

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

This evidence of the respondent's and 1st interested party's engagement with the stakeholders and the public at large on the development of the regulations has not been controverted. In the absence any contrary evidence, I am satisfied that there was sufficient public participation in the development of the Regulations and to that extent, the Regulations cannot be faulted on the ground of procedural impropriety ostensibly because of lack of public participation.

The applicants have not suggested that they ever attended any of the meetings called by the 1st Interested Party or that if they attended, their

views were not taken into account in the final draft of the regulations. The evidence by the respondent and the 1st Interested Party that the view of those who attended the meetings were taken on board have not been controverted.

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

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

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

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

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

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

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

**SIGNED, DATED AND DELIVERED ON 28TH MAY 2021**

**Ngaah Jairus**

**JUDGE**