



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 147 OF 2019

IN THE MATTER OF: THE GOVERNMENT CIRCULAR REFERENCED OP/CAB/9/83A ON THE OPERATIONALIZATION AND IMPROVEMENT OF CARGO LOGISTICS AT THE PORTS OF ENTRY AND INLAND CONTAINER DEPOTS

AND

IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 43, 46(1) (a), 46(c), 46(3), 47 and 232 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTIONS 60, 62 AND 73 OF THE PUBLIC HEALTH ACT, CAP 242, LAWS OF KENYA

AND

IN THE MATTER OF: SECTIONS 28 AND 30 OF THE FOOD, DRUGS AND OTHER SUBSTANCES ACT, CAP 254, LAWS OF KENYA.

AND

IN THE MATTER OF: THE STANDARDS ACT, CAP 496, LAWS OF KENYA

AND

IN THE MATTER OF: THE HEALTH ACT NO. 21 OF 2017, SECTIONS 15, 68(c), 68 (2) (a), and 69 LAWS OF KENYA

AND

IN THE MATTER OF: THE INTERNATIONAL HEALTH REGULATIONS 2005

AND

IN THE MATTER OF: FOOD, IMPORT AND EXPORT INSPECTION CERTIFICATION SYSTEMS (FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS 2002)

AND

IN THE MATTER OF: LEGAL NOTICE NUMBER 127 OF 19TH JUNE 2018

BETWEEN

THE ASSOCIATION OF PUBLIC

HEALTH OFFICERS OF KENYA.....PETITIONER

VERSUS

THE KENYA BUREAU OF STANDARDS.....1ST RESPONDENT

THE KENYA PORTS AUTHORITY.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The Petition before the Court is dated 14/10/2019. The Petitioner is an Association comprised of Public Health Officers employed throughout Kenya and with mandate to promote the advancement and diffusion of Knowledge regarding hygiene, sanitary science, preventive medicine, health education, food safety, and all matters pertaining to environment health.

2. The 1st Respondent is a Statutory body established under Sections 3 and 4 of the Standards Act Cap 496 Laws of Kenya with the statutory mandate of promoting standardization and specification of commodities among others.

3. The 2nd Respondent is a Statutory body established by the Kenya Ports Authority Act and has the mandate to manage and operate the port of Mombasa and all scheduled seaports along the Kenyan Coastline.

4. The 3rd Respondent is the Attorney General of the Republic of Kenya.

Factual Background

5. The Petitioner avers that on the 4/6/2019, the President of the Republic of Kenya through the Head of the Public Service issued a government circular referenced OP/CAB 9/83A (herein after called the circular) headed ***Operalization and improvement of cargo logistics at the ports of entry and inland container depots***. The circular stipulated that the Government appreciated the cost of doing business and efficiency at the Ports of entry was dependent on actions of Government Agencies, shipping lines, clearing agents as well as the cargo owners and decided that it is critical to have proper co-ordination and harmonization of various intervention measures at the ports of entry in order to achieve the said goals.

6. The Petitioner avers that the said circular was copied to all Cabinet Secretaries, all principal secretaries, and all Head of state Corporations/Agencies. The circular grouped government agencies working at the ports of entry into the following categories:

a) The Lead Agencies as per the circular shall have the following meaning for the various points of entries, Sea Ports and Inland Container Depots-Kenya Revenue Authority; International Airports-Kenya Airports Authority; Land Border Points-Kenya Revenue Authority.

b) Category one that comprised of Port health, Immigration, Kenya Revenue Authority, Customs Department, Port Facility Security Office, (PFSO), Kenya Ports Authority and whose mandate would be to have full access to vessels and shall be the only Agencies whose representatives will be allowed to board docked vessels at the port.

c) Category two comprised of Kenya Ports Authority, Kenya Revenue Authority, Kenya Railways Corporation and the Kenya Bureau of Standards was given the mandate of operating within the port and shall not fill the accountability form but must however adhere to the agreed timelines and procedures for clearance of cargo.

d) Category three comprised of the National Intelligence service (NIS), the Director of Criminal Investigations (DCI) and the Kenya Health Inspectorate Services (KEPHIS) to be domiciled inside the ports of entry and shall undertake any cargo related intervention after making a formal request to the Head of the lead agency using the port of entry accountability form.

e) Category four to include all other government agencies not included in Categories one, two and three and shall be domiciled outside the Ports of entry and entry to the ports by any of these government agencies shall be sanctioned by the lead agency to facilitate the Agencies to undertake their mandate.

f) Category five composed of clearing Agents.

g) For the purposed of ensuring conformity to quality standards and the adherence to other regulatory requirements for cargo entering the country, the, 2nd Respondent, The Kenya Bureau of Standards shall be the lead agency for the purposes of coordinating inspection of goods at the Country of origin and the issuance of enriched CoCs.

7. Arising from the circular, the 2nd Respondent herein through its Managing Director issued a directive through a letter dated 8/7/2019 addressed to the Port Health Officer, Mombasa; the letter was headed *Operalization and Improvement of Cargo logistics at the ports of entry and inland container depots* and referenced GMO/2/3. The said letter communicated that in accordance to the said circular, port health officers in discharging their functions are allowed to board vessels at the port. However, they are not allowed to stop any cargo released by Kenya Revenue Authority or Kenya Bureau of Standards (1st Respondent), and their intervention where necessary, shall be made to the lead Agency through the Kenya Bureau of Standards.

8. The Petitioner avers that the effect of the said circular would negatively impede the Port Health Officers from discharging their functions that include stopping and searching any vessel, seizing and detaining any goods and taking samples for analysis as mandated under the

Public Health Act as well as the Food, Drugs and other Substances Act; thereby contravening the said Act. Further effect of the said circular is to render Port Health Officers situated at the points of entry mere spectators as their role is only limited to boarding any vessel and inspecting the food, drugs and other substances without their intervention should their inspection reveal a need to intervene. This is despite the mandate of the 2nd Respondent under the Standards Act to promote the standardization and specification of commodities and to provide codes of practice while the mandate of the Public Health Officer situated at the points of entry is to ensure that food, drugs and other chemical substances entering through the points of entry are fit for human consumption or use.

9. The Petitioner states that the effect of having the 2nd Respondent as a lead agency in matters dealing with food, drugs and other Chemical Substances makes it difficult for a Port Health Officer to discharge his function as envisioned under the Public Health Act, the Food Drugs and other Substances Act as any intervention should be done through the 1st and 2nd Respondents. Consequently, food, drugs, and other substances that might be contaminated can still find their way into the country through the points of entry and through the 2nd Respondent's Enriched Certificate of Certificate of Conformity. A Case in point regards the controversial ginger seized by authorized officers in discharging their functions as per the Food, Drugs and other Chemical Substances Act **(a copy of the seizure form was Annexed and Marked M.B.D.4)**. The 2nd Respondent still went ahead and issued a Certificate of Conformity for rotten ginger and ignored Port health warning and recommendation that the said ginger consignment had failed to comply with the standards and thus was recommended for destruction.

10. The Petitioner avers that whereas it fully supports the President's directive, contained in the circular, in matters to deal with food, drugs and chemical Substances, the public health officers should be allowed to carry out their mandate without having to seek permission from officers of the 2nd Respondent. This would avoid confusion when it comes to safety of food, drugs, and other substances that enter the country.

11. It is the Petitioner's case that the circular referenced OP/CAB 9/83A creates confusion and limits the role of a Public Health Officer situated at the sea port from carrying out his statutory functions under the law and thus does not guarantee that the food, drugs and other chemical substances that find their way through the sea point of entry are fit for human consumption and use which is contrary to Article 43(1) (c) of the Constitution; the directive from the 2nd Respondent referenced GMO/2/3 that is grounded on the said circular does not guarantee that foods, drugs and other substances that enter through the port of entry are fit for human consumption and use which is contrary to Article 46(1) of the Constitution; although the circular was meant to ensure that there is efficiency at the point of entry, Article 232 of the Constitution establishes the principle of good governance, which applies to all State organs and State Corporations. Therefore, the Circular should be carefully balanced with the need to ensure that only safe food, drugs and other chemical substances reach the consumer and thus avoid subjecting the public to hazardous risk. Consequently, the Petitioner's right to a fair administrative action that is efficient, expeditious, lawful, reasonable, and procedurally fair as provided under Article 47 of the Constitution was impaired.

12. The Petitioner therefore prays for the following orders:

a) A declaration be issued that the Government of Kenya circular OP/CAB 9/83A dated 4th June 2019 addressed to all Cabinet Secretaries, all principal secretaries and all Heads of State Corporations/Agencies and headed Operationalization and improvement of cargo logistics at the ports of entry and inland container depots contravenes Articles 43(1) and Article 46 (1) of the Constitution of Kenya as it limits Port Health Officers from carrying out their functions as envisaged under the Public Health Act, Cap 244, the Food Drugs and Chemical Substances Act as well as the International Health Regulations (2005).

b) A declaration be issued that the 2nd Respondent's directive referenced GMO/2/3 that is grounded on the Government of Kenya circular OP/CAB/9/83A contravenes Articles 43(1) and Article 46(1) of the Constitution of Kenya as it limits Port Health Officers from carrying out their functions as envisaged under the Public Health Act, Cap 244, the Food Drugs and Chemical Substances Act as well as the International Health Regulations.

c) A declaration be issued that the directive as contained in the Government of Kenya CIRCULAR OP/CAB 9/83A dated 4/6/2019 addressed to all Cabinet Secretaries, all principle secretaries and all Heads of State Corporation/Agencies and headed Operationalization and improvement of cargo logistics at the ports of entry and inland container depots that import (that include food, drugs and other chemical substances) that contain a certificate of conformity from the Country of origin need not be subjected to another verification contravenes Article 43(1) and Article 46(1) of the Constitution of Kenya only to the extent that it limits Port Health Officers from carrying out their functions as envisaged under the Public Health Act. Cap 244, The Food Drugs and Chemical Substances Act as well as the International Health Regulations.

d) An Order of certiorari do issue to bring into this Court and quash the Government of Kenya circular referenced OP/CAB/9/83A dated 4th June 2019 addressed to all Cabinet Secretaries, all principle secretaries and all Heads of State Corporation/Agencies and headed Operationalization and improvement of cargo logistics at the ports of entry and inland container depots that import (that include food, drugs and other chemical substances) that contain a certificate of conformity from the Country of origin need not be subjected to another verification contravenes Article 43(1) and Article 46(1) of the Constitution of Kenya only to the extent that it limits Port Health Officers from carrying out their functions as envisaged under the Public Health Act. Cap 244, the Food Drugs and Chemical Substances Act as well as the International Health Regulations.

e) An Order of certiorari do issue to bring into this Court and quash the Government of Kenya circular referenced OP/CAB/9/83A as it contravenes Article 43(1) and Article 46(1) of the Constitution of Kenya only to the extent that it limits Port Health Officers from carrying out their functions as envisaged under the Public Health Act. Cap 244, the Food Drugs and Chemical Substances Act as well as the International Health Regulations.

f) An Order of certiorari do issue to bring into this Court and quash the 2nd Respondent's directive referenced GMO/2/3 that is grounded on the Government of Kenya circular OP/CAB/9/83A as it contravenes Article 43(1) and Article 46(1) of the Constitution of Kenya as it limits Port Health Officers from carrying out their functions as envisaged under the Public

Health Act, the Food, Drugs and Chemical Substances Act as well as the International Health Regulations.

g) **THAT** the Respondents bear the costs of this suit.

h) **THAT** this Honourable Court be pleased to grant such further Order or Orders as may be just and appropriate.

13. The petition is supported by the amended affidavit of **Mohamme Bagajo Duba** sworn on 8/10/2019.

The Response

14. The 1st Respondent opposed the petition through its Replying Affidavit sworn on 31/10/19 by **Bernard M. Nguyo** who is the Acting Director, Quality Assurance, and Inspection.

15. The 1st Respondent's case is that the Petition filed herewith discloses no reasonable cause of action against it because the Circular and directive being challenged did not emanate from it and further, the orders sought are not directed to it. Therefore, the Petition against it ought to be struck out *in limine* or dismissed with costs accordingly.

16. That 1st Respondent states that is a statutory body established under Section 3 of the Standards Act, Cap 496, with the mandate to provide standardization and conformity assessment with relevant Kenyan Standards, and Section 4 of the Standardization Act, empowers it:

(a) to promote standardization in industry and commerce;

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

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

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

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

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

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

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

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

17. In execution of the foregoing mandate, the 1st Respondent has had to build corresponding large and significant capacity in various aspects of its dealing both within and outside the country and has developed the following undertakings:

a) Well-equipped and sufficient laboratories.

b) The minister for trade and industry, in consultation with the National Standards Council and pursuant to the provisions of Section 4 and 20 of the standard Act Cap 496 of the Laws of Kenya promulgated the pre export verification of conformity to Kenya Standards of imports order 2005 through Legal Notice Number 78 published on 15/7/2005 in Kenya Gazette Supplement No. 53(popularly known as the PVOC programme).

c) The 1st Respondent has sufficient and well trained personnel in all critical parts of Kenya.

d) Various Container Freight Services have been contracted to facilitate work.

e) Development of various standards. The 1st Respondent standards development Division has eight technical committees whose mandate is to deliberate on the need of standards formulation and covers different scopes and the composition of the technical committees include manufacturers, researchers, users and other Government agencies and the 1st Respondent acts as the secretariat to all Technical Committees.

18. The 1st Respondent avers that it received the aforementioned circular dated 4/6/2019 from the head of Civil Service and on behalf of the Presidency, and that the circular aims to bring order through proper co-ordination and harmonization of various intervention measures at the

Kenya's Ports of entry with a view of positively managing the cost of doing business as well as enhancing efficiency. The circular outlined several measures, which addressed inefficiencies in the critical processes and factors contributing to increased processing time and costs and the Circular defined lead agencies. The second main limb of the circular sought to increase efficiency by reducing duplication of roles by the various Government Agencies and other entities by grouping all of them in only five (5) categories. Category one comprised sea vessel boarding parties; category two had frontline port operators, category three had intelligence-led operators, category four was for all the other Government agencies and Category five was for clearing agents. Limb three of the circular outlined the operational areas for various categories of entities; while, limb four related to the enriched certificate of conformity; limb five dealt with Kenya Ports Authority's use of peripheral storage facilities; limb six touched on cargo logistics and the final limb was on agency mandates.

19. The Port Health officers where the Petitioner draws some of its membership were placed in category One (sea vessel boarding parties) domiciled within the port of entry and the circular permitted them to have full access to vessels and their representatives were allowed to board docked vessels at the port.

20. The 1st Respondent avers that it being named as a lead agency did not lessen the importance of other entities operating at the port of entry; rather it is about coordinating inspection of goods at the country of origin and issuance of enriched certificate of conformity in a much more efficient manner so as to shorten the process and bring down the cost for the benefit of ultimate consumers. Furthermore, the circular did not take away nor interfere in any way with the mandate of any of the entities operating at the Kenya Ports of entry including members of the Petitioner, and there is nothing stopping the Petitioner from performing duties as envisaged under the various legislative framework such as the Health Act, Public Health Act, Food, Drugs and Chemical Substances Act and even the Constitution.

21. The 1st Respondent states that it has adequate capacity and is well placed to play the lead agency role, and that the Petitioner and all the entities named in the circular are supposed to work together in harmony, and if there is any issue relating to a particular container, then the said issue ought to be raised through the lead agency for appropriate action to be taken. Further, entities including the Petitioner are able to access the online system and track any issue even before a ship docks and raise it for remedial action.

22. Regarding the controversial ginger, the 1st Respondent avers that the subject ginger had been imported by an EPZ company known as Fairails EPZ as raw material for manufacture of another product meant for the export market. However, pursuant to Legal Notice No. 127 of 19/6/2018, the 1st Respondent has no jurisdiction over substances brought into the country for use in EPZ Zones.

23. The 1st Respondent avers that the Petition herein has been filed for reasons other than enforcement of Constitutional rights. The Petition is in bad faith, bad in law, and amounts to abuse of the court process, and entertaining the same would only stifle and suffocate efforts by Government aimed at restoring order at the port of entry, by removing or reducing duplicate processes, and bringing down the costs of goods for the benefit of Kenyan consumers.

24. In response to the amended Petition, the 2nd Respondent filed a Replying Affidavit sworn on the 9/12/2019 by **William K. Ruto**. The deponent avers the port of Mombasa is the largest port in East Africa and serves as the gateway to Eastern and Central Africa, and as such it handles large volumes of cargo destined to both local and transit markets. Under Section 12 of the Kenya Ports Authority Act, it has the mandate to maintain, operate, improve, and regulate the scheduled seaports and to carry on the business of stevedore, wharfinger, lighterman, and acts as a warehouseman. Before publication of the subject circular, the Government through various agencies including port Health representatives in the Ministry of Health as well as the 1st Respondent, conducted various stakeholder meetings geared for the implementation of the circular in order to ease operation at all Ports of entry, to improve on cargo logistics and to ensure that all the services rendered to the market are economic and competitive. It is therefore absurd for the petitioners to institute these proceedings now, purportedly acting on instructions of Port Health Officers, yet indeed their officers and representatives played an integral role in development of the circular.

25. The 2nd Respondent states that in the circular, Port Health Officers who the Petitioner represent have been classified under the Category 1: Sea Vessel Boarding Parties and therefore, no vessel can be allowed into the port of Mombasa, without first obtaining certification from the Port Health Officers, who are mandated to board any vessel that calls at the Port first, before any other agency, in order to carry out their roles which include the granting of *pratique*. Without *pratique*, a vessel cannot be allowed to berth and commence work at the port facility. Further, the Port Health Officers stationed at the Port of Mombasa have Special Boarding Passes that allow them unfettered access and authority to access and board vessels for purposes of carrying out their mandate under the law. The members of the Petitioner play a mandatory statutory role of ensuring that no cargo that does not meet the approved standards is shipped into Kenya and they are part of the Multi-agency team stationed within the port facility and with representation forming the various Technical committees of the 1st Respondent that are charged with ensuring the development of health, safety and quality standards of goods destined for Kenya. Therefore, the Petitioners assertion that the statutory mandates of its officers is being stripped and bestowed upon the 2nd Respondent by virtue of the Circular and the 2nd Respondent's letter is a misguided interpretation of the circular and a total misunderstanding of the cargo import /export operational framework.

26. The 2nd Respondent further alleges that there has been enhanced efficiency through a reduced cargo dwell time at the port of Mombasa following the issuance of the said circular, and the dwell time is expected to reduce further once the intervention measures are fully harmonized at the port of entry.

27. The 2nd Respondent avers that its letter Ref. GMO/2/3 dated 8/7/2019 only seeks to ease the mode of carrying out of the Port Health Officer's mandate and suggests a coordinated operations strategy whereby the Port Health Officers communicate through their lead Agency (the 1st Respondent) of its intended further action with respect of cargo. Therefore, the said letter does not violate any of the Human Rights alleged by the Petitioner and neither does it limit nor deter the Port Health Officers from undertaking their mandate.

28. The 3rd Respondent opposed the Petition via its Grounds of Opposition dated 31/10/2019. The grounds are summarized as follows:

- a) **The application is misconceived, frivolous, vexatious and an abuse of the process of the court.**
- b) **The Petitioner is not a legal person capable of suing in its personal capacity and/or suing on behalf of other persons.**
- c) **The Government of Kenya Circular OP/CAB 9/83A dated 4th June, 2019 whose implementation the Petitioner seeks this Honourable Court to stay and or suspend has not been placed before this honourable court.**
- d) **The Petitioner/Applicant seeks orders staying and/or suspending the directive of the Head of Public Service without affording the Head of Public Service an opportunity to be heard contrary to the principles of natural justice.**
- e) **The Petitioner/Applicant has failed to state with clarity how the Circular issued by the Head of Public Service in exercise of Executive Authority in accordance with Article 129 of the Constitution Referenced OP/CAB 9/83A and dated 4th June, 2019 violates and/or threatens to violate any right.**

The Rejoinder

29. In response to the 3rd Respondent's Grounds of Opposition, the Petitioner vide Supplementary Affidavit sworn on the 20/11/2019 by **Mohamed Bagajo Duba** avers that it is an association registered under the Societies Act, Cap 108 with almost five thousand bona fide and paid up members and by virtue of being a professional body, it plays a crucial role in promoting the advancement and diffusion of knowledge regarding hygiene, sanitary science and all matters pertaining to environmental health and thus have *locus standi* to institute these proceedings and that the Attorney General is mandated under Article 156 of the Constitution to represent the National Government in Court proceedings to which the National Government is a party.

30. In response to averments that the 1st Respondent is not a necessary party in these proceedings, the Petitioner avers that the 1st Respondent has been granted a lead agency role and that of the issuance of enriched Certificate of Conformities which are interpreted to mean that they can overrule the statutory mandate granted to the Port Health Officers under the law, hence the 1st Respondent is a necessary party.

31. The Petitioner avers that it is inconsequential whether the controversial ginger mentioned herein was destined for Kenyan market or not. The point of consideration should be whether or not it was safe for human consumption. Further, the Petitioner avers that the releasing of the controversial ginger notwithstanding the fact that it had not given it a clean bill of health is not in tandem with the ultimate goal of protecting the consumers of that product whether destined for the Kenyan consumer or not.

Submissions

32. The Petition was argued by way of written Submissions.

33. **Mr. Onyango** Learned Counsel for the Petitioner submitted that the circular and the 2nd Respondent's directive referenced OP/CAB9/83A create a scenario whereby Port Health Officers situated at the points of entry are curtailed from effectively carrying out their mandated functions as per the Public Health Act, as well as the Food, Drugs and Chemical Substance Act yet the functions played by the Public Health Officers at points of entry are very crucial in ensuring that any food that enters through the points of entry are not injurious to the intended consumers. On the issue of the 1st Respondent being placed as a Lead Agency, **Mr. Onyango** submitted that the role of the 1st Respondent is standardization as provided under Section 4 of the Standards Act, yet the Port Health Officers are required to seek permission from it in discharging their statutory mandate, with the result that the 1st Respondent has even gone ahead to overrule the mandate of the Port Health Officers. Counsel cited **Association of Kenya Medical Laboratory Scientific Officers vs. Ministry of Health & another [2019] eKLR** where the Court held that under Articles 43 and 47 consumers have a right to goods and services of reasonable quality and information.

34. Counsel submitted that the directive by the 2nd Respondent is contra-Statute as the main mandate of KRA is the collection of taxes while the 1st Respondent's mandate is promotion of the standardization and specification of commodities. The circular and the directive by the 2nd Respondent are not legislations and should not override express statutory provisions under the Public Health Act as well as the Food, Drugs and Chemical Substances Act.

35. **Mr. Simiyu** Learned Counsel for the 1st Respondent submitted that the Petition does not disclose a reasonable cause of action because the circular was issued by the Head of Public service on behalf of the presidency and on the other hand the directive being challenged was issued by the 2nd Respondent and none of the orders sought are directed at the 1st Respondent.

36. On infringement of the Petitioner Constitutional rights, **Mr. Simiyu** submitted that the circular did not take away and or interfere with the statutory mandate of any entity operating at the Ports of entry including members of the Petitioner and that the 1st Respondent being named the lead agency is about working in harmony through coordinating inspection of goods at the country of origin and issuance of enriched certificate of conformity in a much more efficient manner so as to shorten the process and bring down the costs to the benefit of consumers.

37. On the question of alleged rotten ginger, Counsel submitted that the 1st Respondent's mandate is drawn from Legal Notice 127 of 2018 dated 19th June 2018 which exempts raw materials from PVOC. Further, Counsel submitted that Newspaper cuttings cannot be used to anchor the Petition.

38. **Mr. Simiyu** submitted that the Petitioner is guilty of material non-disclosure and lack of good faith, for failure to disclose that its members have not been stopped from doing their work, and that they have 1st level entry and access to vessels calling at the Port of entry.

Further, they are supposed to raise any issue through the lead agency for appropriate action to be taken using the accountability form and that there is an online system being used and accessible by all entities, and any issue can be tracked and remedial action issued even before a ship docks.

39. **M/s. Ikegu** Learned Counsel for the 2nd Respondent submitted that the directive issued is well within the confines of the Constitution as Article 232 of the Constitution stipulates that public service entities should strive to make use of economic resources effectively and efficiently. Counsel submitted that the Petitioner is part of the Multi-agency team ensuring that there is no cargo released from the port of Mombasa if it does not conform to the relevant quality and standards.

40. Counsel further submitted that the Petition does not raise a constitutional moment because the Petitioner has not demonstrated that indeed their rights have been violated in any way.

41. **Mr. Makuto** Learned Counsel for the 3rd Respondent relied on their grounds of opposition dated 8/7/2019 and submitted that the Head of Public Service right to a fair hearing is in jeopardy as he has not been included as a party in the Petition yet his directive is being challenged.

Determination

42. I have considered the Petition, the facts in support thereof, the affidavits and Grounds in Opposition thereto, the submissions made in support of the parties' respective cases as well as the authorities relied upon.

43. The following issues arise for determination:

(i) Whether the circular referenced OP/CAB 9/83A is an affront to Article 43(1) and 46(1) of the Constitution.

(ii) Whether the directive from the 2nd Respondent can override the statutory mandate bestowed on Port Health Officers (the Petitioner)?

(iii) What reliefs are available to the Petitioner?

(i) Whether the circular referenced OP/CAB 9/83A is an affront to Article 43(1) and 46(1) of the Constitution

44. It is common ground that the main aim of the contested circular was to bring order at the Ports of entry through proper co-ordination of and harmonization of various intervention measures to reduce the duplication of roles by various Government agencies at the Ports of entry; to increase efficiency and reduce the cost of doing business. The point of disagreement by the Petitioner is that they are being left out in the performance of their statutory mandate to intervene after inspection of food, drugs and other substances imported into the country are found to be unsafe as envisaged under the Public Health Act as well as the Food, Drugs and other Chemical Substances Act. The Petitioners are annoyed that any such intervention can only be through the 1st Respondent, thereby relegating Petitioner's role to that of a bystander.

45. The general rule is that the formulation and execution of policy are mandates firmly within the province of the executive arm of Government, and a court of law may not interfere with these mandates. The Court of Appeal in **Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 Others [2016] eKLR** held as follows:

“With this in mind, the role of the legislature is to make laws and policy and that of the executive is to implement those laws and policies. The role of the judiciary is to interpret the policies and laws as enacted and approved by the legislature and executive. Generally, courts have no role to play in policy formulation; formulation of government policy is a function best suited for the executive and legislature. In *Marbury -vs- Madison-* 5 US. 137 it was stated that:

The province of the court is solely, to decide on the rights of individuals and not to enquire how the executive or executive officers perform duties in which they have discretion.”

46. Similarly, Mumbi Ngugi, J. in **Ndora Stephen vs. Minister for Education & 2 Others, Nairobi High Court Petition No. 464 of 2012** observed as follows:

“the formulation of policy and implementation thereof were within the province of executive. Questions which are in their nature exclusively political should never be adjudicated upon by courts. In the instant case, the trial court directed that State policies and programs on the provision of shelter and access to housing for marginalized groups be presented to the trial court. What would the trial court do with such policies if tabled? Would the court interfere or evaluate the soundness of the policy? A court should not act in vain and issue orders and directions that it cannot implement. In making orders and directions in relation to Article 43 (1) of the Constitution, the provisions of Article 20 (5) (c) of the Constitution must be borne in mind. Article 20 (5) (c) stipulates that the court may not interfere with a decision by a State organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion. We opine that it is advisable for courts to practice self-restraint and discipline in adjudicating government or executive policy issues. This precautionary principle should be exercised before delving and wading into the political arena which is not the province of the courts.”

47. However, an exception to the general rule stated above is found in **William Odhiambo Ramogi & 2 others vs. Attorney General & 6 Others, Mombasa High Court Petition No. 159 of 2018 [2018] eKLR**, where the Five-Judge Bench observed as follows:

“[89].....that there are constitutionally permissible situations where this Court may interfere in the policy decisions of the Government, and particularly if a policy decision is in actual or threatened violation of the fundamental rights guaranteed under the Constitution, or in violation of other provisions of the Constitution. The necessity of vindicating constitutionally secured personal liberties and fundamental freedoms is the principal justification for the anti-majoritarian power that judicial review confers upon the Courts, and we are therefore reluctant to find that a claim of fundamental rights, such as the one presented by the Petitioners is non-justiciable, even though it may concern the political process, or the internal workings of other government branches.”

48. In **DDA vs. Joint Action Committee, Allottee of SFS Flats (2008) 2 SCC 672: AIR 2008 SC 1343**, the Supreme Court of India held as follows in this regard:

“64. An executive order termed as a policy decision is not beyond the pale of judicial review. Whereas the superior courts may not interfere with the nitty-gritty of the policy, or substitute one by the other but it will not be correct to contend that the court shall lay its judicial hands off, when a plea is raised that the impugned decision is a policy decision. Interference therewith on the part of the superior court would not be without jurisdiction as it is subject to judicial review.

65. Broadly, a policy decision is subject to judicial review on the following grounds:

- (a) if it is unconstitutional;**
- (b) if it is dehors the provisions of the Act and the regulations;**
- (c) if the delegatee has acted beyond its power of delegation;**
- (d) if the executive policy is contrary to the statutory or a larger policy.”**

49. The issue is whether the circular the subject matter herein is unconstitutional. The Petitioner has stated that the circular violates Article 43(1) (a) and Article 46(1)(c) of the Constitution and creates a scenario in which Port Health Officers are curtailed from effectively carrying out their statutory mandate as per Sections 60,62,73 of the Public Health Act, Sections 15(c), 68(1)(c) &(2)(a) and Section 30 of the Food, Drugs and Chemical Substance Act.

50. Article 43 provides:

“(1) Every person has the right—

- (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;**

Article 46 provides:

(1) Consumers have the right—

- (a) ...**
- (b) ...**
- (c) to the protection of their health, safety, and economic interests;”**

51. I have looked at the circular referenced OP/CAB/83A. I note that the same is aimed at harmonization of various intervention measures at the port of entry in order to reduce the duplication of roles, the cost of doing business and increase efficiency of the Government entities operating at the Ports of Entry. The said agencies have been grouped into 5 categories with the Petitioner’s Members being grouped in Category **One** that comprised of Port Health, Immigration, Kenya Revenue Authority, Customs Department, Port Facility Security Office, (PFSO), Kenya Ports Authority and whose mandate would be to have full access to vessels and shall be the only Agencies whose representatives will be allowed to board docked vessels at the port.

52. Under Section 15(c) of the Health Act, the National Government has the following duties to the people of Kenya

- c) ensure the implementation of rights to health specified in the Bill of Rights and more particularly the progressive realization of the right of all to the highest attainable standard of health including reproductive health care and the right to emergency treatment;**

53. On Public and environmental health, Section 68 of the Health Act provides:

“(1) The National health system shall devise and implement measures to promote health and to counter influences having an adverse effect on the health of the people including—

- (a)**

(b)

(c) the promotion of supply of safe foodstuffs of sufficient quality in adequate quantities and the promotion of nutritional knowledge at all population levels;

(2) The national health system shall ensure that measures for managing environmental risk factors to curtail occurrence and distribution of diseases are put in place and implemented. In particular, such measures shall target—

(a) the reduction of disease burden arising from poor environmental hygiene, sanitation, occupational exposure and environmental pollution;”

54. Similarly, under Section 73 of the Public Health Act, the Minister may make rules—

(a) prescribing the powers and duties of port health officers and the procedure to be followed in the examination of, and the granting of pratique to, vessels, and requiring every master of a vessel on arrival at any port or place in Kenya to furnish a declaration of health in respect of the existence or suspected existence on board, in any person, animal or thing, of any infectious disease, or any other disease which the Minister may notify in the *Gazette*, prescribing the form of declaration, and empowering any port health officer or other duly authorized officer to require the master of any vessel to verify upon oath the statements in the declaration and to administer the necessary oaths; such rules may prescribe modified requirements or procedure in respect of vessels arriving at a second or subsequent port of call in Kenya on the same voyage;

55. Going by the said circular it is my view that the National Government through its State Agencies has a duty to ensure that when exercising its mandate under the statutes, the said mandate is not in violation of Article 43(1) and Article 46(1) of the Constitution when it comes to goods that are for human consumption and affect the environment. In exercising its statutory mandate, the National Government is supposed to ensure that its action are not unconstitutional, contra-Statute and/or *ultra vires*.

56. The Petitioner herein has not demonstrated how the Circular by the Head of Public Service is unconstitutional, Contra-Statute, or *ultra-vires*, and how the said circular impedes their rights and the rights of consumers guaranteed under Statute. It is not clear how the circular is in violation of Articles 43(1) and 46(1) of the Constitution. The fact that the 2nd Respondent has been given the lead agency status, in my view, has not in any way impeded on the statutory mandate of the Port Health Officers, since the aim of appointing the 2nd Respondent as a lead agency was for proper co-ordination of, and harmonization of various intervention measures to reduce the duplication of roles by various Government agencies at the Ports of entry; to increase efficiency and reduce the cost of doing business. If a Port Health Officer has suspicion that a particular consignment is questionable then they have the power to board any vessel for the purpose of inspection and raise the concerns through an accountability form on their online system regardless of whether an enhanced certificate of conformity was issued or not.

57. Furthermore, it is not illegal for the Head of Public Service to constitute a multi-agency team in order to reduce the cost of business and enhance efficiency at the port. See **Phoenix Global Kenya Limited vs. Kenya Revenue Authority & 6 others [2019] eKLR** where Ogola J stated as follows:

“It is the finding of this court that the various Ministries whose functions overlap can constitute a team to coordinate their function especially in urgent critical situations where the life of a nation is concerned. The constitution of the Multi - Agency Team was not frivolous. It arose out of a grave national concern that contraband and poisonous goods were entering the country and this had multiple negative implication in the life of the nation. No responsible government would be expected to take an askance or a care free attitude when such grave issues arise.”

(ii) Whether the directive from the 2nd Respondent can override the statutory mandate bestowed on Port Health Officers.

58. I have looked at the directive issued by the 2nd Respondent vide letter dated 8/7/2019. The same implies that the Petitioner’s members would be allowed to exercise their mandate. However, the Port Health Officers were not allowed to stop any cargo released by KRA or KEBS and in case of any intervention where necessary, the same will be made to the Lead Agency (KPA) through the 1st Respondent.

59. On Powers of Port Health Officer Section 60(1) of the Public Health Act provides:

“(1) The port health officer may at any time board any vessel and inspect any part thereof or anything therein, and may medically examine any person on board and require any such person to answer any question for the purpose of ascertaining whether or not infection exists or has recently existed on board.”

60. On the granting of restricted or conditional pratique to and quarantining of vessels, Section 62 of the Public Health Act provides:

“62. In the case of any vessel having, or suspected on reasonable grounds of having, on board in any person, animal or thing the infection of any infectious disease, the port health officer, acting in accordance with instructions and with rules made under this Part, may grant or continue pratique to such vessel subject to such conditions or restrictions as may be deemed necessary, or, if he deems it necessary so to do, may withhold or withdraw pratique and place the vessel in quarantine:

Provided that, when pratique restrictions are imposed or any vessel is placed in quarantine or when any person on board of or landed from any vessel is compulsorily detained, isolated or removed, the port health officer shall immediately report, by

telegraph or other expeditious means, the action taken by him and the reasons therefor to the Director of Medical Services and the nearest medical officer of health.”

61. On Powers of authorized officers, Section 30 of the Food, Drugs and Chemical Substances provides as follows:

“(1) An authorised officer may, at any hour reasonable for the proper performance of his duty—

(a) enter any premises where he believes any article to which this Act or any regulations made hereunder apply is prepared, preserved, packaged, stored or conveyed, examine any such article and take samples thereof, and examine anything that he believes is used or capable of being used for such preparation, preservation, packaging or storing or conveying;

(b) stop or search or detain any aircraft, ship or vehicle in which he believes that any article subject to the provisions of this Act is being conveyed and to examine any such article and take samples thereof for the purposes of this Act;

(c) open and examine any receptacle or package which he believes contains any article to which this Act or any regulations made thereunder apply;

(d) examine any books, documents, or other records found in any place mentioned in paragraph (a) of subsection (1) of this section that he believes contain any information relevant to the enforcement of this Act with respect to any article to which this Act or any regulations made hereunder apply and make copies thereof or take extracts therefrom;

(e) seize and detain for such time as may be necessary any article by means of or in relation to which he believes any provision of this Act or any regulations made thereunder has been contravened.”

62. The above are the statutory provisions that grant the member of the Petitioner their mandate. The extent of that mandate is clear. It is not limited in any way. Therefore, this Court finds and holds that the directive by the 2nd Respondent restricting the Port Health Officers from stopping any cargo released by KRA or by KEBS is Contra-Statute as there is no statutory provisions that has been relied on that limits the mandate of the Port Health Officers. Therefore, the 2nd Respondent’s directive goes against the guidelines provided in the Circular and in particular, Clause 7, which is, headed **“Agency Mandate”** and which provides that:

“For the avoidance of doubt, it is hereby clarified that all Government Agencies with mandate over international trade operations shall continue to remain accountable for the discharge of their respective mandates in accordance with the existing legal frameworks, but subject to adherence with the guidelines provided in this circular.”

63. From the foregoing, it is the finding hereof that the purpose and intent of the circular in creating the Multi-Agencies at the port of entry was to limit the duplication of roles and to increase efficiency. A lead agency was appointed for proper coordination and harmonization of the various intervention measures. The circular was never meant to take away the mandate of any Agency. Consequently, the 2nd Respondent’s directive issued on the 8/7/2019 restricting the mandate of the Port Health Officers is contra-Statute and *ultra-vires* and the same is hereby quashed.

64. It is the finding of this Court that the main prayer of the Petition concerning the Circular referenced OP/CAB/9/83A dated 4/6/2019 has not been proved, and to that extent, the Petition fails.

65. However, the Petitioner has proved that the letter by the 2nd Respondent referenced GMO/2/3 grounded on the said Circular was Contra-Statute and is hereby quashed.

66. In the upshot, the Petition succeeds and fails as stated above, with the following orders being granted.

a) A declaration be and is hereby issued that the 2nd Respondent’s directive referenced GMO/2/3 that is grounded on the Government of Kenya circular OP/CAB/9/83A contravenes Articles 43(1) and Article 46(1) of the Constitution of Kenya as it limits Port Health Officers from carrying out their functions as envisaged under the Public Health Act, Cap 244, the Food Drugs and Chemical Substances Act as well as the International Health Regulations.

b) An Order of certiorari do issue to bring into this Court and quash the 2nd Respondent’s directive referenced GMO/2/3 that is grounded on the Government of Kenya circular OP/CAB/9/83A as it contravenes Article 43(1) and Article 46(1) of the Constitution of Kenya as it limits Port Health Officers from carrying out their functions as envisaged under the Public Health Act, the Food, Drugs and Chemical Substances Act as well as the International Health Regulations.

c) Parties shall carry their own costs of the Petition.

Orders accordingly

Dated, Signed and Delivered at Mombasa this 11th day of June, 2020.

E.K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Gikandi holding brief Odhiambo for Petitioner

Mr. Makuto for Hon. Attorney General

Mr. Simiyu for 1st Respondent

Mr. Makuto holding brief Ms. Ikegu for 2nd Respondent

Mr. Kaunda Court Assistant