



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 31 OF 2015

JULIUS MUTIGA.....1ST PETITIONER
ROSE NJOROGE.....2ND PETITIONER
SUSAN WANJIRU.....3RD PETITIONER
JAMES WAMBUGU.....4TH PETITIONER
JOSEPH NJEGA.....5TH PETITIONER
AUGUSTUS VUNDI.....6TH PETITIONER
EDITH WAMBUI.....7TH PETITIONER
SIMON KABUU.....8TH PETITIONER
GIDEON KINYUA MWAL.....9TH PETITIONER
DANIEL KINGO'RI.....10TH PETITIONER
BERNARD KARANJA.....11TH PETITIONER
DANIEL WACHIRA.....12TH PETITIONER
JOSEPH GACHOMBA.....13TH PETITIONER
SAMUEL MUIRURI.....14TH PETITIONER
JOHN WAWERU.....15TH PETITIONER
JOHN KIGOGO.....16TH PETITIONER
MARY NJOKI PAUL.....17TH PETITIONER

VERSUS

CS MINISTRY OF AGRICULTURE.....1ST RESPONDENT
THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT
HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. Through the petition dated 27th January, 2015 Julius Mutiga, Rose Njoroge, Susan Wanjiku, James Wambugu, Joseph Njega, Augustus Vundi, Edith Wambui, Simon Kabuu, Gideon Kinyua Mwai, Daniel King’ori, Bernard Karanja, Daniel Wachira, Joseph Gachomba, Samuel Muiruri, John Waweru, John Kigogo and Mary Njoki Paul pray for orders as follows:

- a) A declaration that the directive to pack potatoes in 50 kg bags was in violation of the petitioners’ constitutional rights.**
- b) An order for the suspension of the directive.**
- c) An order stopping the police from arresting and prosecuting the petitioners on the basis of 50 kg bags.**
- d) Cost of this petition be borne by the respondents.**

2. The Cabinet Secretary, Ministry of Agriculture is the 1st Respondent, the Inspector General of Police is the 2nd Respondent and the Attorney General is the 3rd Respondent.

3. Nyandarua County Government, Uasin Gishu County Government and the Agriculture and Food Authority subsequently joined the proceedings as the respective 1st, 2nd and 3rd interested parties.

4. The brief facts of the case as disclosed in the petitioners’ pleadings disclose that sometime in 2014 the 1st Respondent gave a directive to farmers to pack potatoes in sacks of 50 kilograms only. It is the petitioners case that the directive was issue without consultation of the farmers. The petitioners averred that the directive had caused them suffering and losses stemming from harassment by county governments and the police. The petitioners deposed that the manner in which the directive was issued was unconstitutional.

5. The respondents opposed the petition through the replying affidavit sworn on 20th February, 2015 by Sicily Kariuki the then Principal Secretary of the Ministry of Agriculture. She averred that the directive to package potatoes in bags not exceeding 50 kilograms was informed by Section 42 of the Agriculture Fisheries and Food Authority Act of 2013.

6. The Principal Secretary also averred that the impugned directive was also in line with the International Labour Organization’s Maximum Weight Convention No.127 which stipulated that the permissible weight which may be transported manually by one adult should not be more than fifty-five (55) kilograms. Further, that the said Convention which came into force in Kenya on 10th March, 1970 also prohibits the manual transportation of a load which by reason of its weight is likely to jeopardize the health and safety of the transporter.

7. It was further averred that the petitioners’ claim that traders were refusing to purchase potatoes in the smaller sacks is farfetched as the farmers have the liberty to adjust prices in line with the size of the package. The Principal Secretary deposed that the directive was also beneficial to the farmers who were being exploited by middlemen who often repackaged the overloaded bags into smaller bags for their own benefit and not for the benefit of the producers.

8. The Principal Secretary additionally averred that Section 42 of the Agriculture, Fisheries and Food Authority Act, as well as the directive of the 1st Respondent, could not be deemed unfair or unconstitutional as they were based on the law and had a rational connection to a legitimate purpose. The Court was therefore urged to dismiss the petition.

9. The advocates for the parties thereafter filed and exchanged submissions on the petition. I do not deem it necessary to refer to those submissions and the reason shall shortly become apparent.

10. The Agriculture and Food Authority (“AFA”) was by consent of the parties allowed to join these proceedings on 28th October, 2019 as the 3rd Interested Party. The AFA opposed the petition through an affidavit sworn on 6th February, 2020 by its Interim Head of the Food Crops Directorate, Leonard Kubok.

11. The AFA’s case is that the impugned directive had been replaced by the Crops (Irish Potato) Regulations, 2019 and the substratum of this petition had therefore been overtaken by events. Further, that the Crops (Irish Potato) Regulations, 2019 which came into force in May, 2019 had been challenged in Nairobi H.C. Judicial Review No. 250 of 2019, Republic v The Ministry of Agriculture, Fisheries and Irrigation & 2 others ex-parte Susan Wanjiku & 80 others and the Court had declined to stop the implementation of the Regulations.

12. Turning to the substance of the petition, the AFA deposed that the impugned directive was issued to curb exploitation of farmers by middlemen who did not adhere to the measurement requirements leading to huge price differences of up to 1000% as a result of usage of extended bags of 130–260 kilograms.

13. It is additionally averred that the prescribed 50 kg maximum weight was informed by the provisions of Section 42 of the Agriculture, Fisheries and Food Authority Act, 2013 which required that the unit of measurement of the weight of all produce subject to regulation by the Authority shall be the kilogramme and each single package shall not exceed a weight of fifty kilogrammes.

14. The AFA’s case is that the impugned directive was further guided by international best practice including the International Labour Organization’s Convention No.128 of 1967 which recommended a maximum weight of 50 kilograms for crop packaging and which was

adopted by Kenya in 2012 through Kenya Bureau of Standards/East African Standard KE EAS 775:2012. Further, that the Convention in any case form part of the laws of Kenya by virtue of Article 2(5) & (6) of the Constitution.

15. The 3rd Interested Party's contention that the petition has been overtaken by events was never responded to by the petitioners.

16. I have perused the Crops (Irish Potato) Regulations, 2019 and find that regulation 19(1) & (2) provides that:

19. (1) The unit of measurement of all irish potatoes shall be the kilogram.

(2) The maximum weight for each single unit of package of irish potatoes shall be 50 kilograms.

17. These provisions supersede the impugned directive issued by the 1st Respondent in 2014. The 3rd Interested Party is therefore correct that this petition has been overtaken by events and is no longer fit for determination. The impugned directive is no longer in existence and determining its constitutionality has become moot.

18. Courts should not determine moot matters as was held by the Court of Appeal in **Ernie Campbell & Company Limited v National Housing Corporation [2019] eKLR** as follows:

“Further, we note that the tender was re-advertised on 29th November, 2016 and the appellant submitted its bid. On 22nd February, 2017, the tender was awarded to M/s Endeavours Construction Company Limited. The contract having been awarded to M/s Endeavours Construction Company Limited, the prayers sought in the applicant's notice of motion of 5th February, 2016 are clearly overtaken by events.

In Tanzania Roads Agency vrs. Kondan Singh Construction Limited & Another [2013] eKLR this Court stated:

“... since this appeal was to be determined either way, by either dismissing it or allowing it, and since the appeal for all intents and purposes has been overtaken by events, the best result that commends to us in this appeal is to have it dismissed”

Similar sentiments were expressed in Alcon International Limited vs. Standard Chartered Bank of Uganda & 2 others, Appeal No. 3 of 2013, wherein the East African Court of Justice at Arusha stated:

“The abstract exposition of the law is the province of academics and not Courts of Justice and hence the use of the adjective “academic” to describe such endeavours”.

In the Ugandan case of the Environment Action Network Ltd vrs. Joseph Eryau, Civil Application No. 98 of 2005, the Court of Appeal stated:

“The reliefs which the respondent is seeking on appeal cannot be granted because there is no live dispute between the parties. Courts do not decide cases for academic purposes because court orders must have principal effect and must be capable of enforcement. The determination of Miscellaneous No. 39/01 by the High Court drove the Respondent into a limbo of legal mootness.”

In our view, to grant the appellant the orders sought will be futile and tantamount to an academic exercise.”

19. From the cited authority it therefore follows that the petition should stand dismissed at this stage. I will, nevertheless, point to the petitioners the single reason why their petition should have failed anyway. Section 42 of the Agriculture, Fisheries and Food Authority Act, 2013 being the law that was in force at the time the 1st Respondent issued the impugned directive provided that:

The unit measurement of the weight of all produce subject to regulation by the Authority shall be the kilogramme and each single package shall not exceed a weight of fifty kilogrammes.

20. The 1st Respondent was therefore simply restating the law in issuing the impugned directive. Nowhere in their pleadings have the petitioners challenged the constitutionality of Section 42 of the Agriculture, Fisheries and Food Authority Act, 2013. The impugned directive was therefore issued in accordance with a valid law.

21. For the stated reasons, I find the instant petition without merit. The same is dismissed. The parties are directed to meet their own costs of the proceedings.

Dated, signed and delivered virtually at Nairobi this 17th day of December, 2020.

W. Korir,

Judge of the High Court