



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CONSTITUTIONAL PETITION NO. 4 OF 2018

IN THE MATTER OF THE CONTRAVENTION, AND FURTHER THREATENED CONTRAVENTION OF ARTICLES 10,22, 27, 40, 43 AND 159 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE CROPS ACT NO. 16 OF 2013 LAWS OF KENYA

AND

IN THE MATTER OF: THE INTERPRETATION OF SECTION 43, OF THE AGRICULTURE, FISHERIES AND FOOD AUTHORITY, ACT NO.13 OF 2013 WITH REGARDS TO INTERPRETATION AND PROHIBITION OF EXPORT OF RAW "MACADAMIA"

AND

IN THE MATTER: OF THE KENYA REVENUE AUTHORITY ACT NO. 2 OF 1995 LAWS OF KENYA

AND

IN THE MATTER OF: A CONSTITUTIONAL PETITION

BY

RUTH WANJA NYAGA.....1ST PETITIONER

MICHAEL MWENDWA.....2ND PETITIONER

VERSUS

THE CABINET SECRETARY, MINISTRY OF AGRICULTURE,

LIVESTOCK AND FISHERIES.....1ST RESPONDENT

AGRICULTRE AND FOOD SECURITY AUTHORITY.....2ND RESPONDENT

KENYA REVENUE AUTHORITY.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

AND

COUNTY GOVERNMENT OF THARAKA NITHI.....1ST INTERESTED PARTY

NUT PROCESSING ASSOCIATIONS.....2ND INTERESTED PARTY

R U L I N G

1. Before this court is a Notice of Motion dated 19th September 2018 brought by Ruth Wanja Nyaga and Michael Mwenda (the 1st and 2nd Applicants/ Petitioners respectively in this petition). The Applicants have invoked **Article 10, 22, 27, 40, 47, and 159** of the **Constitution of Kenya** and **Rules 3, 4, 5(a), 8(1), 9(1), 10, 21 and 23** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and inherent power of this court is seeking the following prayers namely:-

1. This motion be certified urgent (prayer spent).

2. That pending the hearing and determination of this motion, a conservatory order do issue by way of an injunction to forthwith restrain the Respondents by themselves, their officials, servants, assigns agents or any person whomsoever, acting under or at their behest, from harassing arresting, detaining, or in any manner howsoever interfering with the petitioners business of buying, selling processing and exporting Macadamia with or without shells as per their clients demand.

3. That pending the hearing and determination of the petition herein, a conservatory order do issue by way of an injunction to forthwith restrain the Respondents by themselves, their officials, servants, assigns, agents or any person whomsoever acting under or at their behest from harassing, arresting, detaining or in any manner howsoever interfering with the petitioners' business of buying, selling, processing and exporting Macadamia with or without shell as per their clients demand.

4. That pending the hearing and determination of this motion, a temporary order do issue directing that the petitioners be allowed to export their Macadamia goods with or without shell which are in the process of exportation.

5. Pending the hearing and determination of the petition herein a temporary order do issue directing that the Petitioners be allowed to export their Macadamia goods with or without shell which are in the process of exportation.

6. That the Director General of the Kenya Revenue Authority and the Director Kenya Ports Authority be directed to supervise and ensure compliance of this order.

7. That this Honourable Court do issue such directions on the hearing of the petition filed herein or on the conservatory orders sought.

8. That costs be provided.

2. This application is premised on the following grounds paraphrased as follows:-

a) That the petitioners are engaged in lawful business of farming and selling macadamia both within and outside Kenya.

b) That the Petitioners have been subjected to punitive regulations by the 2nd Respondent whose effect is that they have to sell their Macadamia to local brokers who have monopolized the European Market who buy their Macadamia at low prices of Kshs.150 per Kilo.

c) That as a result the Petitioners have been forced to seek alternative markets which they have found in China where the same Macadamia is purchased at Kshs.350/- per Kilo.

d) That the Petitioners have entered into lawful contracts with buyers from China who they believe offers better opportunity as opposed to local buyers whose buying prices would consign them and Macadamia farmers to poverty.

e) That the Petitioners have been unable to supply Macadamia to their Chinese buyers as a consequence of the provisions of Section 43 of The Agriculture and Food Authority Act No. 13 of 2013 (hereinafter to be referred to as AFA Act) which provides that they can only export with the authority of the Cabinet Secretary which authority cannot issue without authority of parliament. The Petitioners assert that this cannot be achieved as they have no sway in parliament and hence the need for a Constitutional intervention.

f) That the cited impugned provision above does not promote the values of human dignity, equality, equity and freedom and in their view, it has no place in the current constitutional dispensation. The Petitioners are apprehensive of making any progress in parliament in light of accusations of bribery in that house.

g) That they have a different view on the definition of the word "raw" in that Oxford Dictionary defines "raw" as something in its natural state and that mature Macadamia in its natural state has two shells with the outer shell being green in colour while the inner shell is brownish in colour. The Petitioners citing Black's Law Dictionary have described "raw material" as a basic substance found in their natural, modified or semi processed state used as an input to a production process for subsequent modification or transformation into a finished good.

h) That the Petitioners do not seek to export raw Macadamia to their Chinese buyers but machine dried Macadamia with shell having been harvested, and processed it by removing the green shell then drying using machines comprising of drying bins, boilers, electricity and charcoal which process takes up to 14 days and that dried Macadamia in a finished product that can be consumed in that state.

i) That the Petitioners have no other recourse other than the legal redress herein and that unless this Honourable court intervenes as sought herein, the Petitioners will suffer irreparable loss.

j) That pursuant to Article 2(6) of the Constitution and Article 19 & 20 of the said Constitution, the Petitioners have a right to protection under the Universal Declaration of Human Rights and that there are threats to the breach of those rights.

k) That unlike coffee, pyrethrum, barley, wheat etc which undergo a manufacturing process, Macadamia like Avocado and French beans are preserved once drying process is completed and can be consumed in that state and/or shipped to the international markets without compromising natural taste and state.

l) That given the provision of Section 43 of the AFA Act in their view does not ban or prohibit exporting of mature, processed and dried Macadamia with or without shell, they should not be hindered.

m) That the 1st and 2nd Respondent are bent on enforcing the impugned law and Regulations prohibiting export of Macadamia with shell which in their view only serves to safeguard the interest of a few people in order to avoid competition to the detriment of the farmers and agricultural sector as a whole negating the values that underlie an open and democratic society based on human dignity, equality, equity and freedom. The Petitioners assert that in an open society such as Kenya, Macadamia trade should be guided by the doctrine of free business franchise where the farmers are entitled to sell their farm produce to the buyers of their choice for better returns.

n) That the impugned law is born out of malice, ill will and selfish desire by a few elites who seek to engage in unfair business practice by locking out competition from the farmers comprising of ordinary Wanjikus who are seeking to better their lives by selling Macadamia with shell to the Chinese buyers who offer better returns and that the impugned legislation contravenes the Petitioner's rights under Article 43 of the Constitution.

o) That the acts complained of have the potential of depriving them of their means of livelihood and they will be left without recourse to the protection of the law unless this court intervenes.

p) That this court is seized with the jurisdiction to deal with and adjudicate any issue arising from interpretation of the law infringement, threatened infringement and abridgement of Petitioners rights as outlined in this application.

3. This application is supported by the affidavit of Ruth Wanja Nyaga (the 1st Petitioner) sworn on 19th September 2018. She depones that she is aware of a ban on raw Macadamia effected vide a ministerial order vide in Legal Notice No.109 of 2009 dated 16th June, 2019 and which later culminated into law (Agriculture and Food Authority Act No. 13 of 2013).

4. The Petitioners have asserted that they have been subjected to punitive regulations by the 2nd Respondent (Agriculture and Food Authority) whose effect have in their view forced them to sell their Macadamia to local brokers who have monopolized European Market and that their monopoly has seen the prices of Macadamia fell to Kshs.150/- per Kilogram.

5. The Petitioners have faulted the regulations which they say include directions as to when to harvest and sell mature Macadamia which lead to waste and loss because they contend that there are Macadamia which mature before specified dates.

6. The Petitioners term the regulations as unreasonable as in their view then inhibit production and that in the reason they sought alternative markets in China where they claim they got buyers with whom they have entered into contract agreements which they have exhibited in the affidavit in support of this application.

7. The 1st applicant has further deposed that they should be allowed free trade guided by the doctrine free business franchise where the farmers are entitled to sell their ram produce to the buyers of their choice for better returns from their investment. They assert that selling Macadamia with shell will earn them better returns as opposed to selling Macadamia without shell and that the law prohibiting the cause in their view, is thus oppressive, capricious and contravenes their rights under **Article 43** of the **Constitution**. They have further claimed that in countries such as Malawi, Zimbabwe, Australia, South Africa and others who export Macadamia nut with shell, the prices fetched in Kshs.500/- per Kilo as opposed to what a Kenyan farmer gets which is Kshs.150/- per Kilo.

8. The 1st Petitioner further depones that she is aware that every part of the Macadamia has economic value as outer husk is combined with other organic matter to make an excellent mulch around young plants and that the shell is also grounded to a fine powder which makes resulting granules extremely hard that are used as an industrial abrasive and also used in cosmetic industry.

9. The 1st Petitioners further deponed that Macadamia nuts are also used to make high quality oil which is of superior quality than other cooking oils hence the value.

10. The applicants felt that the impugned law and regulations are in breach of their legitimate expectation that the laws and Regulations so formulated in furtherance of objects of the Crops Act and the Rights enshrined in the Bill of Rights will be consistent with the Constitution.

11. The Petitioners through the 1st Petitioner in a further affidavit sworn on 14th January, 2019 asserts that they sought for export licence but the same was declined on account of **Section 43** of the AFA Act. She avers that the denial of license was unlawful, malicious and without a lawful reason.

12. The applicants have termed **Section 43** of **AFA** as ambiguous as it does not in their view define what raw Macadamia is and therefore cannot be relied upon to prohibit the Petitioners as the statute in their view does not differentiate between inshell Macadamia and Macadamia kernels.

13. The Petitioners have alleged that while others have been issued with export licence to export Macadamia, they have been discriminated and denied the license.
14. They have termed the denial of licence as a violation of their right to enjoyment of property under **Article 40(2)(a) and (b)** of the **Constitution** and that claim that they have been exposed to criminal liability by dint of **Section 16(1)** of the **Crops Act**. They claim that their Chinese partners have either been blocked from direct trade and those who have tried have been arrested and extradited to China.
15. In their written submissions done through counsel, the applicants have submitted that Macadamia was brought within ambit of a scheduled crop via gazette notice No. 1 of 2015 and that the Act does not define what **“raw Macadamia”** constitute and that the definition is derived from KEBS which define raw macadamia as that which has not been subjected to any heat treatment to dry it.
16. The applicants have further submitted that the ambiguity of **Section 43** of **AFA Act** led to the unilateral interpretation by the Respondents which they claim has affected their fundamental rights under Article 19, 24, 40 and 43 of the Constitution.
17. The applicants contend that they stand to lose Macadamia nuts worth Kshs.15million which will result in economic hardships unless the reliefs sought here are granted. In addition to this, the applicants have insisted that they are likely to lose the market they had secured and contend that the loss of the market cannot be quantified. They have submitted that the Respondents will not be prejudiced in the event the application is allowed as they will still go through the quality control. They have cited the decision in **Gitarau Peter Munya -vs- Dickson Mwenda Kithinji and 2 Others [2014] eKLR** to back up their contention.
18. On balance of convenience, the Petitioners have submitted that they stand to lose more if the orders sought herein are not granted as damages will not be adequate to compensate for loss of market. They have also contended that they are likely to be charged and arrested under **Section 16(4)** of the **Crops Act** and to forestall such an eventuality they plead that conservatory orders be issued.
19. The Respondents have opposed this application. The 1st Respondent (Cabinet Secretary Ministry of Agriculture, Livestock and Fisheries) has through a Replying Affidavit sworn on 17th October, 2018 by one Ann Onyango has deposed that the Petitioners are engaged in unlawful business as they are not registered and licensed as dealers of a scheduled crop as required under **Sections 16 and 19** of the **Crops Act**. According to the 1st Respondent Macadamia is regulated under Horticultural Crops Development Authority Order 2011 by the Agriculture and Food Authority and that the regulations require that dealers must register for traceability purposes and sign a contract with a producer which has to be registered with the regulatory body.
20. The 1st Respondent has deposed that the Petitioners have not proved that the Chinese buyers are offering better prices and that no evidence have been tabled to show what other markets in other jurisdictions offer.
21. The 1st Respondent has denied that the provisions of **Section 43** of the **AFA Act** is punitive and has cited two decisions in Nairobi H.C J.R No. 368 of 2010 (**Republic –vs- Minister of Agriculture and Another Exparte Equatorial Nut Processes Ltd and 3 Others**) and **J.R No. 78 of 2012 (Republic –vs- Minister of Agriculture Commission of Custom and Excise and African International Co.Ltd)** where it claims that **Section 43** of the cited Act was dealt with and found not to be punitive as alleged.
22. The 1st Respondent contends that some individuals have instead of complying with the law have been trying to smuggle and export unprocessed Macadamia to china and views this petition as a furtherance of that intention. The 1st Respondent further contends that the Petitioners are in contravention of **Sections 18 &19** of the **Crops Act** by engaging in processing of macadamia without registration or license.
23. The 1st Respondent further deposes that the Petitioners are not registered as Macadamia dealers nor licensed as Macadamia processor and has gone ahead to exhibit a list of the registered dealers for the year 2017/2018.
24. The 1st Respondent has insisted that by dint of **Section 43** of **AFA Act 2013** that there is a ban of export of raw Macadamia except with written authority of the Cabinet Secretary and that the Petitioners have neglected to seek for that authority before filing this petition.
25. The 1st Respondent has further denied that processing Macadamia involves removing of green husk and drying, asserting that further processing is required which in their view includes cracking of the hard shell to convert the nut into an edible product.
26. The 1st Respondent contends that in addition to the ban on export of raw Macadamia, the Government has through strategies and policies encouraged value addition to support manufacturing sector, create employment as well as improve incomes. The 1st Respondent has further insisted that the Petitioners have not provided evidence that they are purchasing Macadamia at better prices than licensed dealers and how the ban on export of raw Macadamia is prejudicial to their constitutional rights.
27. The 1st Respondent has denied the claims by the Petitioners that the provisions of **Section 43** is ambiguous insisting that KEBS has developed standards which provide for definition and standards of processed Macadamia nuts and that those standards are meant to enhance good agricultural practices and ensure quality of Macadamia nuts.
28. The 2nd Respondent (Agriculture and Food Authority) on its part has similarly opposed this application relying on the Replying Affidavit sworn on 4th December, 2018 by one Richard Ndegwa, who has deposed that Macadamia is a scheduled crop pursuant to a Gazette Notice No. (3 VOL CXVII) No. 1 of 2015 and that scheduled crops as per the Crops Act were specified in order to be monitored and regulated due to their economic impact on the country.

29. The 2nd Respondent has given the process chain, that Macadamia undergoes stating that the nut comes from a tree in a fruit state which is either in green or greyish cover called husk. He states that the husk is removed by farmers resulting in a brownish in-shell raw nut called Macadamia nut which is then sold to local processors for processing. He further states that the in-shell raw nut is then processed for export by sorting, washing, drying and cracking of the shell to extract the kernel which is allowed for export. He contends that any machine drying of the nut with the shell amounts to raw Macadamia.

30. The 2nd Respondent has justified the basis of the ban of raw macadamia asserting that the ban has created employment opportunities with over 20,000 jobs created apart from contribution of foreign exchange.

31. The 2nd Respondent has further contended that it registers Macadamia dealers in Kenya and that the Petitioners are not registered and have exposed themselves to punitive measures. It is the contention of the 2nd Respondent that granting the orders sought herein would allow commission of an illegality.

32. The 2nd Respondent have submitted that the petitioners have not demonstrated efforts made to obtain permission from the Cabinet Secretary to export raw nuts and denied the Petitioner's contention that permission originates from Parliament. The 2nd Respondent has cited a similar petition in Embu High Court which was dismissed because the Petitioners had not obeyed the law before seeking its interpretation.

33. The 2nd Respondent has further submitted that the market the Petitioners refer to is not legitimate because in the absence of a licence, the said alternative markets are illegitimate. It is the 2nd Respondent's contention that there is a presumption of legality of the law that the law cannot aid a law breaker. It is their contention that a statute can only be suspended in rare circumstances.

34. Kenya Revenue Authority (The 3rd Respondent) on its part has also opposed the application herein through a Replying Affidavit by one Dennis Makobu Kinyanjui sworn on 19th October 2018. The 3rd Respondent asserts that the law specifies goods that are restricted and are only exported with authority of the Cabinet Secretary. It avers that their role is only to enforce the law and regulations. The 3rd Respondent has deposed that they are expected to enforce the AFA Act and that the Petitioners should liaise with the Cabinet Secretary in regard to export of Macadamia,

35. The 3rd Respondents contends that the Petitioners have not discharged the onus of proving that **Section 43 of AFA Act** is unconstitutional and that they have not shown that the damages if any cannot be compensated by way of damages at the end of trial. It is submitted that the Petitioners have not established a prima facie case with probability of success adding that the Petitioners have not met the threshold as illustrated in the case of *Giella –vs- Cassman Brown*. They have further contended that the Petitioners have not demonstrated what irreparable loss they will suffer and have relied on the decision in the case of *Charter House Investment -vs- Simon Sang and 3 Others [2013] eKLR* where the court observed that an injunction is given to preserve status quo and that the status quo in this scenario is for things to remain as they are until the issue of constitutionality of **Section 43 of AFA Act** is determined.

36. On balance of convenience the 3rd Respondent submits that all laws are deemed constitutional until declared otherwise and submitted that the applicant cannot contravene the law and enjoy orders on that basis.

37. The 1st Interested Party (County Government of Tharaka Nithi) and the 2nd Interested Party (The Nut Processors Association of Kenya) have also opposed this application echoing what the Respondents have advanced in opposition to this application and for the interest of judicial time, I find no basis to repeat everything advanced. They have contended that the law (AFA Act) was passed to safeguard the interest of Macadamia farmers and to ensure that Kenya exports quality Macadamia in order to fetch better prices for farmers. They further contend that the Macadamia industry will be thrown into chaos if the application is allowed as there will be no set standards on harvest and exports. They have submitted that the processing of Macadamia employs upto 15,000 people directly and 30,000 indirectly and that exporting raw Macadamia would kill employment.

38. Analysis and Determination

This court has considered this application and the response made by the Respondents and the Interested Parties. At the heart of this application and perhaps the entire petition is the provisions of **Section 43** of AFA (Agriculture and Food Authority Act). The provision is headed prohibition of exports of some new product and it states;

“ A person shall not export raw cashew nuts, pyrethrum, bixa, Macadamia or any other agricultural product as may be presented, except with the written authority of the Cabinet Secretary.”

39. The applicant has taken issue with the above provision on two fronts namely:-

i. That the provision is unconstitutional and offends various articles of the constitution which he has cited (to wit Articles, 10, 22, 27, 40, 43 and 47).

ii. That the statute or (AFA Act) does not define what **“raw Macadamia”** is and to them, the Macadamia they hold have been subjected to a process which in their view do not fit the description of what the statute describe as **“raw”**. The Respondents deny this and in particular the 2nd Respondent has gone to great lengths to give details on the processes macadamia goes through to attain export quality and specifications given by KEBS.

The question posed therefore is whether the Macadamia nuts held by the applicants, whose sample was informally shown to this court during the hearing of this application, are **“raw”** as advanced by Respondents or **“processed”** as advanced by the Petitioners.

40. This court finds that the above question cannot be determined at this stage and has to await full trial when all the issues regarding the processing of Macadamia can be interrogated and determined. In my view to call on this court to determine this question based on the scanty evidence presented in this application would be premature and unfair.

41. It is clear from this application, that the applicants' move to export Macadamia nuts have been thwarted by Respondents who have justified their actions on the provisions of **Section 43 of AFA Act**. The applicants are now seeking conservatory orders in the nature of staying the operations of that statute to allow them to export what they are currently holding which they value at Kshs.15 million. Though the applicants have not attached any valuation from a crop expert to ascertain the veracity of their valuation, this court is minded to consider the legal principles applicable to the reliefs sought by the applicants in this application.

42. It is now well settled as stipulated in *Giella –vs- Cassman Brown [1973] EA* and adopted in various decisions that a party seeking an injunctive order must satisfy the following conditions to succeed in getting the injunctions.

- i. A prima facie case with high probability of success.
- ii. That the applicant would suffer irreparable loss that cannot possibly be quantified in monetary terms and compensated by an award of damages.
- iii. Where there is doubt about the above two conditions then a decision is made on the balance of convenience.

To begin with what constitutes a prima facie case,

In the case of *MRAO LTD –VS- First American Bank of Kenya Ltd [2003] eKLR* the Court of Appeal held as follows:-

“ A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the applicant’s case upon trialit is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which apparently has been infringed by the opposite party as to call an explanation from the latter.....”

43. In this petition, the applicants have taken issue with the constitutionality of the provision of a statute and have stated that the provision have infringed on some cited constitutional rights. The Respondents and Interested Party have denied the same holding that the law as it stands is valid and that they are mere enforcers of the said law (**Section 43 of AFA Act**). The Petitioners have not denied that they do not hold license to export raw Macadamia or that they are not registered as nut processors by the licensing authority (2nd Respondent). In fact the applicants have expressed frustrations that their attempts to obtain a license from the 1st and 3rd Respondents were declined. The applicants however have not exhibited the attempts made in this application and furthermore they have not challenged the refusal if at all by the Respondents or anyone for that matter through Judicial Review (JR). This is because the 3rd Respondent is a statutory body mandated to inter alia issue license to process or manufacture crops or its products for export or local consumption or markets from such a body fails to discharge its statutory obligation an aggrieved party is at liberty to challenge its acts of commission or omission and the right way is through Judicial Review and there is nothing in the present constitutional dispensation that hinders a party in Constitutional Petition to seek a Judicial Review relief because **Article 23 of the Constitution** provides for the same.

44 It is evident from the petition herein that the Petitioners are not seeking Judicial Review order to challenge any decision, if at all from the 2nd Respondent or any of the Respondents' refusal to grant them manufacturing license of Macadamia nuts or export license of raw nuts.

45. Secondly, it is a fact that there is a statute that bars export of raw Macadamia and that statute (AFA Act) is as I have observed above the main contention in this petition. However, it is true that there is a presumption of legality or constitutionality of the laws passed by parliament except where the legality or constitutionality is successfully challenged in a constitutional court. Where an act of Parliament is challenged in court, the main actor in the legislation (which in our case is the National Assembly) must be called upon to answer if the law meets constitutional requirements. A party cannot impugne any piece of legislation without involving parliament because that is the legislative body which drafts and passes legislation before it is asserted to by the president and gazetted to become law.

46. The Petitioners in this petition have impugned parts of statute but have failed to sue the main actor (Parliament) as one of the parties in this petition. It is therefore understandable for 1st, 2nd and 3rd Respondents to cry foul stating what can be described in the common parlance that they are **“watu wa Mkono”** which is true because once a law is passed it is upto the specified state agencies to enforce it and the 1st, 2nd and 3rd Respondents have stated that they are doing what they were employed to do and cannot be faulted for that. The applicants have not stated that any of the Respondents has acted arbitrarily or operated outside the law or acted ultra vires or acted contrary to the rules of natural justice. They have not shown any proof of harassment by any or all the Respondents other than the fact that they are enforcing a law which for obvious reasons has not pleased the applicants. They should however direct that displeasure on the statute and the body who passed it rather than those agencies employed to enforce the same.

47. This court finds that the provisions of **Section 43 of AFA Act** is legal and enforceable unless declared unconstitutional upon determination of this petition. The burden of proving unconstitutionality of any legislation rests on the person who alleges the same. The applicants have asked this court to suspend the operation of a statute which is only done in rare and in exceptional circumstances. In the case of *Kizito Ngenwa –vs- Minister for Internal Security and Provincial Administration [2011] eKLR*, the court citing the decision in *Bishop Kimani and others –vs- AG and Others*, the court held that it is a serious legal and constitutional step to suspend the operation of a statute and that an applicant must show the operation of the law is a danger to life. The applicant have not demonstrated sufficiently that the operation of the **AFA Act** or **Section 43** to be specific endangers their lives or is a gross to their constitutional rights. By virtue of operating without a license, the applicants are in clear breach of the law as it stands and cannot be expected to ask for a shield from this court because this is a court of law. Unless and until the impugned law is suspended or declared unconstitutional everyone including the

applicants must obey it. I certainly find no reason to suspend the said law by way of any conservatory order.

In the light of the above the applicants have failed in the 1st condition for a grant of injunction. I do not find it necessary at this stage to go delve into the other two conditions but looking at the pleadings before me it goes without saying that the applicants have also failed to meet the threshold for the grant of reliefs sought in this application. In the premises the application dated 19th September, 2018 must fail in its entirety and the same for the reasons advanced is disallowed. The costs shall be in the main petition.

Dated, signed and delivered at Chuka this 24th day of April, 2019.

R.K. LIMO

JUDGE

24/4/2019

Ruling dated signed and delivered in the open court in presence of Kinoti for Petitioner, Naegu holding brief for Lemiso for 3rd Respondent and Dr. Khaminwa for 2nd Interested Party and Maina for 2nd Respondent.

R.K. LIMO

JUDGE

24/4/2019