



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. 206 OF 2019

BRIAN KIRIMI MUKURU.....PETITIONER

VERSUS

CABINET SECRETARY, MINISTRY OF AGRICULTURE,

LIVESTOCK AND FISHERIES.....1ST RESPONDENT

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

ATTORNEY GENERAL.....3RD RESPONDENT

NATIONAL ASSEMBLY.....4TH RESPONDENT

AND

THE SENATE.....1ST INTERESTED PARTY

COUNCIL OF GOVERNORS.....2ND INTERESTED PARTY

RULING

1. Through the Notice of Motion dated 15th August, 2019 the Petitioner, Brian Kirimi Mukuru, prays for orders as follows:-

“ 1. That this matter be certified urgent and service of the same be dispensed with in the first instance.

2. Pending the hearing and determination of the main petition, a temporary conservatory order be and is hereby granted restraining the respondents and their servants from tampering with, or making any amendments or regulations under the Crops Act, 2013 together with Agriculture Food Authority Act 2013 in so far as the matter is *sub judice*, and will grossly affect the prosecution of the petitioner’s petition herein and judicious determination of the legality or constitutionality of the impugned legislations.

3. Pending the hearing and determination of the main petition, a temporary conservatory order be and is hereby issued restraining the respondents from making any allegations or regulations purporting that inshell macademia is raw before the issue on whether processed inshell macademia is raw or not is determined by this court.

4. Pending the hearing and determination of the main petition, a temporary conservatory order be and is hereby granted allowing the petitioner to exercise his property rights on “inshell macademia” and enjoy those rights without let or hinderance and allow the petitioner herein to trade in, sell, process and export processed inshell macademia locally and internationally.

5. Pending the hearing and determination of the main petition, a temporary injunction order be and is hereby granted prohibiting the respondents from coercing, intimidating or in any manner forcing the petitioner to remove the “brown shell” or any part of macademia nut during export or at any point in time whatsoever contrary to the petitioner’s/client market

specification/requirements.

6. Pending the hearing and determination of this petition, a temporary judicial review order of mandamus be and is hereby issued directed at the 1st and 2nd respondents jointly and severally, to issue a letter or license or both as may be required allowing the petitioner herein to trade in, process and export processed inshell macademia immediately failure to which this order be accepted and/or deemed by any authority within Kenyan borders as sufficient.

7. That the honourable court be pleased during or before the hearing of the main petition herein, to visit one of macademia processing industries on a date and factory to be chosen by the court to view the machines used in processing inshell macademia before cracking and the machine used in cracking macademia nuts so as to make a just and judicious determination on whether processed inshell macademia can be termed as raw simply because of the shell in a democratic nation.

8. Any other order.”

2. The application is supported by the grounds on its face and the Petitioner's affidavit. In brief, the Petitioner's case is that the respondents are trying to defeat this case by enacting the Crops Regulations, 2019. It is the Petitioner's case that one of the aims of the said regulations is to define the term "raw macademia nut" yet the meaning of "raw macademia nut" is an issue for the determination of the court in this petition.

3. It is also the Petitioner's case that the legality or constitutionality of the Crops Act, 2013 and the powers conferred upon the 1st Respondent, Cabinet Secretary for Agriculture, Livestock and Fisheries, by Section 40 of the said Act to legislate is an active matter in court which is fiercely contested by farmers, traders and the Petitioner herein and the 1st Respondent's action of purporting to make regulations will further aggravate the matter and deny him a fair hearing hence violating his rights under Article 50 of the Constitution. Further, that the intended regulations are premised on an illegal instrument namely the Crops Act, 2013 and such regulations are incurably illegitimate, null and void hence the need to maintain the *status quo*.

4. It is the Petitioner's position that raw macademia is not defined under Section 43 of the Agriculture and Food Authority Act, 2013 and the said Section is therefore vague or ambiguous. It is therefore the Petitioner's proposition that inshell macademia is not restricted or prohibited in any law and the attempt to interpret inshell macademia as raw when the issue is already in court is fraudulent and laced with ulterior motives. The Petitioner's averment is that there is no provision of law that requires the removal of shells from macademia nuts or removal of any part thereof before sale locally or internationally. His position is that such removal reduces the product by 50% hence depriving the owner of the nuts of his rights to property. The Petitioner goes on and on about how defining raw macademia will affect the livelihoods of farmers and traders.

5. It is the Petitioner's averment that the respondents have imposed restriction on sale of inshell macademia without any legislation or regulation in place thereby acting unlawfully and unconstitutionally. The Petitioner contends that Section 43 of Agriculture and Food Authority Act, 2013 prohibits export of raw macademia without the authority of the 1st Respondent but this should not be a springboard to denying him an export licence as the word "**raw**" is vague and ambiguous. His view is that without an express provision in law prohibiting sale of inshell macademia, the respondents' failure to grant him an export permit on allegation that inshell macademia is raw is without legal basis and *ultra vires*.

6. The 1st Respondent, the Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries and the 3rd Respondent, the Attorney General, opposed the application through grounds of opposition dated 12th September, 2019 and an affidavit sworn by the 1st Respondent, Hon. Mwangi Kiunjuri on 11th September, 2019. The 2nd Respondent, Agriculture and Food Authority, opposed the application through a notice of preliminary objection dated 4th September, 2019 whereas the 4th Respondent, the National Assembly, opposed the application through grounds of opposition dated 4th September, 2019. The 1st Interested Party, the Senate, filed grounds of opposition dated 4th September, 2019. The 2nd Interested Party, Council of Governors, did not participate in the proceedings.

7. In his replying affidavit, Hon. Mwangi Kinjuri averred that his Ministry in conjunction with the 2nd Respondent and the county governments, are indeed in the process of developing the Crops (Nuts and Oil Crops) Regulations, 2019 but this is work in progress which is being done in strict compliance with the laid down legal procedure. It is his averment that the regulations are being made based on the mandate granted to him by Section 40 of the Crops Act, 2013 and to the best of his knowledge he is not aware of any court order declaring the Crops Act, 2013 and the Agriculture and Food Authority Act, 2013 unconstitutional or any court order prohibiting him from developing the Crops (Nuts and Oil Crops) Regulations, 2013.

8. Through their grounds of opposition, the 1st and 3rd respondents oppose the application on the grounds that the prayers sought are mandatory in nature and cannot be granted at the interlocutory stage; that the Petitioner is seeking to curtail the statutory mandate of the respondents to make laws and regulations; that the orders sought violate Articles 94 and 95 of the Constitution which clothes Parliament with legislative authority; that the impugned Crops Act, 2013 enjoys the presumption of constitutionality; that the court lacks jurisdiction to determine which macademia nuts are allowable for export as the authority to regulate and promote agriculture in the country belongs to the 2nd Respondent acting in concert with the 1st Respondent and other state officers and agencies as per the provisions of the Crops Act, 2013; that the application violates Section 43 of the Crops Act, 2013 as the Petitioner has failed to activate the dispute resolution mechanisms provided by the Act; that the orders sought are against public policy and public interest as the Petitioner ought not to be allowed to hold the respondents' operations to ransom in order to sustain his alleged claim; and that it would be against the principles of natural justice for the court to issue orders which would prejudice interested parties not before the court. The court was therefore urged to dismiss the application and award costs to the 1st and 3rd respondents.

9. On its part, the 2nd Respondent opposed the application on the grounds that the prayers sought are premature as the draft regulations have

complied with the legal requirements and are currently before the 4th Respondent where they will be subjected to public participation; that the application is an unlawful attempt by the Petitioner to curtail the respondents from carrying out their lawful mandates; that Section 40 of the Crops Act, 2013 mandates and empowers the 1st Respondent in consultation with the 2nd Respondent and the 2nd Interested Party, to make regulations for better carrying into effect of the provisions of the Act; that the draft regulations are in accord with the parent legislation and Constitution and there is no violation of the Constitution or any statute; that the application is not supported by adequate evidence to warrant the grant of the orders sought; that the application is couched in terms of a mandatory injunction or prohibition and the material placed before court falls far below the threshold required to grant a mandatory injunction or prohibition at the *ex parte* stage; and that the **High Court in Chuka High Court Petition No. 4 of 2018, Ruth Wanja Nyaga & another v Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries and 3 others** has decisively and extensively dealt with all the issues raised herein and the application is therefore *res judicata*. The 2nd Respondent therefore concludes that the application is incompetent and an abuse of court process and ought to be struck out.

10. The 4th Respondent filed grounds of opposition supported by submissions. It is the position of the 4th Respondent that the 1st Respondent is empowered by Section 40 of the Crops Act, 2013 to make regulations and that provision is yet to be declared unconstitutional. The 4th Respondent states that the challenge to the impugned regulations is premature as the regulations have neither been gazetted nor subjected to parliamentary approval. Other grounds upon which the application is opposed are that the orders seek to stop the respondents from exercising their legislative authority hence a usurpation of the powers of the respondents; that the application violates the doctrine of separation of powers; that the application is premature, speculative and not justiciable; that this court should be slow in granting orders that interfere with the mandates of other State organs; and that the application lacks merit, is frivolous, generally argumentative and an outright abuse of the court process. The cases cited in support of the grounds of opposition are **Robert N. Gakuru & another v Governor Kiambu County & 3 others [2013] eKLR**; **Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR**; and **Civil Appeal No. 11 of 2018, Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others**. Consequently this court was urged to dismiss the application with costs.

11. The grounds of opposition filed by the 1st Interested Party are similar to those of the 4th Respondent. The decisions cited by the 4th Respondent in support of its grounds of opposition are the same with those cited by the 1st Interested Party. In the circumstances I do not need to reproduce the 1st Interested Party's pleadings.

12. In support of his application, the Petitioner filed submissions dated 11th September, 2019. It was submitted for the Petitioner that the law governing the grant of conservatory orders is found in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** and **Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR**.

13. It is the Petitioner's case that he has established a *prima facie* case in that his petition challenges the constitutionality of Section 43 of the Agriculture and Food Authority Act, 2013 for being vague and for violating his property rights. On that score, he submits that he has an arguable case. He cites the decision in **Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR** for the definition of a *prima facie* case.

14. Asserting that there is real danger that he will suffer prejudice if conservatory orders are not granted, the Petitioner submits that his petition will be greatly prejudiced if the Crops (Nuts and Oil Crops) Regulations, 2019 are allowed to come into force. Further, that the said draft regulations will violate his right to property. It is the Petitioner's position that the facts of his case meet the requirement for demonstration of real and imminent danger as held in **Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 others [2014] eKLR** and **Simon Kioko Kitheka (supra)**.

15. The Petitioner asserts that his case falls within the parameters of Article 23(3)(c) of the Constitution and he deserves to be granted the reliefs sought. His case is that his customers prefer inshell macademia and a removal of the brown shell will deny him access to the Asian market hence the need to grant the orders sought.

16. In their submissions dated 17th September, 2019, the 1st and 3rd respondents submit that the Petitioner has not met the threshold for grant of injunctive orders for the reason that the orders sought in the application are the same as those sought in the petition and the grant of any orders at this stage will result in the determination of the petition. Further, that the application has not met the conditions for grant of interlocutory relief as established in the cases of **East African Industries v Trufoods [1972] EA 420** and **Giella v Cassman Brown & Co. Ltd [1973] EA 358**.

17. The 1st and 3rd respondents stated that the petition has no reasonable chances of success considering that the Petitioner has not demonstrated the rights that are alleged to have been violated, or continue to be violated or are likely to be violated by the carrying out of the statutory mandate of the respondents.

18. Section 16(1)(i) of the Government Proceedings Act is cited for the proposition that an injunction or an order of specific performance should not issue against the government. Also cited in support of this proposition is the decision in **Kariuki Muigua T/A Kariuki Mungai & Co. Advocates v Commissioner of VAT & 2 others [2012] eKLR**.

19. Still urging that the Petitioner's case is doomed to fail, counsel for the 1st and 3rd respondents asserts that the evidentiary burden of proving that the process of making the regulations violates the Petitioner's rights rests squarely on the Petitioner as pronounced in **Ndyanabo v Attorney General [2002] TZCA2**.

20. It is the 1st and 3rd respondents' position that the Petitioner has failed to state with reasonable precision the right or fundamental freedom violated or threatened with violation and the constitutional provisions allegedly violated as required by the case of **Anarita Karimi v Republic [1976-80] 1KLR 1272**. Further, that the Petitioner has failed to show the nexus between the carrying out of the statutory duties by the respondents and the alleged difficulty in prosecution of the petition.

21. Hammering home the alleged hopelessness of the petition, counsel submitted that the 1st Respondent is empowered by Section 40 of the Crops Act, 2013 to make regulations and every statute enacted by Parliament enjoys a presumption of constitutionality. According to counsel, there is a general but rebuttable presumption that a statute or statutory provision is constitutional and the burden is on the person alleging unconstitutionality to prove that a statute or its provision is constitutionally invalid. The case of **Mark Ngaywa v Minister of State for Internal Security & Provincial Administration & another [2011] eKLR** is quoted as stating the said principle of constitutional interpretation.

22. On whether the Petitioner has made out a case to warrant interference with the respondents' statutory powers, counsel submits that where the law has granted certain and specific functions to a public office, the courts ought to be slow in interfering with the mandate of that institution. It is urged that this court should not usurp the statutory mandate of the respondents by directing them to issue a licence to the Petitioner. In counsel's view, the granting of orders as prayed in the application will amount to judicial interference with the statutory mandate of a public body to the detriment of the general public.

23. The decision of the Court of Appeal in **Civil Appeal No. 11 of 2018, Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others** is quoted for the statement that courts must decline to intervene at will in the constitutional spheres of other organs, particularly when they are invited to substitute their judgment over that of the organs in which constitutional power reposes. Also cited in support of the proposition are the cases of **Speaker of Senate v Attorney General [2013] eKLR** and **Commission for the Implementation of the Constitution v National Assembly, Senate & 2 others [2013] eKLR**.

24. The 1st and 3rd respondents accuse the Petitioner for acting in bad faith, stating that he is seeking to circumvent the legal process for grant of a licence yet he has never applied for such a licence or complied with the conditions for grant of a licence.

25. Finally, counsel submits that the orders sought are contrary to public interest in that a grant of the orders will prejudice third parties who are not before court. Further, that the Petitioner has failed to utilize the alternative dispute resolution mechanism provided by the Crops Act, 2013.

26. For the 2nd Respondent it is submitted that the application is based on a clear violation of Section 16 of the Crops Act, 2013 which requires every dealer in a scheduled crop, specifically macademia, to register with the 2nd Respondent. It is the 2nd Respondent's position that the Petitioner has admitted to selling macademia without being registered as required. Further, that the Petitioner has not demonstrated that he has applied for a licence and is therefore using this case to seek a license. Having failed to demonstrate that he is currently registered to buy or sell macademia, which is a scheduled crop, it would be so hypothetical as to be meaningless for the court to issue any declaration allowing the Petitioner to deal with macademia in a manner not contemplated under sections 2 and 16 of the Crops Act, 2013.

27. It is the 2nd Respondent's case that the Petitioner has not proved the necessary ingredients for the grant of the orders sought. Asserting that the Petitioner has not established a *prima facie* case, counsel contends that in order to establish a *prima facie* case, the Petitioner ought to have demonstrated that the 2nd Respondent's actions had violated his rights. This, the 2nd Respondent asserts, was not done as there is no evidence that the Petitioner has been denied a trading licence and that in any case, Section 43 of the Crops Act, 2013 does not require the 1st Respondent to authorize export of macademia.

28. It is the 2nd Respondent's case that the Petitioner will not suffer irreparable injury if the orders are not granted and any injury suffered would be adequately compensated by an award of damages. It is asserted that issuance of orders will lead to irreparable damage to the macademia industry. Further, that the Petitioner has not demonstrated that any loss he may suffer cannot be compensated by way of damages. It is therefore the 2nd Respondent's view that the balance of convenience tilts in favour of not granting the orders sought by the Petitioner.

29. The 2nd Respondent cites the existence of three other petitions on the same subject matter in various courts and submits that institution of several suits over the same subject matter and issues should be discouraged by the courts. This court was therefore urged to stay this petition pending the hearing and determination of **Chuka High Court Constitutional Petition No. 4 of 2018, Ruth Wanja Nyaga and another v the Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries & others; Embu High Court Constitutional Petition No. 9 of 2018, Edenswin Traders Ltd & another v the Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries & another; and Meru High Court Constitutional Petition No. 23 of 2018, Rose Karimi & 59 others v The Cabinet Secretary, Ministry of Livestock and Fisheries & others**.

30. The 4th Respondent did not file any submissions. Counsel however made oral submissions and reiterated the contents of the 4th Respondent's grounds of opposition.

31. Counsel for the 1st Interested Party submitted that since the Petitioner seeks to stop the 1st Respondent from making regulations, he can only succeed by demonstrating that the actions of the 1st Respondent are illegal. Counsel points out that Section 40 of the Crops Act, 2013 empowers the 1st Respondent to make regulations whereas Section 11 of the Statutory Instruments Act provides for the approval of statutory instruments by Parliament. According to counsel, the impugned regulations are yet to complete the process of validation and they are not yet regulations in the eyes of the law hence this court is being asked to litigate over unknown future events. For that reason the application is said to be premature hence not justiciable. The decision in **Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR** is cited in support of the said statement.

32. On the accusation that the 1st Interested Party is guilty of an illegality for meeting the 1st and 2nd respondents over the draft regulations, counsel submitted that there is no law that bars the Senate from attending public consultative meetings for formulation of regulations. Further, that Section 5 of the Statutory Instruments Act require regulation making bodies to conduct consultation before making statutory instruments. Citing the decisions in **Justus Kariuki Mate (supra)** and **Pevans East Africa Limited (supra)**, counsel urges the court not to interfere with the functions of the Senate.

33. The principles that guide the grant of conservatory orders were summarized Onguto, J in **Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education, Science and Technology & 5 others** [2015] eKLR when he stated that:

“For the grant of conservatory orders under Article 23(3) of the Constitution as read together with Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 the court ought to consider certain pertinent factors. A series of cases may be stated to have laid down the proper guidelines applicable. I would state the principles which govern a court considering an application for interim or conservatory relief to be the following:-

- **The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see Centre for Rights Education and Awareness & 7 Others –v- The Attorney General HCCP No. 16 of 2011. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see Godfrey Mutahi Ngunyi –v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others –v- Attorney General & Others HCCP No. 7 of 2011.**
- **The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR and also Peter Musimba –v- The National Land Commission & 4 Others (No. 1) [2015] eKLR.**
- **If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.**
- **The Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya’s decision in Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR.**
- **The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters: see Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012 as well as Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.”**

34. The question is whether the Petitioner has met those parameters. It is difficult to state before the hearing of a case that a party has not established a *prima facie* case. To do so would amount to determining the case without a hearing. The Petitioner seeks a declaration that various sections of the Agriculture and Food Authority Act, 2013 are unconstitutional. Until he is heard, one cannot say he does not have an arguable case. I will therefore find that his petition has passed the first test for grant of orders.

35. However, the fact that the Petitioner’s petition has met the standards for an arguable case does not mean that his application for conservatory orders has surmounted that hurdle. As can be seen from the face of the Petitioner’s notice of motion, he seeks orders primarily based on the allegation that the respondents are in the process of making regulations that are likely to affect this petition. It has been pointed out by the respondents and the 1st Interested Party that the regulations are yet to meet the requirements of being called a statutory instrument and that the Petitioner’s application is meant to curtail the 1st Respondent’s mandate to make regulations under Section 40 of the Crops Act, 2013.

36. It is observed by this court that the Petitioner framed his application and submissions in a manner to suggest that some provisions of the Crops Act, 2013 are already invalidated. The truth of the matter is that no evidence has been tendered to show that any provision of the Crops Act, 2013 has been found unconstitutional and the fact that no provision of the Crops Act, 2013 has been found unconstitutional is explained by the fact that the Petitioner is now seeking to declare some provisions of the Act unconstitutional. Considering that the application is based on this false presumption, it then goes without saying that the application is not anchored on an arguable case.

37. In **Simon Kioko Kitheka (supra)** Odunga, J stated that:-

“A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the applicant has to show that he or she has a case which discloses arguable issues and in this case arguable constitutional issues.”

38. At this stage no provision of the Crops Act, 2013 has been declared unconstitutional. An application that proceeds on the incorrect assumption that some provisions of the said Act have already been found to be invalid cannot be termed arguable. The Petitioner may indeed have an arguable petition but that arguability cannot be transmuted into an arguable application. It is also observed that there is no correlation between the petition and the application. Nowhere in his petition does the Petitioner challenge the powers of the 1st Respondent to make regulations under Section 40 of the Crops Act, 2013. Section 40 is not among the several provisions he wants the court to declare unconstitutional.

39. Has the Petitioner established any harm to be suffered if the prayers sought are not granted? In **Simon Kioko Kitheka**, Odunga, J held that **“the burden is on the person seeking to suspend the operationalization of a legislation or part of it to show that there is danger which is imminent and evident, true and actual and not fictitious and which danger deserves immediate remedial attention or redress by the court. A remote danger will not do. In other words the applicant must show that the probability as opposed to mere possibility of the danger occurring is real and imminent.”** Section 40 of the Crops Act, 2013 clearly vests the power of making regulations on the 1st Respondent. That power is exercised in consultation with the 2nd Respondent and the county governments. The Petitioner has not explained how the exercise of statutory power by the 1st Respondent threatens his constitutional rights.

40. What the Petitioner is simply saying is that the Crops Act, 2013 should stand suspended until his petition is heard and determined. As pointed out by the respondents and the 1st Interested Party, the Crops Act, 2013 has mechanisms through which the Petitioner can exercise his constitutional rights and freedoms. One of the mechanisms is provided by Section 16 of the Act which requires him to register with the 2nd Respondent before dealing in macademia, which is a scheduled crop. Through this application he wants the court to direct the 2nd Respondent to register him as a dealer and if the 2nd Respondent fails to comply then this court's order should serve as registration under Section 16. Again, this amounts to an overthrow of the Crops Act, 2013. Granting such orders at the interlocutory stage will amount to determining the petition without hearing those opposed to it. Indeed mandatory orders may be granted at the interlocutory stage. However, an applicant has to demonstrate an exceptionally strong case. The Petitioner has not done that.

41. Where does the public interest lie? In **Gatirau Peter Munya (supra)**, the Supreme Court stressed the importance of considering the public interest when dealing with an application for conservatory orders. Before me the Petitioner seeks to stop the respondents and the interested parties from making regulations. Firstly, it is noted that the draft regulations are not limited to the macademia industry. They extend to other nuts and oil crops. Halting the making of the regulations will therefore have repercussions that will extend to other crops and other parties. Secondly, the regulations being made do not affect the Petitioner alone. They affect other players in the macademia industry. It is therefore not in the public interest to allow one individual to paralyze an entire industry. Thirdly, as correctly pointed out by the respondents and the 1st Interested Party, this application is premature. It seeks to stop a future event. The draft regulations are still being made and they are not yet law. It is not certain that the regulations will even become law. In that sense, the application becomes speculative in nature.

42. It is also important to observe that the Petitioner will not suffer any prejudice if orders are not granted. When the draft regulations will be placed in the public domain for public input, he will have a say on them. Indeed, he should be mobilizing players in the macademia industry to reject the draft regulations if he indeed thinks that the same are not good for the industry.

43. Having established that the Petitioner has failed to pass the test for grant of conservatory orders, I need not consider the other grounds raised by the respondents and 1st Interested Party in opposition to the application. It suffices to state that the application has not merit. It is therefore dismissed.

44. The Petitioner did not make any submissions on the prayer for site visits. The respondents and the 1st Interested Party did not submit on the same. In the circumstances, I also dismiss this particular prayer. The Petitioner is however at liberty to reactivate the same before the petition is heard and determined. Costs shall abide the outcome of the petition.

Dated, signed and delivered at Nairobi this 31st day of October, 2019

W. Korir,

Judge of the High Court