



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

PETITION NUMBER 4 OF 2015

**IN THE MATTER OF ARTICLE 22(1) AND ARTICLE 23 OF
THE CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR
FUNDAMENTAL FREEDOMS UNDER ARTICLE 27, 43, AND 47 OF
THE CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

IN THE MATTER OF THE CROPS ACT 2013

AND

**IN THE MATTER OF THE REPUBLIC NOTICE, POLICY ON AGRICULTURAL
PRODUCE WEIGHTS BY THE COUNTY GOVERNMENT OF KAJIADO**

BETWEEN

MUNYALO KAMOTE.....1ST PETITIONER

DOUGLAS MWANGI & 28 OTHERS.....2ND PETITIONERS

VERSUS

COUNTY GOVERNMENT OF KAJIADO.....RESPONDENT

JUDGEMENT

The Petitioners, MUNYALO KAMOTE, DOUGLAS MWANGI and 28 OTHERS approached this Honorable Court by way of a Petition filed on 15th March, 2015 seeking final orders and remedies in response to the County Government of Kajiado's Policy on agricultural produce weights which they deemed were a violation of their rights protected by the Constitution of Kenya 2010. Apart from interim orders they had sought interim orders to restrain the County Government from continued infringement of their rights. While the matter was pending determination a Notice of motion dated 12th March 2015 in which conservatory orders were granted by this Honorable Court through a ruling dated 1st August 2016.

Background to the Petition

It is not in dispute that the Petitioners herein are tomato farmers from Oloitoktok area within Kajiado County. They are the main producers of tomatoes in the county and they have invested heavily in tomato production with the large scale farmers ploughing about 100 acres and the smallest scale farmers farming on about 2 acres. They supply their tomatoes to various markets both locally and regionally including Nairobi,

Juba in the Republic of South Sudan and Kampala in Uganda among other markets. The Petitioners has carried out tomato farming and trade for many years and the prices and others aspects of the undertaking have always been determined by the forces of supply and demand in the various markets. It is through this venture that the farmers earn a living, educate their children and meet all their needs. They also employ other people in their farms during planting, weeding, spraying, harvesting and packaging and these people also rely on the same for their livelihood.

On the 10th December 2013, the County Assembly passed a resolution to implement a policy for agricultural produce weights in the County. The public notice issued by the County Assembly on the 18th December, 2013 stated that the same was pursuant to Section 6(1) (b), (2) and (3) of the Crops Act No. 16 of 2013 (herein "*the policy*") and that the Respondent's County Executive had adopted in a meeting held on the 17th of December 2013. The said Public Notice requires that the packaging of tomatoes was to be restricted to "Mombasa" a crate at 24kgs (flat) and "Nairobi" crate was to weigh 64kgs (flat).

The Petitioners Case

The crux of the matter herein is the contention by the Petitioners that the entire process leading to the implementation of the policy, the decision to enforce it and its provisions were done without recourse to the laid down procedures and the law thereby violating the Petitioners fundamental, constitutional rights under article 10, 5c, 27, 43, 47(1) and (ii) and 50 of the Constitution of Kenya 2010.

According to the evidence of PW1 on 18/12/2013 through a public notice the Respondents issued guidelines in the policy on weights and measures. He further told this court that under the rubric of specifying the different weights of 24kgs, 64kgs and mode of packaging some of the markets shunned to purchase their tomatoes. The change of the weights and packaging without prior consultation with the Petitioners affected them economically due to the heavy losses incurred. In support of this issue PW1 attached a demonstration by way of photographic prints admitted exhibit 1-8.

In answer to whether the Respondents consulted them while developing the policy PW1 denied participation in any meeting concerning the policy. PW1 further testified that by the Respondents ignoring their input and participation in developing the policy their constitutional rights to a fair hearing, equality before the law, non-discrimination has been violated.

The Petitioners in their submissions illustrated the losses suffered during transportation, the vagueness in the policy and the suffering of the farmers. The Petitioners annexed photographs which illustrate the negative effect of the new policy in question. (See MK-1 to MK-8). PW1 admitted having attended the meeting in which the proposed changes were mentioned but he denied that they had agreed and stated that they even protested the first time the Policy was introduced before it was suspended and reintroduced without addressing the concerns raised by the farmers. He further denied having endorsed the policy which he termed unfair and discriminatory in its nature. He also stated that they tried further consultations which were blocked by the respondents which forced the Petitioners to seek legal redress in the current petition.

Mr. Wangira learned counsel for the Petitioners submitted that the impugned policy was developed and published in contravention of Article 10 and 174 (c) of the Constitution for lack of public participation. On this legal proposition learned counsel relied on the cases of **Robert N. Gakuru & Others v Governor Kiambu County & 3 Others [2014] eKLR, Doctors for Life Internal v Speaker of the National Assembly & Others CCT 2016 2ACC 11 2006 12 C BCLR 1399.**

The two superior courts in different jurisdictions but faced with similar scenarios took the view that the principles of public participation and inclusion are cornerstones in the democratic governance in realization of the fundamental rights and freedoms. Secondly, the courts emphasized that public participation is driven by an interplay of factors, channels and peal tones for meaningful engagement to occur both qualitatively and quantitatively to achieve positive outcomes.

Mr. Wangira further submitted that the purported policy by the Respondents did not address the economic and social rights of the Petitioners as provided for under Article 43 of the Constitution. The Crop Act No. 16 of 2013 submitted that the Respondents have not violated any constitution or legislation by making of the impugned policy.

The Respondent's Case

The Respondent's case is couched in the further replying affidavit filed on 30th March 2017 and submissions. In response to the petition, the Director of Agriculture averred that Agriculture is a devolved function of the County Government under the fourth schedule of the Constitution of Kenya, 2010 and section 6 of the Crops Act, 2013 which provides for the role of the County Governments in the development of crops. According to the Respondent, on the 5th December 2013 the Respondent in response to numerous complaints by farmers through the County Executive Committee member; Agriculture organized a consultative meeting of stakeholders. Further that in the said meeting the farmers aired their grievances on lack of a level ground for the prayers due to the fact that there were no regulations and standards on weight and measures. He also stated that he established from farmers that there was exploitation by middlemen and brokers at the point of sale of their products due to lack of a regulatory framework to protect their interests. Following the meeting the County took up the matter with the county assembly and on the 10th December 2013, the county assembly passed a resolution to implement the policy in question herein for agricultural produce weights in the county pursuant to section 6 (1) (b), (2) and (3) of the Crops Act No. 16 of 2013 which was followed by a public notice on 18th December 2013 which provides for the implementation of the policy for agricultural produce weights in the County pursuant to the abovementioned sections. According to the Respondent, through policy, it only seeks to regulate the packaging of produce by introducing measures and weights which will in turn create a levelled ground for the benefit of the farmers within Kajiado County.

The Respondents witness Daniel Nyagaka who testified as the County Director of Agriculture was essentially four told: Firstly, that the 2013 policy was adopted in the context of addressing complaints raised by tomato and onion farmers. Secondly, the policy was a product and reference drawn from the Crops Act No. 16 of 2012. Thirdly, there was wide consultation within the local subunits to come up with the policy to address exploitation of farmers by cartels and brokers in the sales of their produce. Fourthly, the policy was to ensure standardization of the weights and measures of all crops in the region. Finally, the Respondents` action was within the constitution itself. The

decision to come up with the policy was clearly influenced by the consideration from the farmers themselves.

According to Ms. Moinket all matters that arose fall under the scope of the statute legislated by the Respondent within its constitutional mandate. Learned counsel further submitted that the clause on weights and measures in the policy was meant to address and protect the Petitioners and other farmers from exploitation by middlemen. She further argued and contended that the Respondents before adopting the policy constituted various local forums for the discussion on the policy to be raised and heard by interested groups. As a further initiative learned counsel submitted that the Respondents organized a public forum of farmers on 5/12/2013 at Kimana area. To support this facilitation learned counsel referred this court to the list of participants in exhibit marked GK-1.

ANALYSIS AND DETERMINATION

Jurisdiction

General constitutional framework on enforcement of fundamental rights and freedoms threatened to be violated or infringed is a purview of the High Court Under Article 165 (2) (b) of the Constitution. In this respect, the High Court is clothed with jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.

The rationale and purpose is provided is for under Article 19 (2) being recognized and protect the human rights and fundamental freedom so to promote social justice and the realization of the potential of all human beings. In the same Article it states *that fundamental freedoms in the bill of rights belong to each individual and are not granted by the state and are only subject to the limitations contemplated in the constitution. further, the citizens and every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been violated/denied/or infringed.* See Article 22 (1) and 258 of the Constitution on locus standi). This therefore settles the question on the powers of the High Court on constitutional interpretation and Petitioners' right to file this petition to seek various reliefs under the constitution.

It is not in dispute that the County Government legislated and passed into law the Crop Act No. 16 of 2013 to fulfill the constitutional mandate on devolved function on agriculture and other related activities.

The Petitioners are aggrieved by the decision made by the County Executive on agriculture to publish a policy notice dated 18/12/2013 on Agricultural Produce Weights in total contravention of the mandatory provisions under the constitution and the County Government Act on citizen participation.

It is now necessary to set out the Articles of the Constitution and other statutory provisions on public participation.

These provisions would be the yardsticks to be applied in arriving at a determination in respect of the petition against the County Government of Kajiado. The constitution makes specific provisions on public participation on all matters established under the constitution which has a direct impact on their human rights.

In our constitution the following Articles are devoted to the provisions on public participation making it one of the key pillars of governance and the rule of law. Under Article 10 (2) (a), (6) (c) it captures *the national values and principles of governance to include democracy and participation of the people, inclusiveness, good governance, integrity, transparency and accountability.* Article 174 (c) sets out the objectives of devolution, to give powers of self-governance to the people and enhance their public participation in the exercise of such powers in decision making.

Communities in the devolved units have the right to manage their own affairs and to further their development.

Under Article 232 (1) (d) the values and principles of public service include the involvement of the people in the process of policy making, transparency and provision to the public of timely and accurate information.

It is also enshrined in the same constitution under Article 27 on guarantees in respect of equality and non-discrimination public participation is directly and indirectly implied to ensure right to equity and non-discrimination.

The constitution creates and recognizes both national and county governments. Section 94, 95 and 96 specifically dictates *counties to establish mechanisms to facilitate public communication and access to information using media with the widest public outreach.* The provisions further provide that *every county shall designate an office ensuring access to information.* The County Government Act under section 100 and 101 mandates them to create an institutional *framework on civic education.* On its part the county government has power to make laws on any matter affecting the governance and development of the people within their borders. The laws and policies so made must conform with the constitution. that is the reason the sovereignty of the people reigns supreme in the entire constitution.

Section 30 (3) of the County Government Act provides *that the Governor should promote and facilitate citizen participation in the development of policies, plans and service delivery in the county.* In the same Act under section 46 (2) it provides that the county *executive committee should bear in mind the need for an all participatory decision making.* Every citizen has right to public participation from the highest hierarchy of government at the national to the ward level of government.

There shall be no derogation from enjoyment of this right to participate in the legislation, policy development, decisions in relation to, strategic plans and development agenda within the county. The constitution further provides and guarantees the right to access information by citizens.

In our context the right to access of information during legislation or development of the policy by any other organ of the County

Government is secured under the constitution.

Case commentary on public participation

The phrase as what constitutes public participation since the promulgation of our Constitution 2010 has been considered by our courts and in other jurisdictions. In South Africa, the Constitutional Court in the landmark case of **Doctors for Life International v the Speaker of the National Assembly [2006] 12 BCLR 1399** determined the following issues:

- i. What the nature of the duty to facilitate public participation is.
- ii. Whether the legislature had discharged its duty to facilitate public involvement in the legislature process of certain health related legislations.
- iii. What the impact on the validity of such legislature if the facilitation of public involvement was flawed is.

The court said and emphasized as to the special meaning of public participation and its effect in the following passage:

“All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful decision. The objective is both symbolical and practical. The persons concerned must be manifestly shown the respect due to their concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws.”

These provisions will mirror throughout the discussion of this petition. In this regard the Petitioner took the following view:

The Petitioners contend that there was no consultation before the policy was implemented. They argued that even though the respondents convened a single meeting on the 5th December 2013 at Kimana, very many other tomato farmers from other areas with Kajiado County were not involved in the process of framing the Policy in question. The Petitioners relied on Article 10 of the Constitution in support of their argument. They humbly submitted that the tomato farmers in Ellangata Ngima, Imbirikani, Rombo among others areas were not consulted, neither were they involved nor did they participate in any process leading to the Public Policy in question even though the same directly affected them and their attendant rights.

The Petitioners further contend failed to invite participants through an advertisement or invite for those who could not make it for the only meeting to submit written memorandum of consideration. The Petitioner argued that the same constitute a violation of article 196 of the Constitution. Reliance was placed on Article 174 (c) of the constitution which outlines a key role of devolution as follows: **“to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;”**

It was also contended by the Petitioners that the policy was not published on the official website of the County Government, or published in the Daily Nation or any other newspaper towards the same end, neither was it circulated to churches in the County on the impending policy. The policy change as stated by the Petitioners if implemented will have profound effect on tomato production, transporting and marketing which has a lifeline activity for those affected. It was their argument that thousands of people from the County ought to have participated in the making of the policy and their input was paramount. The Petitioners relied on the case of **Robert N. Gakuru & Others v Governor Kiambu County & Others (2014) eKLR** in support of their argument.

On the other hand, the Respondent state that they organized a consultative meeting of stakeholders on 5th December 2013, he attached the list of stakeholders he claims to have attended the meeting, minutes of the meeting and the memorandum forwarding the policy to the clerk of the County Government Assembly where the public is represented debated the policy and made a resolution on the 10th December 2013. The Respondent associated itself with the position that public participation varies from case to case and it humbly submitted therefore that reasonable participation was afforded by the Respondent in the instant case and that other than this petition by alleged tomato farmers, the Respondent has not received any complaints from green maize, sweet pepper, chilies and onion farmers. In support of its argument, the Respondent relied the case of **Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others.**[\[1\]](#)

As regards public Participation, Article 10 of the Constitution provides as follows:

- 10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them— (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.**
- (2) The national values and principles of governance include— (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.**

The above article envisages public participation as one of the national values and principles of good governance that bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution, enacts, applies any law or makes or implements public policy decisions.[\[2\]](#)

In the same respect, Justice Sachs observed “... *What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.*”^[3]

In the *Mui Basin Case*^[4] a three-judge bench of the High Court after an in depth consideration of the relevant case law, international law and comparative jurisprudence on public participation culled the following practical elements or principles which both the Court and public agencies can utilize to gauge whether the obligation to facilitate public participation has been reached in a given case:-

a) First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

b) Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.

c) Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya* (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”

d) Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e) Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

f) Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

The essence of public participation was also powerfully enunciated in the case of *Poverty Alleviation Network & Others vs. President of the Republic of South Africa & 19 Others*,^[5] in the following terms:-

“...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.”

Article 47 of the constitution of Kenya provides that every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 47(2) of the Constitution is key as far as the circumstances of this matter are concerned. The same states as follows:

“(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

The *Fair Administrative Action Act*^[6] was enacted to illuminate and expand the values espoused under Article 47 of the Constitution. Section 4(3) of the Act provides the broad parameters which bodies undertaking administrative action have to adhere.

105. In *Judicial Service Commission vs. Mbalu Mutava & Another*^[7] cited by Mr. Kilonzo, the Court of Appeal held that:-

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and

accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

The importance of fair administrative action as a Constitutional right was appreciated in the South African case of *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others* [8] where it was held as follows with regard to similar provisions on just administrative action in Section 33 of the South African Constitution:-

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

In the instant case and in view of the foregoing, the Policy in question affects various stakeholders, that includes the farmers themselves in the five sub-counties of Kajiado, the public that have interest because they directly and indirectly benefit from the commercial farming, Nairobi and Mombasa Counties among other stakeholders most of which if not all were not actively involved in the consultations at all. A considerable number of farmers within Kajiado County were not accorded a chance to participate in the policy making process as pointed out by the Petitioners. The Respondent in its Affidavit seems to claim that they conducted public participation in a view of helping farmers particularly in marketing their products. There is nowhere the court has been shown that the farmers met to discuss about the problem affecting their venture and proposed a resolution to ameliorate the problems they were facing and that the same would be solved, with changes in the manner in which the tomatoes are packaged, that is those packaged for Nairobi should weigh 64 kgs and those for Mombasa weigh 24 Kgs. The minutes produced by the Respondents do not constitute public participation as the number of participants can't be enough to constitute public participation. The rationale under which those units of measure were arrived at is unknown in the absence of public participation. The Public Notice does not demonstrate that the meeting held on the 5th of December 2013, was anchored on discussing improvements on crop production. Further, it is uncontroverted that despite being directly affected by the policy, stakeholders from Mombasa and Nairobi were not consulted or involved in the policy making process. To me, that goes to show that the said meeting held on the 5th of December 2013 in terms of engaging with stakeholders was insufficient and therefore this court finds that the decision to implement the policy was done without undertaking any meaningful stakeholder engagement. The nature and degree of public participation that is reasonable in a given case will depend on the nature and the importance of the policy or decision and the intensity of its impact on the public. The policy in question affects the farmers adversely since it occasioned huge losses on them and affected those that depend and benefit from the venture. Having said so, the process has to be subjected to adequate public participation wide enough to cover a reasonable percentage of the affected stakeholders in the country. It is the court's considered view that the Policy in question be declared unconstitutional for lack of public participation.

The Petitioners stated that the implementation of the impugned policy did not equally treat all areas in the same manner. According to them, other areas such as Imbirikani and tomatoes coming from Tanzania were not put under the same restrictions. In their view, this was discriminatory and a violation of Article 27 of the Constitution which forbids discrimination on any grounds including the one practiced by the Respondent against the Petitioners. They placed reliance on article 27 of the Constitution of Kenya 2010. It was the Petitioners' submission that the failure by the Respondent to implement the impugned Policy in all areas was discriminatory in nature since they were competing with those areas for the same customers in the markets. Further, the Petitioners argued that failure to have a mechanism to impose the Policy against tomato from Tanzania which was traversing through Kajiado, unlawful as it may be was discriminative against them and they urged this Honorable Court to declare the said Policy null and void for being discriminative. In response to the foregoing issue, the Respondents referred to the testimony of Mr. Nyagaka whose testimony indicated that the policy was not discriminatory because the same was addressed to the public. As regards implementation of the Policy, he denied allegation that the policy was not implemented to some parts of Kajiado County since enforcement is through the Respondent's Cess collection points which are distributed all over the County.

Article 27(1) of the Constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms. Subsection (4) of the same Article lays down the grounds under which one cannot be discrimination. It provides that the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. In my view non-discrimination is not limited to the grounds which are specifically alluded to in the above article.

The Policy in contention herein is prima facie discriminatory. Commercial production is not only a local or national venture but a regional if not continental or global. In this case the farmers produce crops for both local, national and regional markets. Having said so, it was important for the Policy makers to understand the dynamics of the regional market before and during the policy framing process so that the provisions of the policy conform to those that apply in national and regional market. We cannot ignore the fact that Kenya is party to the East African Common Market Protocol which seeks harmonization of national law so that they conform to the regional laws in relation to common market. The policy in question is therefore discriminatory in this respect because it confines the Petitioners to strict rules which are not applicable to their competitors such as farmers from other counties and or countries. Thus the Petitioners are manifestly disadvantaged and the same is undoubtedly prejudicial to their venture. The Policy provides for provisions that directly affect other counties specifically Nairobi and Mombasa. The court notes that these are devolved functions which have their own policies which conforms with the national policy. Nairobi and Mombasa are stakeholders to the policy and public participation may be required to inform them of the development of the policy through public participation.

The Petitioners in their submissions articulated that tomato farming is their way of life and it provides them with a livelihood, educates their children, it allows them to employ other Kenyans who provide labor and transport services to tomato farmers. In their view, any policy or legislative enactment affecting tomato farming, transport and marketing goes to the core of their livelihood. Further, it was their view that

they have a right to earn a living and take care of their families and those who offer services to the farmers and marketers similarly have such rights. In support of their argument, the Petitioners relied on Article 43 of the Constitution. The same provides as follows;

“43. (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; (b) to accessible and adequate housing, and to reasonable standards of sanitation; (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities; (e) to social security; and (f) to education.”

They resorted to article 25 of the Universal Declaration of Human Rights (UNDHR), 1948 which provides as follows:

“(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

The Petitioners were therefore of the view that the Respondent through the impugned Policy translates to an infringement on their social economic rights envisaged under the abovementioned articles.

In view of the foregoing, the issue of consideration is whether the petitioners have demonstrated that their social and economic rights envisaged under the constitution and international instruments have been violated by the County Government of Kajiado through the enactment and implementation of the policy in contention herein. As far as social and economic rights are concerned, the state ought to observe, respect, promote and fulfill the right and fundamental freedoms in the bill of rights. In that respect, the state has an obligation to legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of Social and economic rights. In the instant case, it is incumbent the Petitioners to plead their case with a view to disclose a violation of fundamental rights and freedoms, or to demonstrate the failure by the respondent in light of policy formulation or in taking the right measures to ensure enjoyment of social and economic rights by citizens. Thus the Petitioners ought to plead with particularity that which they complain about, the provision said to have been infringed and the manner in which that particular right was violated. The principle is encompassed in the case of **Trusted Society of Human Rights Alliance v Attorney General and Others, Nairobi Petition 229 of 2012 (unreported)**. In that case the Court noted that it was not necessary to set out the infringements or violations with mathematical precision but in such a way that enables the respondent to have notice of the allegations and defend himself and to enable the court adjudicate the violation.

In the Petitioners submissions, the petitioners set out the Constitutional provisions with regard to social economic rights and the obligations of the respondent with regard to the same. The respondent in his submission pointed out that they had identified the problems facing tomato farmers within Kajiado which prompted the County Assembly to come up with policy in contention so as to resolve the problems. According to the evidence on record and the submissions of the Petitioners, there is a considerable damage brought about by the policy measures taken by the respondent. The Petitioners produced photographs which shows poor quality of tomatoes spoilage and discoloration of the tomatoes which they claim to have caused them huge losses. Further the farmers were serving several markets which had unique demands which were not catered for by the by the police in contention. The Plaintiff also lost customers from area such as Eldoret, Kakamega, Kisumu and Garissa who completely stopped purchasing tomatoes from the petitioners which further aggravated losses on them. The aforementioned among other things are part of the negative impact of the Policy in contention herein. Thus, it is clear that the policy apart from being discriminatory, it infringed the rights of the petitioners as envisaged article 43 of the constitution of Kenya as well as Article 25 of the Universal Declaration of Human Rights (UNDHR), 1948. This is so because the state is inherently obliged to undertake positive and progressive measures to ensure that people will achieve their full potential. That is not the case in this matter, the Policy in contention is indeed regressive in nature and it is causing more harm than good to the Petitioners. In the premises, there is no doubt that the policy measures taken by the Respondent to ameliorate marketing and transportation of the Petitioners products is not bearing fruits. Rather, the same caused more harm than good to the farmers and tomato production in Kajiado County, thus the Petitioners’ socio-economic rights were adversely affected by the said policy. Such a policy cannot be allowed to stand.

Disposition

In view of the foregoing analysis and findings, the conclusion is irresistible that the Petition herein succeeds. I find that the Policy in contention is unconstitutional for lack of public participation and stakeholder engagement. The court also finds that the policy in question is manifestly discriminatory contrary to article 27 of the Constitution. The policy is also an infringement of the Petitioners socio-economic rights as expounded above. In the premises, a new policy be developed by the respondents within constitutional and statutory threshold.

Each party to bear their own costs.

It is so ordered.

Dated, signed and delivered at Kajiado this 20th day of December 2017.

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R. NYAKUNDI

JUDGE

Representation

Ms. Moinket for the Respondent

Mr. Wangira for the Petitioners

[1] 2006 (2) SA 311 (cc) at para. 630, Sachs J

[2] Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR

[3] In the South African case of *Minister of Health and Another vs New Clicks South Africa(Pty) Ltd and Others* 2006 (2) SA 311 (CC), at para 630

[4] In the Matter of the Mui Coal Basin Local Community {2015} eKLR

[5] CCT 86/08 [2010] ZACC 5

[6] Act No. 4 of 2015

[7] {2015} eKLR, Civil Appeal 52 of 2014

[8] CCT16/98) 2000 (1) SA 1, at paragraphs135 -136