REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

PETITION NO. 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 PUBLIC NOTICE, POLICY ON AGRICULTURAL PRODUCE WEIGHTS BY THE COUNTY GOVERNMENT OF KAJIADO

BETWEEN

MUNYALO KAMOTE…..…….…….....1ST APPLICANT

DOUGLAS MWANGI & 28 OTHERS…...…….....2ND APPLICANT

Versus

COUNTY GOVERNMENT OF KAJIADO..…….…….....…….…RESPONDENT

RULING

The petitioners Munyalo Kamote, Douglas Mwangi on their own behalf and twenty eight others filed a notice of motion dated 12th March 2015 seeking orders that are framed in the following terms:

> **1. That pending the hearing and determination of this suit a temporary injunction does issue to stop the respondent from implementing its public notice policy on Agricultural Produce Weights dated 18th December 2013.**
>
> **2. That pending the hearing and determination of this suit an interim order do and hereby issues to suspend the implementation of the public notice policy on Agricultural Produce Weights dated 18.12.2013 by the respondent.**

3. That the costs of this application be paid by the respondent.

In support of the application is an affidavit by the petitioners sworn and dated 12.3.2013; and the grounds on the face of the application.

The background and brief particulars to the petition are as contained in the notice of motion is that the petitioners are bonafide farmers based at Loitokitok Sub-County undertaking agricultural activities constituting tomato production. The crop in question on maturity is transported and exported to both national and regional markets.

Prior to the filing of the petition the sale of the crop was dictated by demand and supply forces in the market. That the farmers had set standard weight measures in the unit of crates.

That the respondent caused formulation of the policy referred to as Policy on Agricultural Produce Weights affecting some parts of Loitokitok Sub-County – namely; Rombo, Kimana, Ellanga Ngima, Olorika, Esnet, Namelo, Imbiron, Njukini and parts of Embirikani.

That the particulars of the policy contained interalia that a crate of tomatoes for the Mombasa market shall weigh 24 kilograms whilst that for Nairobi market do weigh 64 kilograms regardless of the size of the crate.

In implementing the policy the petitioners aver that customers from both regional markets like Kampala and other counties i.e. Kakamega, Kisumu have shunned to buy their produce. That this has affected their source of income and finance to service bank loans to assist them in the investment has exposed them to financial risk. That the absence of markets for their tomatoes due to the policy by the respondent has reduced their market share and return of investment.

In support of the application the petitioners annexed the following documents:

1. Policy on Agricultural Produce Weights dated 18.12.2013 from the County Executive Agricultural, Livestock and Tourism "MK-1".

2. Photographs showing unsold crates of tomatoes due to implementation of new policy "MK-2".

3. Photographs denoting specifications of packaging envisaged in the policy in weights of 64 kilograms flat "MK-3".

4. Photographs demonstrating the sorting, repackaging and resultant wastage and declaration "MK-4".

5. Photographs of uncovered and squeezed tomatoes on a lorry having lost their colour and freshness "MK-5"

6. Photographs demonstrating extra man hours for farmers and resultant wastage "MK-6".

7. A comparative photograph indicating the mode of packaging before the policy and new crate on introduction of the policy "MK-7".

8. Photograph showing the old method of packaging and transportation "MK-8".

The petitioners contended in their affidavit that there was no public involvement by the respondent before coming up with the policy and subsequent implementation. That the policy as it stands and implemented is discriminatory in so far as respondent only enforces it at Rombo, Kimana, Ellanga Ngima, Olorika, Esnet, Namelo, Imperion, Njukini and partially Embirikani. Further the petitioners state in the affidavit that the policy has forced them to do away with tomato varieties like Eden F1, Kilele F1 and Faida F1 due

to their delicate nature.

Petitioners' Submissions:

Mr. Wangira made submissions on behalf of the applicants. He reiterated the averments in the supporting affidavit as the basis of the application and relief sought. He relied on the provisions of Article 22 of the Constitution which gives the applicants locus to institute a petition on behalf of the public or other farmers.

Under Article 22(1) of the Constitution;

> **"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.**
>
> **(2) Court proceedings under Clause 1 may be instituted by;**
>
> **(b) A person acting as a member of or in the interest of, a group or class of persons;**
>
> **(c) A person acting in the public interest."**

The applicants' counsel further submitted and invited the court to the provisions of Article 23(1) of the Constitution regarding jurisdiction of the High Court to hear and determine violation, infringement of rights or fundamental freedom in the Bill of Rights.

In buttressing the reliefs available for the High Court to grant relief under Article 23 applicants' counsel relied on the case of the **HON. ATTORNEY GENERAL & ANOTHER VS. COALITION FOR REFORMS & DEMOCRACY & 7 OTHERS CIVIL APPLICATION NO. 12 OF 2015 UR 12/2015.** Counsel further submitted and urged this court to grant conservatory orders on the strength that the policy is discriminative and rights of the farmers have been adversely affected by it in regard to social economic empowerment.

Respondent's case:

The respondent opposed the application by filing a replying affidavit dated 23rd March 2015 sworn by Dr. Kennedy Ole Kerei. It is deponed that the respondent on 5.12.2013 organized a consultative meeting as evidence by annexture "CGK-1".

The deponent further avers that following the consultation the respondent County Assembly exercised mandate on 10.12.2013 to pass a policy on Agricultural Weights and Measures to address exploitation of farmers. In support the respondent annexed "CGK-2".

It is further averred by the deponent that the policy as developed is clear and aimed at all stakeholders and actors in the Agricultural Industry within Kajiado County and the neighbouring zones. The application was argued and disposed off by way of written submissions.

Ms Moinket for the respondent opposed the application and the orders sought as lacking merit. Counsel further submitted that the applicants/petitioners have not demonstrated existence of a prima facie case for grant of the conservatory orders. She relied on the following authorities on the test to be applied in order to establish whether the case falls within the purview:

> **(1) MARTIN NYAGA WAMBORA VS. SPEAKER OF THE COUNTY ASSEMBLY OF EMBU & 3 OTHERS [2014] eKLR**
>
> **(2) CENTRE FOR RIGHTS EDUCATION AND AWARENESS [CREAW] AND 7 OTHERS PETITION NO. 16 OF 2011**

Ms Moinket further submitted that contrary to the applicants' contention the alleged policy is not discriminatory. She urged the court to find that the wording of the policy is directed to all residents of Kajiado County and also the neighbouring countries doing business with Kenya. It was Ms. Moinket contention that the sub-county contributes 70% of the total tomato production in the country. The respondent motion of 10.12.2015 was aimed at safeguarding the horticultural industry from being exploited by brokers and middle men. It was contended by counsel for the respondent that prior to the impugned notice by the applicants, respondent indicated had legislated the Crops Act No. 16 of 2013. The Act objectives were set out under Section 6(1) (b) as constituting interalia:

(1) Development of Crops grown within the county;

(2) Plant disease control;

(3) Markets;

(4) Co-operative societies within the county;

(5) Soil and water conservation.

Counsel for the respondent further submitted that the policy complained of arose from a motion passed in the County Assembly to regulate the marketing of tomato crop in the county.

According to the respondent the regulation of packaging and setting unit of measure in kilograms for any tomatoes leaving the county was a measure to support farmers and enhance productivity. Ms Moinket for the respondent further argument was that pursuant to passing a motion in the County Assembly farmers were consulted resulting in the policy formulation. Ms Moinket argued and submitted that the policy intention was to create an equal opportunity and about planning a return for the applicants/farmers. Ms Moinket urged this court to find that the policy is not unconstitutional nor did it perpetrate discrimination to the applicants in failing to limit access to the markets for their produce. She challenged the applicant's contention that the policy of packing the tomatoes in standard crates and defunctive number of kilograms has locked them out of particular markets.

In respect to the prayer for conservatory orders sought by the applicants, counsel relied on the above authorities referred to herein to urge this court to decline the same.

The gist and arguments as it flows from the authorities was that the applicants have failed to demonstrate a prima facie case.

Secondly the applicants have not demonstrated that they will suffer irreparable loss.

Thirdly the balance of convenience is not in favour of the applicants.

ANALYSIS AND RESOLUTION

Constitutional Provisions Applicable

Article 23 (1) of the Constitution provides that the High Court has jurisdiction, in accordance with Article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to right or fundamental freedom in the Bill of Rights.

In the Bill of Rights the appropriate reliefs the court may grant are as prescribed under Article 23(3) where the relief provided includes conservatory orders.

Article 22(1) of the Constitution provides that:

> **"Every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened".**

Article 27(1) provides:

> **"Every person is equal before the law and has the right to equal protection and equal benefit of the law."**

27(4) expressly bars the state from discriminating directly or indirectly against any person on any of the ground provided therein such as race, sex, ethnic, social origin, belief, age etc.

Article 47(1) of the Constitution provides that:

> **"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."**

Article 258 of the Constitution provides for enforcement of the constitution where any person can institute proceedings under the Bill of Rights on behalf of another person who cannot act in their own name or as a member of or in the interest of a group or class of persons or in the public interest.

Case Law and Commentaries:

The principles to consider in granting equitable remedies were laid down way back in 1973 in the celebrated case of **GIELLA V CASSMAN BROWN & COMPANY LTD [1973] EA 358**. The court held as follows:

> **"(a) The applicant must show a prima facie case with a probability of success.**
>
> **(b) Secondly, the applicant must demonstrate that he will suffer irreparable loss or injury which would not be adequately be compensated by an award of damages.**
>
> **(c) The thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

The question for grant or denial of conservatory orders has been considered widely by the superior courts and other legal scholars since enactment of the Constitution 2010.

In the case of the **CENTRE FOR HUMAN RIGHTS AND DEMOCRACY & OTHERS V THE JUDGES AND MAGISTRATES VETTING BOARD & 2 OTHERS ELDORET NO. 11 OF 2012** it was held as follows:

> **"In our view where a legal wrong or a legal injury is caused to a person or to a determinable class of persons by reason of violation of any constitutional or legal right or any burden is imposed in the contravention of any constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the high court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hopeless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by in action or omission."**

GATIRAU PETER MUNYA V DICKSON MWENDA KITHINJI AND 2 OTHERS 2014 eKLR the Supreme Court held thus:

> **"Conservatory orders bear a more decided public-law contention: for these are orders to**

facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as 'the prospects of irreparable harm' occurring during the pendency of a case; or 'high probability of success' in the applicants case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes."

Having considered the facts, rival submissions, the legal principles in the authorities cited above, constitution provisions together with affidavit evidence, I am of the following considered view:

It is clear that the main issue in contention here is whether the court should confirm conservatory orders as sought by the petitioners/applicants.

I will rely heavily on the principle in the above cases and also in more recent case of **KENYA SMALL SCALE FARMERS FORUM v CABINET SECRETARY MINISTRY OF EDUCATION HIGH COURT PETITION NO. 399 OF 2015 eKLR.** This case, the principles set by a series of cases and which ought to guide a court dealing with an application for conservatory orders were duly summarized. The court stated the guidelines and principles applicable as follows:

(1)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.

(2)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. If the conservatory order is not granted, the petition or its substraction will be rendered nugatory.

(3)The public interest should favour a grant of the conservatory order.

(4)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 inn material matters.

In the case of **KEVIN K. MWITI & 2 OTHERS v KENYA SCHOOL OF LAW & 2 OTHERS [2015] eKLR, Odunga J** stated thus below:

"In considering whether or not to grant a conservative order, it is my view that principle of proportionality plays not remote role."

As was also stated by **Ojwang J** as he then was in (**SULEIMAN v AMBOSELI RESORT LIMITED [2004] 2KLR 589**); the court in responding to prayers should always opt for the lower rather than the higher risk of injustice. The learned judge expressed himself as follows:

"Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in the circumstances; the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant."

As can be deduced from the law, it is not the court function at this stage of the proceedings to resolve the conflicts of evidence in the affidavits filed by each party. At this interlocutory stage, the court should bear in mind not to trespass into the realm of the issues to be determined at the final petition. This was said succinctly in a persuasive authority by the Supreme Court of the Philippines in the case of **REPUBLIC OF PHILIPPINES v SANDIGANBAJAN (FOURTH DIVISION G.R. NO. 152375 16 DECEMBER 2011)** the court laid down the issues to determine, whether the court disposition is already a final order or

interlocutory in the following passage:

> **"As distinguished from a final order which disposes of the subject matter in its entirety or terminates a particular proceeding or action, leaving nothing else to be done but to enforce by execution what has been determined by the court, an interlocutory order does not dispose of a case completely, but leaves something more to be adjudicated upon. The term final judgement or order signifies a judgement or an order which disposes of the case as to all parties, reserving no further questions or directions for future determination. On the other hand, a court order is merely interlocutory in character if it leaves substantial proceedings yet to be heard in connection with the controversy. It does not end the task of the court in adjudicating the parties contention and determining their rights and liabilities as against each other. In this sense, it is basically provisional in its application."**

The question of law to be decided eventually depends on the arguments to be advanced in the main petition. The matter before the court seeks to determine whether or not the interim conservatory orders issued should be confirmed pending hearing and determination of the substantive petition. In doing so at this stage of the proceedings, the court is enjoined to evaluate the facts of the petition visa viz the threshold of issuance of conservatory orders.

(1) A prima facie case

On the question whether the applicants have demonstrated a prima facie case with a probability of success, one has to look at the complaint in the petition. The applicants main contention is on Agricultural Produce Weights Policy dated 18/12/2013 as being unconstitutional for being in contravention of Article 27, 43, 47 (1), (2), 25 (c), 50 (c), 10 (a), (b) (c) and 10 (2) (c) of the Constitution.

Their main complaint in particular was that the respondent in coming up with the policy never consulted for their input before developing it for implementation. It was further their contention that the policy formulation by the respondent was against their wishes for failure to conduct public participation in contravention of Article 10 of the Constitution on values and governance.

The respondent on their part urged the court to find that the application has not met the criteria of a prima facie case. The respondent has based their stand on the following:

The action and implementation of the policy was a response to the cry of farmers from Kajiado South Sub-County during a county organized consultative meeting. According to the respondent contention, it was established from the farmers that there was exploitation by middlemen and brokers at the point of sale of their agricultural produce. The respondent therefore contended that the deficiency identified was lack of a regulatory framework to protect the farmers' interests. The respondent further argued that the policy dated 18/12/2013 was aimed at implementing measures for the agricultural produce weights in the county pursuant to Section 6(1) (b) 2 and 3 of the Crops Act No. 16 of 2013.

The petitioners on the other hand submitted that the policy on weights was discriminatory and a violation of their rights to economic and social rights. Their positions were anchored on the financial resources and human capital as inputs invested in production of crops for commercial markets. Due to the policy there has been a restriction to access other regional and national markets. The petitioners further in their petition have disputed that the respondent organized consultative meeting to come with the policy on agricultural produce weights.

I am of the considered view at this stage that the petition is neither frivolous, misconceived or vexatious. It alleges infringement of Article 47 of fair administrative action, Article 50 on the basic right to a fair hearing, Article 27 on equity and non discrimination, Article 10 of the Constitution on national values and governance principles more particularly on public participation without attempting to determine these issues and others by reliance on written and oral submissions, it's prudent I leave real issues be canvassed in the main petition.

Looking at the constitutional provisions against the petitioners' claims in their submissions, the implementation of the agricultural policy on weights has been impugned as being contrary to those provisions. In my opinion the impugned policy has got to be tested and determined whether it meets the threshold of the constitution and the Crops Act of 2013. I therefore find and hold that the petition passes the test of a prima facie case with a probability of success.

(2) Irreparable damage.

This is the settled test for consideration when one discusses about irreparable damage as defined in **BLACK'S LAW DICTIONARY 9TH EDITION**:

> **"Damages that cannot be easily ascertained because there is no fixed standard of measurement in the award of money in an injury."**

The petitioners have alleged in the substantive petition infringement of their rights under the various Articles of the Constitution i.e. Article 27, Article 10, Article 50, Article 47 touching on fundamental rights. It is their contention that the damage and infringement cannot be calculated and measured in monitory terms.

The respondent contends that the petitioners presented no evidence that that the injury they will suffer outweighs the damage, the injunction will occasion to the agricultural sector in the county. The petitioners on the other hand have argued and contended that through the affidavit evidence and annextures they have shown loss of right to access to markets due to the policy.

In my view the petitioners have alleged the negative impact the policy might have to their enjoyment of social economic rights during the implementation. The respondent has argued that the petitioners have adequate remedy to the infringement of their right. Then it is impossible to calculate in monitory terms what the farmers engaged in commercial production of tomatoes would lose as a result of their produce being denied access to national and regional markets. The threshold of irreparable damage likely to be suffered as a condition to grant the orders sought has been satisfied by the petitioners.

(3) Balance of convenience

The two requirements have been met by the applicants. I do not need to delve into the merits of this test at this stage. Assuming I was in doubt of the two requirements, I would still have made a finding on a balance of convenience in the instant application in favour of the petitioners if at the final determination of the petition, I find that the policy formulated on Agricultural Produce Weights should continued, the same will resume without any inconvenience to the respondent.

On the other hand if this court in adjudicating the issues in the main petition rules that the policy is unconstitutional and therefore null and void, those farmers who would have conclusively complied with the policy and those who would still be subjected to the policy and other stakeholders would have been extremely inconvenienced.

I reply on the principle of the law that where the constitutionality of any action or proceedings or omission is being questioned and a prima facie case is made out, then such act, or omission should be stayed until a decision has been made by a court with competent jurisdiction. I also find that the test of on a balance of convenience fulfilled.

(4) Public interest

The petitioners allege that they have a constitutional right towards fulfilling the duty to defend the constitutional against a possible breach of the supreme law. The respondent challenged the petitioners for their failure to appreciate that the policy in question was for the improvement of production and sales of crops in the entire county.

On consideration of the matter I note that, as petitioners correcting a violation of the constitution is in the public interest. I therefore find the question of public interest does exist.

DECISION

I am satisfied that the petitioners have met the threshold for issuance of conservatory orders pursuant to their notice of motion dated 12/3/2015. Accordingly I allow the application and make the following orders:

> **(1) The interim conservatory orders issued on 25.3.2015 are hereby confirmed pending the disposal of Constitutional Petition No. 4 of 2015 or until such other or further orders of this court.**
>
> **(2) The Constitutional Petition No. 4 of 2015 be heard on a priority basis in the new term not later than 30.9.2016.**
>
> **(3) Both counsels do appear before the Deputy Registrar to fix priority dates.**
>
> **(4) The costs of this application shall abide the outcome of the Constitutional Petition No. 4 of 2015.**

It is so ordered.

Dated, delivered on 1.8.2016 in open court at Kajiado.

…….

R. NYAKUNDI

JUDGE

Representation:

Ms Moinket for the respondent – present

Mr. Wanyika for the appellant – absent

Notification of today's date

Mr. Mateli Court Assistant