



REPUBLIC OF KENYA

IN THE REPUBLIC OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 368 OF 2012

CONSOLIDATED WITH

JUDICIAL REVIEW APPL. NO. 334 OF 2012

BETWEEN

KENYA COFFEE PRODUCERS AND

TRADERS ASSOCIATION 1ST PETITIONER

**COFFEE DEALERS OF KENYA ASSOCIATION..... 2ND
PETITIONER**

AND

COFFEE BOARD OF KENYA 1ST RESPONDENT

MINISTER FOR AGRICULTURE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

TAYLOR WINCH (COFFEE)

LIMITED 1ST INTERESTED PARTY

JOSRA COFFEE COMPANY

LIMITED 2ND INTERESTED PARTY SANGARA COMMODITIES

(K) LIMITED 3RD INTERESTED PARTY

NYAMBENE COFFEE LIMITED 4TH INTERESTED PARTY

JUDGMENT

Introduction and background

1. This case involves the management of the Nairobi Coffee Exchange and regulations concerning it. The Nairobi Coffee Exchange (“NCE”) is an institution recognized under **section 2** of the **Coffee Act, 2001** which states as follows; **“Nairobi Coffee Exchange” means the central coffee auction which is the trading floor of coffee.**”
2. This matter specifically deals with the constitutionality of **Rule 11** of the **Coffee (General) (Amendment) Rules, 2012 (Legal Notice No. 79 of 2012)** dated 9th July 2012 (**“Rule 11”**). **Rule 11** amended the principal rules by deleting **Rule 62** and substituting it with the one that now reads as follows, **“Nairobi Coffee Exchange shall be managed by the Exchange Committee as provided for in the Nairobi Coffee Exchange Trading Rules.”**
3. The repealed **Rule 62** of the **Coffee (General) Rules, 2002** provided as follows, **“The Nairobi Coffee Exchange shall be managed by the Kenya Coffee Producers and Traders Association.”**
4. The effect of **rule 11** is that it removed the management of the NCE from the petitioner and vested it in an entity known as the Nairobi Coffee Exchange Management Committee (“the Exchange Committee”) established under **rule 3** of **The (Nairobi) Coffee (Exchange Trading) Rules, 2012** dated 18th September 2012. Under **rule 4** of these rules the function of the Committee is, *“to manage the operations of the Exchange for the benefit of the coffee industry in an efficient, prudent, and professional manner.”*
5. Prior to the promulgation of the **(Nairobi) Coffee (Exchange Trading) Rules, 2012 (“Exchange Trading Rules”)**, the NCE was not governed by rules promulgated pursuant to the provisions of Act but were prepared by the Manager of KCPTA and approved in accordance with its constitutions. The enactment of the **Exchange Trading Rules** put the management and trading rules on a statutory footing. Although **rule 11** is challenged, it cannot be read in isolation as it is given effect by the **Exchange Trading Rules**. In the context of this judgment reference to **rule 11** includes the **Exchange Trading Rules** save where the context otherwise admits.
6. The **Rule 11** is challenged on the ground that it violates **Article 10** and **47** of the Constitution and **Sessional Paper No. 2 of 2001** (“the Sessional Paper”) as adopted by the National Assembly on 15th August 2001 on the liberalization and restructuring of the coffee industry in Kenya. The **Coffee Act, Act No. 9 of 2001** (“the Act”) was enacted to give effect to the recommendations set out in the Sessional Paper. As regards the role of exchange and the position of the 1st petitioner (“KCPTA”) the Sessional Paper states at clauses 6.3.1(a) and (b) under the heading **“Current and Proposed Policy Changes in Marketing”** as follows;
 - a. *The industry will retain and strengthen the Central Auction System. The Central Auction conducted at the trading floor of the Nairobi Coffee Exchange (NSE) is managed and administered by the Coffee Board of Kenya. It is proposed that this role be handled by an association comprising of members from growers, coffee grower, organisations, millers, marketing agents, brokers, auctioneers, dealers and warehousemen. It is proposed to form an association to be called “Kenya Coffee Producers and Traders Association (KCPTA).*
 - b. *The functions of the proposed KCPTA will include the determination of coffee volumes for each auction and to make trading rules in the NCE. Kenya Coffee Producers and Traders Association (KCPTA), which will supervise auctioneers. The regulations will be in harmony with the provisions of the Coffee Act. MCTA will be advised accordingly.”*
7. KCPTA was registered as a society under the **Societies Act (Chapter 108 of the Laws of Kenya)** in 2004. It brings together coffee producers and traders within Kenya’s coffee industry with the sole aim of managing and regulating coffee trading. Since its establishment it has, by reason of **rule 62** of the **Coffee (General) Rules, 2002**, managed the NCE.

8. The 2nd petitioner, Coffee Dealers Association of Kenya (“CDAK”) was incorporated on 30th April 2012 with its objects being similar to those of the 1st petitioner.
9. The 1st respondent, the Coffee Board of Kenya (“CBK”) was initially established under the ***Coffee Ordinance, (Chapter 333 of the Laws of Kenya)*** which Act commenced on 5th July, 1960. In 1971, the role of the then existing Coffee Marketing Board was abolished under the ***Coffee Act, No. 13 of 1971*** and consolidated with the regulatory function of CBK. **Section 3** of the Act establishes the CBK whose mandate is to generally regulate the entire coffee industry as well as formulate policies governing the coffee industry in consultation with the Minister. One of the objects of CBK, according to **section 7** of the Act, is to “...*promote competition in the coffee industry, production, processing and branding of Kenya coffee locally and internationally, and generally to regulate the coffee industry in the public interest.*” **Section 7** of the Act further provides that, “*the Board shall – (a) in consultation with the Ministry for the time being responsible for agriculture and other interested parties formulate policies and make rules to regulate the coffee industry.*”

Petitioners’ Case

10. The 1st petitioner’s case is set out in the petition dated 23rd August 2012 and the supporting affidavit of Charles Mbaluka Mativo sworn on even date. KCPTA contends that the decision by the Minister for Agriculture (“the Minister”) to publish **rule 11** is unlawful, unconstitutional, unreasonable, disproportionate and arbitrary and therefore unconstitutional.
11. KCPTA avers that on 26th May 2012, the Court in ***John Githinji Wang’ondy and Others v Coffee Board of Kenya and Another Nairobi Petition No. 255 of 2011***, declared that members of the CBK Board of Directors (“the Board”) had been unlawfully appointed consequently the court revoked the appointments. Mr Macharia, learned counsel for KCPTA, argued that as a result of the order, Minister could not promulgate the rules in consultation with the Board of Directors of the CBK (“the Board”) as then there was no legally constituted Board to consult.
12. Mr Macharia submitted that the decision to designate KCPTA as the manager of the NCE was not made by the Minister but was a decision by the National Assembly made through adoption of Sessional Paper as evidenced by clause 6.3.1 which I have set out above.
13. The petitioners further contend that the ***Coffee (General) Amendment) Rules, 2012*** refer to ***Exchange Trading Rules*** as the legal authority which shall constitute the Exchange Committee though the ***Exchange Trading Rules*** do not in fact exist. The petitioners state that this will create total confusion and disruption of Coffee trading in Kenya therefore violating **Articles 10** and **47** of the Constitution.
14. The petitioners challenge the decision to vest management of the NCE in an entity other than the KCPTA on the ground that it has not been subjected to adequate public participation and scrutiny as required by the Constitution. The petitioners complain that the changes to the management of the NCE have been formulated by a small group of people with vested interests and without adequate consultation, stakeholder participation, transparency or the inclusiveness required by **Article 10(2)** and as intended by the Sessional Paper. In addition, the petitioners aver that the respondents are biased against the petitioners and have openly taken sides with a few members of the trade association.
15. The petitioners argue that the impugned rules seek to effectively reverse the privatization of coffee marketing which was set in motion by the Sessional Paper which set the liberalization policy which was enacted through the Act and that neither of the respondents has authority to make rules or regulations that govern the Nairobi Coffee Exchange. In addition, KCPTA argues CBK is heavily indebted and is not a suitable organization to be entrusted with the coffee trade platform.

10. Charles Mbaluka Mativo, the Chief Executive Officer of KCPTA also attacks the decision of the Minister to change the management of NCE on the ground that it failed to provide transitional arrangements for management of NCE. He depones that **rule 11** fails to take into account key issues such as the fact that it renewed its 6 year lease with the NCE trading floor in February 2012, that it has six employees, all of whom are dedicated to ensuring that the NCE operates smoothly and who will be rendered redundant. KCPTA avers that it holds about six tonnes of coffee samples which it must retain for a period of six months in the event of a dispute between coffee traders regarding any consignment sold at the NCE and provision needs to be made for this.
11. CDAK supports KCPTA's case. In the Notice of Motion dated 31st August 2012, supported by the affidavit of Peter Kariuki Mukunga, a member of its management committee, the CDA sought judicial review orders to quash the respondent's decision to publish the rules. According to CDAK, the Minister acted unilaterally in amending the **Coffee Rules**. It contends that the Minister's action is *ultra vires* his jurisdiction as it amounted to amending the **Coffee Act, 2001**. CDAK supported the arguments made by KCPTA.
12. According to Mr Orina, learned counsel for the 2nd petitioner, CDAK learnt that the Court had disbanded the CBK Board on 21st May 2012 and that the rules were gazetted on 3rd August 2012. He submitted that the remaining directors had no authority to transact business of the magnitude and that in the absence of a properly constituted Board to delegate its task, the rules lacked legal basis. It was counsel's conclusion that on the whole there was no Board in place to advise the Minister and that the Minister acted *ultra vires* the Act and Constitution.

Respondents' Case

13. The respondents oppose the petition on the basis of the affidavit of Loice Njeru and a further affidavit sworn on 17th January 2013 and written submissions and authorities. CBK maintains that there was public participation and extensive consultations prior to the promulgation of the rules. CBK annexed various correspondence and minutes of meetings to support its point that the rules were a culmination of extensive stakeholder engagement. It avers that the KCPTA was at all material times represented at these meetings and in fact gave a written representation on the 25th August 2011. CBK maintains that KCPTA attended and took part in various deliberations of stakeholders and that it was represented in the sub-committee that was appointed on the 2nd of August 2011 to look into reforming the NCE.
14. CBK avers that CDAK was registered as a society on 30th April 2012 and informed CBK of its existence on 22nd August 2012, long after the consultative meetings that led to the formulation of the **rule 11** by coffee industry players had taken shape and there is no basis for it to complain that there was lack of public participation on its part.
15. CBK contended that there was no legal or factual basis for the petitioners to call for the nullification of the rules maintaining that the new rules are meant to ensure transparency and accountability in the management of NCE.
16. CBK denies that the contention that it did not have a Board in existence at the material time to advise the Minister on the formulation of Rules. CBK contends that none of the members of the Board whose appointment was nullified by the court order sat in the consultative meetings from which the new rules were proposed. Mr Masika, learned counsel for the CBK, submitted that the Board was properly in office when KCPTA was to forward its proposal and that the draft rules were forwarded to the Minister on 2nd March 2012 which was before the revocation of some of the Board members by the order issued on 25th May 2012. Counsel submitted that **section 7(4)(a)** of the Act empowers the CBK to make rules and that under **section 44(1)** of the Act the Minister is given powers to make rules in consultation with the Board.
17. Mr Masika also submitted that the rationale for formulating the **rule 11** and the accompanying

rules arose from stakeholders' complaints and that this process has been going on since 2011. Counsel urged court to consider the rules in the context of the entire rules maintaining that the rules were in conformity with the Act and were for the good of the coffee industry and that it was within CBK's mandate to perform regulatory functions. He urged the court to dismiss the petition.

18. The 2nd Respondent supported CBK's case and filed grounds of opposition dated 8th April 2013. It maintained the stance that the formulation of rules was done in active participation of all stakeholders in the coffee industry. In urging the court not to issue the reliefs sought on the basis that the petitioners had not demonstrated how their rights had been infringed, the Minister contended that the gazettment of the subsidiary legislation was lawful and done in accordance with **section 44** of the Act which vests power on the Minister to "*make Rules for prescribing anything which by the Act is required to be prescribed, and generally for the better carrying out of the provisions of this Act.*" According to Mr. Irari, learned counsel for the Minister, the Minister is mandated to make rules to regulate the industry and it has not been demonstrated that the petitioners' rights have been infringed.

Interested Parties Case

19. In a ruling dated 8th April 2013, I allowed the interested parties to be joined to these proceedings. The interested parties are members of the 1st petitioner and represent the interests of other active members. The interested parties support the respondents' case based on the replying affidavits filed on 27th March 2013 sworn by Dirk Sickmueller, a Director of the 1st Interested Party, and Faith Karimi, the Marketing Manager of the 4th Interested Party. The interested parties contend that they fund that at least 90% of the income of the KCPTA. It is their deposition they and other stakeholders have for a long time been dissatisfied with the management of NCE by the KCPTA as a result of which they sought the intervention of the CBK. This led to the establishment of a special committee to look into the complaints and subsequent meetings of stakeholders on diverse dates to try and arrest the situation.

20. The interested parties deny the petitioners' claim that there was no public participation as required under the Constitution. They aver that rigorous consultative meetings were held with the involvement of all stakeholders regarding the running of the NCE which culminated in the rules.

21. The interested parties support the respondents' position and assert that there was no legal basis for disturbing the rules as **Rule 11** removed the management of the NCE from KCPTA and vested the same on the Exchange Committee which draws membership from persons nominated from a wide range of stakeholders.

Analysis and determination

22. The application for judicial review and petition were consolidated and the essence of the orders sought by both KCPTA and CDAK are to quash **rule 11** of **Legal Notice No. 79 of 2012** and that the respondents be prohibited from implementing the consequential rules governing the management of the NCE contained in the ***Exchange Trading Rules***.

23. Several issues have been canvassed by parties including issues relating to the conduct of business and management of the affairs of the KCPTA. It appears that there are serious disagreements and divisions among the stakeholders in the coffee trading industry as evidenced by the joinder of the interested parties to these proceedings. These disagreements are not of concern and I have deliberately declined from commenting on or dealing with them as they may have to be resolved substantively in other forums. I shall therefore confine my findings to the core legal issues.

24. For purposes of the present petition only two issues are necessary for determination;

a. Whether **rule 11** of the ***Coffee (General) (Amendment) Rules, Legal Notice No. 79 of 2012*** is

- unconstitutional.
- b. Whether the process leading to the enactment of the **rule 11** and *Exchange Trading Rules* is unconstitutional.

Constitutionality of the Rules

25. The first question is whether the substance of the impugned rules contravenes the Constitution or whether it violates the petitioners' fundamental rights and freedoms. As stated earlier in the judgment, the effect of **rule 11** is to divest the KCPTA of the management of NCE and vest it in another body, the Nairobi Coffee Exchange Management Committee.
26. In considering whether subsidiary legislation is constitutional or otherwise, courts will have regard to various factors. These factors are well stated in the case of ***Maharashtra State Board v Kurmarsheth and Others [1985] LRC (Const) 1096, 1097*** cited by the Mr Masika, the CBK's counsel, where the court had this to say regarding evaluation on the constitutionality of subsidiary legislation, "[T]he constitutionality of the impugned regulations has to be adjudged only by a three-fold test, namely, (1) whether the provisions of such regulations fall within the scope and ambit of the power conferred by the statute on the delegate; (2) whether the rules/regulations framed by the delegate are to any extent inconsistent with the provisions of the parent enactment and lastly (3) whether they infringe any of the fundamental rights or other restrictions or limitations imposed by the Constitution."
27. I agree with the principles elucidated and I shall use this three-fold test to assess the constitutionality and legality of the impugned rule.

Whether the rules fall within the scope of the power conferred by the statute on the delegate

28. On this first issue, the petitioners have contended that the Minister acted *ultra vires* his jurisdiction in publishing the rules which action was tantamount to amending the Act. The respondents on the other hand have maintained that they acted within the law in formulating the rules in discharge of their regulatory mandate.
29. The general object and purpose of the CBK is to be found in **section 7** of the Act, which I have cited earlier in the judgment. The section goes further to vest in the Board powers to formulate policies and rules to regulate the coffee industry. **Section 7(2)(a)** states that the Board shall "*in consultation with the Ministry for the time being responsible for agriculture and other interested parties, formulate policies and make rules to regulate the coffee industry.*"
30. Under **Section 44(1)** of the Act, "*The Minister may after consultation with the Board, make Rules for prescribing anything which by this Act is required to be prescribed, and generally for better carrying out the provisions of the Act.*"
31. My reading of these provisions answer the question under consideration in the affirmative. The rules made were within the scope of the regulations that the Minister in consultation with the CBK could formulate. The Minister could as a matter of fact, make rules, "*prescribing anything, which under this Act may be prescribed*" in accordance with the **section 44(2)(g)** of the Act. The trading of coffee is an integral element of the coffee business and it falls within the mandate of the CBK and the Minister to regulate and promulgate rules within the Act including the regulation of the NCE trading.
32. **Section 31(c)** of the ***Interpretation and General Provisions Act, (Chapter 2 of the Laws of Kenya)*** provides that subsidiary legislation may at any time be amended by the same authority and in the same manner by which it is made. The power to appoint necessarily includes power to dismiss and re-appoint or revoke the appointment. **Section 51(1)** of the ***Interpretation and General Provisions Act*** states as follows, "*Where by or under a written law a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, a board, commission, committee or similar body appointed, constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it.*"

33. The KCPTA has relied on past government policy through the Sessional Paper to buttress its claim that the rules under challenge are *ultra vires*. I do not see how change in a management body contravenes the earlier road map of liberalization and restructuring of the coffee industry as reflected in the Sessional paper and encapsulated in the **Coffee Act, 2001**. In any case, laws and government policy are not static but are susceptible to modification in light of societal developments. As was held by Lenaola J., in the case of **Mount Kenya Bottlers Limited and 3 others v Attorney General and Others, Nairobi Petition No. 72 of 2011 [2012]eKLR**, “Where there is established practice based on legislation, I think that the expectation that the practice will continue indefinitely is illegitimate given that laws are not cast in stone but keep on being amended ever so often. In the case of R v Ministry of Agriculture and Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd, Sedley J. observed that ‘where a practice is generated by a policy which is itself liable to change, the practice cannot logically be expected to survive such a policy change.’”
34. It is true that the Sessional Paper set forth a programme of liberalisation of the Coffee Industry but the provisions of the Act, the powers of the Minister and the CBK cannot be constrained by the Sessional Paper where the Act has clear provisions. In my view, the Sessional Paper only provides a frame of reference and is not legislation even though it was approved by the National Assembly. It is the Act that governs the scope of power of the CBK and the Minister and unless the provisions are ambiguous, the plain and ordinary meaning of the Act should be applied to full effect. I would therefore adopt the sentiments of the court in **R v Secretary of State for Health, ex parte US Tobacco International Inc. [1992] 1 All ER 212** where it was stated that, “a Minister cannot fetter a discretion given him under statute. Providing he acts within his statutory powers, rationally and fairly, he is entitled to change his policy.”

Whether the Rules in contravention of the Act

35. The purpose of the Act according to its long title is, “**An Act of Parliament, to provide for the development, regulation and promotion of the coffee industry, and for connected purposes.**” According to the memorandum of objects to the **Coffee Bill, 2001** published in the Kenya Gazette of 8th June 2001 the purpose of the then proposed law was “to streamline operations in the coffee industry with a view to ensuring that the industry is managed in an efficient and well co-ordinated manner. The Bill proposes to increase the participation of coffee growers in the management of coffee Board of Kenya and to privatize the marketing of coffee, a service currently undertaken by the Coffee Board of Kenya. The new role of the Board is to be limited to regulating and facilitating operations in the coffee industry.”
36. These objectives clearly fall within the liberalisation spirit of the Sessional Paper that paved the way for the **Coffee Act**. I do not see how the change in the manner in which the NCE is managed in the circumstances compromises or stifles the achievement of this objective. On the contrary, it appears to me the policy in changing the manner in which the NCE is managed bears a rational connection to a legitimate government purpose, which is to reform the management of coffee trading in the country and involve more stakeholders.
37. Liberalisation is not a talisman that excludes an economic activity from the scope of governmental regulation. For purposes of this case, liberalisation is not equivalent to granting KCPTA the power to run the NCE in perpetuity nor does it mean that KCPTA cannot be divested of such authority when the circumstances permit. How liberalisation is achieved and effected is a matter for the legislature and the legislature has determined the scope of liberalisation by providing a framework of regulation within the **Coffee Act**. In other words, liberalisation is achieved within the framework of the powers granted by the Act to the CBK and Minister. Both authorities are given wide latitude to achieve the objective of liberalisation and have the power to achieve this means consistent with the letter of the law. There is nothing in the Act that stipulates that the management of the NCE shall necessarily lie with KCPTA. The Act leaves it open and it is within the power of the CBK and the Minister exercising their regulatory authority to effect the purposes of the Act by appointing any body to run the NCE. As such, I do find that the rules do not violate the Act as to render them *ultra vires* and therefore invalid.

Whether the rules are unconstitutional

38. Does the **rule 11** violate constitutional provisions or breach the petitioners' fundamental rights and freedoms? The petitioners contend that the new rules infringe on their constitutional provisions particularly **Article 10** which requires public participation as one of the principles of governance. They also assert that the rules are oppressive and violate **Article 47**. I shall address the issue of public participation later on.
39. **Article 47(1)** protects the right to fair administrative action and it provides, "*Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*" I have addressed substantially the right to fair administrative action in the foregoing section by addressing the scope of the rule making authority of the Minister and the CBK and whether the impugned rule fall within the four corners of the statute.
40. I will now address the question as to whether the **rule 11** is unfair or oppressive, or unreasonable as to breach **Article 47** which ties in with what I have considered. It must be recalled that this court has a defined role. In **Maharashtra State Board v Kurmarsheth and Others (supra at 1094)** the court observed that, "*The court cannot sit in judgement over the wisdom of the policy evolved by the legislature and the subordinate regulation-making body. It may be wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that, in its opinion, it is not wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the Court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution.*"
41. Lord Russell in the oft cited case of **Kruse v Johnson [1898] 2 QB 91** observed that, "*When the Court is called upon to consider the bye-laws of public representative bodies clothed with the ample authority which I have described, accompanied by the checks and safeguards which I have mentioned... They ought to be, as has been said, 'benevolently interpreted' and credit ought to be given to those who have to administer them that they will be reasonably administered... The learned Chief Justice said further that there may be 'cases in which it would be the duty of the court to condemn bye-laws made under such authority as these were made (by a county council) as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, "parliament never intended to give authority to make such rules; they are unreasonable and ultra vires. But it is in this and this sense only, as I conceive, that the question of reasonableness or unreasonableness can properly be regarded. A bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient or because it is not accompanied by an exception which some judges may think ought to be there."*
42. I adopt these sentiments entirely and I do not find the rules to be in breach of **Article 47(1)** as to invite the exercise of this court's authority.

Stakeholder and Public participation

43. Having concluded that the **rule 11** and **Exchange Trading Rules** do not violate the constitution as alleged, I now move to assess the process leading to its enactment. The petitioners argue that the act of the Minister was contrary to the constitution, **Coffee Act** and the rules of natural justice and in defiance of **section 44** of the Act which requires consultation of stakeholders.
44. KCPTA has also condemned the rules on the ground that the amendment does not have transitional provisions and does not take into account various provisions relating to the

management of the NCE by the 1st petitioner *vis a vis* the newly established body. **Section 31(c)** of the ***Interpretation and General Provisions Act*** is very clear that where the authority has been replaced wholly or in part by another authority, the power conferred upon the original authority may be exercised by the replacing authority concerning all matters or things within its jurisdiction as if it were the original authority. In my view therefore the Exchange Committee is empowered to deal with and make the necessary transitional arrangements to take care of KCPTA's concerns.

45. The petitioners' argument that the rules were made in contravention of a court order issued on 25th May 2012 invalidating the appointment of the CBK Board and that therefore, the Minister cannot be said to have promulgated the rules '***after consultation with the Board.***' as required under **section 44** of the Act cannot hold water for three reasons. The first reason, which is factual, is that the court order did not invalidate the entire Board membership but only those appointed by the Minister under **section 4(a)** of the Act. In any case, and I agree with the respondents and interested parties, that by the time the court order was granted, consultations leading to the formulation of the rules had already begun a year earlier.

46. The second reason that the argument fails is that the Board is a body corporate under **section 3(2)** of the Act and is therefore a separate legal entity from its directors. The law is very clear regarding the effect of a defect in the membership or composition of Board on a decision made by it. **Section 53** of the ***Interpretation and General Provisions Act*** states as follows;

53. Where by or under a written law a board, commission, committee or similar body, whether corporate or unincorporate, is established, then, unless a contrary intention appears, the powers of the board, commission, committee or similar body shall not be affected by -

(a) a vacancy in the membership thereof; or

(b) a defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof.

I therefore do not agree with the petitioners' assertion that the rules ought to be invalidated on account of a deficiency in the constitution of CBK Board.

47. The rules are also condemned on the basis that they were not tabled in Parliament as required under **section 34(1)** of the ***Interpretation and General Provisions Act***. The section states that "*All rules and regulations made under an Act shall, unless a contrary intention appears in the Act, be laid before the National Assembly without unreasonable delay...*" I dismiss this line of argument which I can only describe as a red herring and adopt the sentiments of Hon. Justice Ojwang in ***Republic v Wilfred Onyango Nganyi and Another, Nairobi Criminal Appeal No. 96 of 2005 (Unreported)*** where the learned judge observed as follows; "*I was not convinced that if ministerial instruments are not laid before the National Assembly they become utterly void. It is clear at the very least, that all things done under such rules will not become void, even if the National Assembly were to revoke the rules in question. General national practice is a highly relevant consideration in such a matter. If it were to be found that routinely, the Executive rarely lays regulations before Parliament, and Parliament itself does not regularly call upon Ministers to comply with the requirement, so that large amounts of ministerial rule-making has gone on without Parliament raising a finger, then the Court would have to take judicial notice of that practice. Although in the present matter, there was no positive evidence that Legal Notice No. 161 of 2003 had been or had not been laid before the National Assembly, the appearances are that it was not laid. Yet much activity on the ground has taken place, during times when the National Assembly has indeed been in session; and yet the point has, apparently, never once been raised at that forum. I think the practical judicial attitude in such a situation is to look to fundamental issues only.*" (See also ***Michael Mutua Ndunda and another v Attorney General & 3 Others, Nairobi Petition 226 of 2011, Republic v The Minister for Transport & Communications and others, ex parte Gabriel Limion Kaurai, Nairobi High Court Misc. Application No. 109 of***

2004).

Whether there was public participation

48. The major stone cast on the rules is that there was no public consultation in the process leading up to their publication as required by **Article 10** of the Constitution. The golden thread running through the Constitution is one of sovereignty of the people of Kenya. **Article 1** articulates this fact clearly and **Article 10** makes public participation a national value. *In Agricultural, Horticultural and Forest Industry Training Board v Aylesbury Mushrooms Ltd [1972] 1 All ER 280* the Court observed as follows, at page 284, “*The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice. If the invitation is once received, it matters not that it is not accepted and no advice is proffered. Were it otherwise organizations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding there can be no consultation.*” (See also **Centre for Rights Education and Awareness (CREAW) and Others v Attorney General, Nairobi Petition No. 16 of 2011**).
49. I have perused the correspondence presented to this court between the various stakeholders. Contrary to the petitioners’ claims, I find that there were indeed lengthy consultations, through meetings and exchange of correspondence, at intervals throughout the process amongst and across the various stakeholders in the coffee industry. I particularly note, and this is uncontroverted, that the KCPTA was in fact represented in the special sub-committee that was to interrogate on various issues including on the improvement on the NCE and was also copied on various correspondence.
50. I am of the view that the Minister was entitled to act as she did in transferring the management of the NCE to another body given the complaints of mismanagement by the 1st petitioner in accordance with the advancement of the **Article 10** value of need to foster good governance in the institution. This decision was the result of consultation and it was done in public interest in view of the significant role that such an important body that handles the larger share of coffee trade in the country plays in the economy of the country.
51. The changes engendered by **rule 11** are largely as a result of cracks in institutional governance at KCPTA. The CBK Task Force on KCPTA was appointed following complaints by stakeholders. The Task Force comprised of thirteen members representative of the various players in the coffee industry. Some of its terms of reference were to interrogate the legal status of the management of the NCE, interrogate the rules governing the membership, organizational and management structure of KCPTA, interrogate role of the Board in the management of the NCE and propose ways of strengthening, monitoring and control of coffee trading activities. In its report the task force made several findings. It was noted in the report that “*Rule 62 of the Coffee (General) Rules, 2002 stipulates that the Nairobi Coffee Exchange shall be managed by KCPT. The result of such a provision is to make it a legal entitlement to an organization such as KCPTA to run the operations of the NCE without being answerable to anyone even when there are performance issues. It was felt that the manager of the NCE should not be fixed but should be subject to change with the Board being able to vet the performance of every manager of the NCE.*” The Task Force then recommended the adoption of the proposed **Exchange Trading Rules**. In the circumstances the respondents’ decision to amend the rules was founded on an investigative process that was participatory. I find no basis to make a finding of unreasonableness.
52. KCPTA states that the changes in the management of the NEC were as result of bad faith and bias against it by some of the stakeholders. I have considered the depositions and I note that the whole process of change of management of the NCE was a result of complaints made by stakeholders pointing towards wanting performance by KCPTA. These complaints were acted upon by the respondents when the process of review was initiated and which KCPTA was involved. I therefore do not read any bad faith, bias or unreasonableness as alleged by the 1st petitioners as to invite this court to quash the Minister’s decision.

Disposition

53. I have come to the conclusion that the **rule 11** of the ***Coffee (General) (Amendment) Rules, 2012*** and the ***The (Nairobi) Coffee (Exchange Trading) Rules, 2012*** as formulated do not in any way infringe upon the petitioners' rights. On the contrary, they were promulgated in line with the respondents' mandate of regulating the coffee industry and in accordance with the values of transparency and public participation and are not *ultra vires* the provisions of the ***Coffee Act, 2001***.

54. In light of the foregoing, I find that the petitioners' claims lack merit. Consequently, the petition and notice of motion dated 23rd August 2012 and 31st August 2012 respectively are hereby dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 19th day of April 2013

D.S. MAJANJA

JUDGE

Mr Macharia instructed by Mbugwa, Atudo and Macharia Advocates for the 1st petitioner.

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Mr Orina instructed by Orina Riechi and Company Advocates for the 2nd petitioner.

Ms Irari, Litigation Counsel, instructed by the State Law Office for the 2nd Respondent.

Mr A. Masika instructed by Masika and Koross Advocates for the interested parties.