



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 16 OF 2013

BETWEEN

MOSES MUNYENDO & 908 OTHERSPETITIONERS

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

MINISTER FOR AGRICULTURE.....2ND RESPONDENT

JUDGMENT

Introduction

1. The issue for consideration is whether the *Crops Act, 2012* and the *Agriculture, Fisheries and Food Authority Act, 2012* (“the AFFA”) (collectively referred to as “the Acts”) passed into law and assented to by the President on 14th January 2013 are unconstitutional on the ground that they were enacted without public participation.
2. This petition has been brought by 909 citizens who are stakeholders in the agricultural sector as they possess expertise and interest in various sectors of agriculture in Kenya.
3. It is not in dispute that the agriculture sector is the backbone of the Kenyan economy, directly contributing 24% of the GDP indirectly valued at Kshs.385 billion. Agriculture accounts for 65% of Kenya’s total exports and provides more than 60% of informal employment in rural areas. In light of this, any policy that affects agriculture is of great importance to the people of Kenya.
4. The purpose of the Acts is to consolidate various laws that govern agriculture. More particularly, the *AFFA* consolidates all the agriculture, fisheries and food related institutions and bodies established under separate Acts of Parliament under one umbrella body; the Agriculture, Fisheries and Food Authority.

Petitioners’ Case

5. The petitioners allege that the preparation of the bills leading up to enactment was, “*undertaken in an environment of secrecy.*” They aver that there was no public consultation or participation and

that the bills only came to light when they were introduced in Parliament on 9th October 2012.

6. The petitioners, as stakeholders in the agriculture sector, contend that they sought audience with the Agricultural Sector Coordination Unit which is the secretariat within the Ministry of Agriculture addressing agriculture and rural development, the Minister for Agriculture and Parliament to raise concerns about the content of the bills but this was in vain.
7. It is the petitioner's case that the Agriculture Sector Coordination Unit, Ministry of Agriculture and Parliament failed to adhere to the principles and values of national governance contained in **Article 10** in so far as they failed to ensure public participation. Furthermore, they contend that Parliament did not comply with **Article 118(1)(b)** of the Constitution which provides that Parliament shall, "**facilitate public participation and involvement in the legislative and other business of Parliament and its committees.**"
8. The petitioners aver the **Crops Act** and **AFFA** present fundamental obstacles to the development of the agricultural sector. In essence the petitioners argue against adopting a merger of all agriculture related industries under one Authority. They state that if stakeholders were involved in meetings to discuss drafts of policies and bills, the deficiencies in them would have been thoroughly debated. The petitioners claim that there exists a body of experienced and intelligent experts within Kenya comprising producers, processors, professional and policy makers who, given a chance, will enrich the legislation.
9. The petitioners aver that in the circumstances, the Acts are unconstitutional null and void and they therefore seek the following orders;
 - A. *A declaration that the Crop Act, 2012 and the Agriculture, Fisheries and Food Authority Act 2012 (AFFA Act) are unconstitutional for being enactments done in violation of the mandatory provisions of Article 10 and Article 118 (1)(b) of the Constitution of Kenya;*
 - B. *A declaration that the Crop Act, 2012 and the Agriculture, Fisheries and Food Authority 2012 (AFFA Act, 2012) Act are unconstitutional for being enactments made inconsistently with the procedure demanded under Article 10 and 118(1)(b) of the Constitution of Kenya;*
 - C. *The costs of this petition be borne by the respondent.*

Respondents' Case

10. The petitioners' case was opposed on the basis of the replying affidavit of Dr Romano Kiome, the Permanent Secretary of the Ministry of Agriculture, sworn on 3rd April 2013. In essence, he denies the allegations by the petitioner that there was no public participation. He states that "*the said Acts of Parliament were prepared after extensive consultation from stakeholders in the agricultural section and the public through their elected representatives in Parliament and that in the process of preparation of the Acts various retreats were held by the Ministry and the stakeholders in order to input all their views and that of the public in the Bill and the end result was the two Acts.*"
11. The Permanent Secretary demonstrated that there was extensive consultation through various reports as follows;
 - a. Report of the Agricultural Sector Permanent Secretaries retreat held on 13th May 2011 at the Kenya School of Monetary Studies.
 - b. Report of the Ministers and Permanent Secretaries retreat at Sarova Whitesands Mombasa on 8th – 9th April 2011.
 - c. Report on the Legal, Regulatory and Institutional Reforms TWG activities.
 - d. Independent Evaluation of the Implications of the new Constitution on the proposed Agricultural Sector Consolidated Legislation (Bill and Reports).

Apart from these reports the Permanent Secretary annexed various list of stakeholders consulted during the period when the bills were being drafted and discussed.

Determination

12. I have considered the submissions by the parties, both oral and written in support of and in opposition to the petition and I now make my determination as follows.
13. The petitioners have made substantial and indeed attractive arguments about the merits and demerits of the Acts in relation to the agricultural sector but these arguments are not appropriate in a judicial forum unless it is shown that there is a direct breach of the Constitution. **In Republic vs. Ministry of Finance and Another Ex Parte Nyong'o Nairobi HCMCA No. 1078 of 2007 (HCK) [2007] KLR 299**, the Court held: **“Good public administration requires a proper consideration of the public interest. There is considerable public interest in empowering the public to participate in the issue. It ought to be the core business of any responsible Government to empower the people because the government holds power in trust for the people. People’s participation will result in the advancement of the public interest. Good public administration requires a proper consideration of legitimate interests..... Once public participation is attained and the decision making authority after considering the views expressed makes a decision, the issue whether or not such decision ought to have been made, can no longer be a subject of judicial review since the decision is no longer questionable on the process of arriving thereat but can only be questioned on the merits and that is not within the realm of judicial review. In the replying affidavit filed by the interested party there are minutes of meetings involving the local administrative authorities, members of the community, councillors and the interested party. Whereas the adequacy and extent of the participation of the community in the said meetings and in the decision making process may be challenged, that challenge, in my view would go to the merits rather than to the process that was followed.”** [Emphasis mine] (See also **Republic v Kenya Forest Service ex-parte Charles Kariuki and Others HC Misc. JR No. 285 of 2012 [2013] eKLR**)
14. Whether the policies pursued by the Acts are proper or not is not a matter for the court but one for the legislature. In **Commission for the Implementation of the Constitution v Parliament of Kenya and 2 Others Nairobi Petition No 454 of 2012 [2013]eKLR**, the issue for consideration was whether the **Leadership and Integrity Act, No. 19 of 2012** fell short of the threshold required by the Constitution for effective legislation. The court observed thus; “[63][The question]..... Whether to have a “one stop-shop” or have a various public entities involved in the implementation of **Chapter Six** under the umbrella of EACC is a matter for the legislative policy. Attractive and weighty arguments can be marshaled for either position but it is not a matter in which the Court should delve into unless the Constitution is contravened. As was stated by court in **Mount Kenya Bottlers Limited & 3 others v Attorney General and Others, Nairobi Petition No. 72 of 2011 [2012] eKLR**, “it must be upheld and as Wiles J. stated in *Lee v Bude* in *Torrington Rly (1871) L.R. 6*, the Courts cannot act as “regents” over what is done in Parliament because such an authority does not exist.” The Court further noted that, “[69] Declaring a statute as unconstitutional, needless to say is a serious issue with deep-seated ramifications and the court should not be overly enthusiastic in pronouncing so unless clear grounds known in law have been clearly established.” I agree and adopt these sentiments and I decline the petitioners’ entreaty to wade into the policy morass of whether the Acts are appropriate for this country.
15. In any case such a course is precluded by the fact that the petitioners prayers are limited to determining whether there was public participation in enacting the Acts as required by **Articles 10 and 118(1)(b)** of the Constitution.
16. Public participation as a national value is an expression of the sovereignty of the people articulated in **Article 1** of the Constitution. The golden thread running through the Constitution is one of sovereignty of the people of Kenya and **Article 10** that makes public participation a national value is a form of expression of that sovereignty. **Article 94** vests legislative authority of

the people of Kenya in Parliament and **Article 118(1)(b)** obliges the legislature to “*facilitate public participation and involvement in the legislative and other business of Parliament and its committees.*”

17. In the ***Doctor’s for life International v The Speaker National Assembly and Others (CCT12/05) [2006] ZACC 11*** the South Africa Constitutional Court explained that the duty to facilitate public involvement in the legislative process is an aspect of the right to political participation recognized in affairs of state and enabled and anchored by other rights and fundamental freedoms such as the freedom of expression, association and freedom of access to information. All these rights and fundamental freedoms are to be found in **Articles 33, 36 and 35** respectively of our Constitution. The Court stated that, “*The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.*”
18. The National Assembly and public institutions have a broad measure of discretion in how they achieve the object of public participation. How it is affected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public. Sachs J., observed in ***Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others*** 2006 (2) SA 311 (CC) at para. 630, that, “*The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. 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.*”
19. All statutes come with a presumption of constitutionality and the petitioners must discharge this burden of proving that a statute is unconstitutional. In ***Law Society of Kenya v Attorney General Nairobi Petition No. 318 of 2012 (Unreported)***, the court observed as follows, “[51] *In order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute. I am entitled to take judicial notice of the **Parliamentary Standing Orders** that require that before enactment, any legislation must be published as a bill and to go through the various stages in the National Assembly. I am entitled to take into account that these **Standing Orders** provide for a modicum of public participation, in the sense that a bill must be advertised and go through various Committees of the National Assembly which admit public hearings and submission of memoranda.*”
20. Whether or not there was public participation in this case is a question of fact and it is for the petitioners to prove that in fact the Constitution was violated to an extent that the resulting law is null and void. In the present case the enactment of the Acts may be considered in two stages; the pre-parliamentary or consultative stage and the parliamentary stage.
21. As concerns the pre-parliamentary or consultative stage, the Permanent Secretary has given evidence on how different stakeholders were consulted. Some of the organisations consulted include the following; Kenya National Federation of Cooperatives, National Cotton Growers Association, Meru Central Dairy Co-operative Union Limited, Cereal Growers Association and the Horticultural Farmers and Exporters Association. The organisations consulted are, in my view, broadly representative of agricultural interests in the country. This evidence is not controverted by the petitioners. Furthermore, I do not think it is necessary that every person or professional be invited to every forum in order to satisfy the terms of **Article 10**. Thus the contention that by the first petitioner, “*I am aware that majority of Kenyans producers, processors, professionals or policy makers have not been invited to any stakeholders meetings to enrich any of the law*” is not necessarily decisive of the lack of public participation. Such an argument was dismissed by

Lenaola J., in *Consumer Federation of Kenya (COFEK) v Public Service Commission Nairobi Petition No. 263 of 2013 [2013]eKLR* thus, “[13] ... The Petitioner has latched on to the phrase “participation of the people” in a selective and selfish manner. I have said that there is no express requirement that “participation of the people” should be read to mean that “the people” must be present during interviews but taken in its widest context that their in-put is recognised.”

22.The petitioners have alleged that they sought audience to raise certain concerns with the relevant bodies but this was in vain. Apart from the bland statement, there is no evidence of any engagement formal or otherwise with the said offices was actually rebuffed. Did the petitioners send correspondence or memoranda which were not received or rejected without consideration? It is not clear.

23.As regards the parliamentary stage, as have stated, I am entitled to presume that the process of enactment was in accordance with the *National Assembly Standing Orders* unless the contrary is shown. The *Standing Orders* provide for public participation and it has not been demonstrated that the process was devoid of any public participation.

24.On the whole therefore, the petitioners have not discharged their burden of showing that the statutes were enacted without public participation. Consequently, the petition is dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 6th day of August 2013

D. S. MAJANJA

JUDGE

Mr Echesa instructed by Manyonge Wanyama and Associates Advocates for the petitioners.

Mr Obura, Litigation Counsel, instructed by the State Law Office for the respondents.