



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**PETITION 255 OF 2011**

**BETWEEN**

**JOHN GITHINJI WANG'ONDU..... 1<sup>ST</sup> PETITIONER**  
**JOHN KAREGI MACHARIA.....2<sup>ND</sup> PETITIONER**  
**JOSPHAT MUNENE NDEGWA..... 3<sup>RD</sup> PETITIONER**  
**PETER KARIUKI KIBOI .....4<sup>TH</sup> PETITIONER**  
**JOHN KARIUKI KING'ORI .....5<sup>TH</sup> PETITIONER**  
**CHARLES KIBICHO WAMBUGU.....6<sup>TH</sup> PETITIONER**  
**STEPHEN KAMWERU KAMAU.....7<sup>TH</sup> PETITIONER**  
**PAUL MWAI NDERITU .....8<sup>TH</sup> PETITIONER**

**AND**

**THE COFFEE BOARD OF KENYA.....1<sup>ST</sup> RESPONDENT**  
**THE MINISTER FOR AGRICULTURE.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioners are coffee farmers within Nyeri. They claim to commence these proceedings on their own behalf and on behalf of all coffee farmers and stakeholders in Kenya.
2. Their grievances relate to regulation of the coffee crop industry in Kenya. Coffee is important in Kenya due to its contribution to foreign exchange earnings, farm incomes, employment and food security. It has been a leading export crop and is currently the third foreign exchange earner after tea and tourism.

3. The petitioners' case has its roots in the liberalisation and privatisation reforms that were introduced in the 1990's. Previously, the coffee industry was heavily controlled. Coffee was marketed by the 1<sup>st</sup> respondent, Coffee Board of Kenya ("the Board"), which was also the coffee industry regulator.
4. Following many years of agitation for liberalisation, the Government, through the Ministry of Agriculture and Rural Development issued ***Sessional Paper No. 2 of 2001 on Liberalisation and Restructuring of the Coffee Industry ("the Sessional Paper")***. The paper at clause 3.1 of stated that the, ***"The government intends to divest from business activities in accordance with the policy of liberalization and privatisation. CBK (Coffee Board of Kenya), which is a state co-operation, regulates the coffee industry with regard to production, processing, marketing and export of coffee as stipulated in the Coffee Act, Cap 333. It also markets all coffee produced in the Country on behalf of farmers. Initially, the regulatory and marketing functions were carried out by separate institutions. These multiple roles of CBK have tended to create conflict of interest and inefficiencies. It is therefore necessary to separate the regulatory role of the government which is done through the CBK, from the marketing function, which will be conducted by the "private sector."***"
5. ***The Sessional Paper*** was the product of a consultative process. It also gave rise to wide ranging consultations amongst stakeholders in the coffee industry. It was debated in the National Assembly and approved as setting out the official government policy on the coffee industry. As a result the ***Coffee Bill, 2001*** ("the Bill") was introduced in the National Assembly to give effect to the reforms suggested in the ***Sessional Paper***. According to the Memorandum of Objects and Reasons, the main object of this Bill was to, ***"streamline operations in the Coffee industry with a view to ensuring that the industry is managed in an efficient and well coordinated manner [and] to increase participation of the coffee growers in the management of the Coffee Board of Kenya and to privatize the marketing of coffee."*** The Bill also proposed to limit the role of the Board to regulatory and facilitating operations in the coffee industry.
6. The Bill received approval of the National Assembly and was assented to on 31<sup>st</sup> December 2001. The ***Coffee Act, 2001*** repealed the ***Coffee Act (Chapter 333 of the Laws of Kenya)***. The general effect of the Act was to introduce a more democratic manner of running the coffee industry. The rules made under the Act were intended to avoid conflicts of interest between various sectors of the industry and encourage competition amongst various players with the ultimate result that the farmer would reap the maximum benefit from the crop.

### **The Petitioners' Case**

7. The petitioners complain that the raft of amendments made to the ***Coffee Act, 2001*** negate both the tenor and spirit of the Act as intended by ***the Sessional Paper*** and whose effect was to defeat the principal purpose of the reforms. The amended petition does not particularise these amendments but according to the submissions these revisions were procured through the ***Finance Act, 2005***. Some of the amendments included the following;
- (i) The definition of "grower" under the Act which previously meant any person cultivating coffee was amended to mean a person who cultivates coffee and is registered with the Board.
- (ii) The definition of "marketing agent" originally excluded any person who conducts the business of milling, warehousing, roasting, packing or buyer or any subsidiary of the Board. The amendment introduced merely provided that a marketing agent was a grower licenced by the Board to market his or its coffee or a person appointed to market coffee through a specific agreement.
- (iii) The Act was amended to remove from the Board membership persons elected by the coffee cooperative societies, plantation growers and coffee trade organizations. Henceforth the membership of the Board would comprise persons appointed by the Minister on the basis of interest and expertise in matter of the coffee industry.
8. The petitioners contend that amendments to the ***Coffee Act, 2001*** has had the following effects:

- (i) The Board has been regaining control of active trading in coffee contrary objectives set out in the ***Sessional Paper*** which intended to limit its functions to regulation and facilitation of the coffee industry.
- (ii) The amendments brought back conflicts of interest within the coffee industry with the result that there has been a dramatic drop in annual production of coffee. These conflicts have also affected the returns to the farmer.
- (iii) The amendments allowed the unregulated entry of selected players into the coffee industry leading to a drop in the quality of Kenyan coffee within the international market.
- (iv) The appointment of the members of the Board by the 2<sup>nd</sup> respondent, the Minister of Agriculture (“the Minister”) has denied the petitioners the right to democratic participation in the affairs of the Board and a consultative process of election.
- (v) The amendments to the ***Coffee Act, 2001*** effected through the ***Finance Act, 2005*** were not subject to any consultation with the farmers and the stakeholders in the industry and or debate on the floor of Parliament as these were introduced through a Finance Bill.

9. The petitioners also complain that the Board has vested the exclusive right to appoint the millers and marketing agents in the management committees of the co-operative societies to the detriment of the petitioners and coffee farmers by its ***Circular Number 18*** of the 5<sup>th</sup> October 2011 contrary to ***Cooperative Societies Act (Chapter 490 Laws of Kenya)***.

10. The petitioners aver that the respondents actions infringe on their fundamental rights and freedoms protected by the Bill of Rights as follows;

(a) All amendments of the ***Coffee Act, 2001*** were effected without consulting the stakeholders in the industry contrary to **Article 10(2)**. The petitioners contend that they were not afforded the right to participate in the decision making and the respondents failed to adhere to the principles of good governance, integrity, transparency and accountability.

(b) ***Circular No. 18*** issued on the 5<sup>th</sup> October 2011 and titled “***Circular on Appointment of Commercial Millers and Marketing Agents,***” by the Board in conjunction with the Commissioner of Cooperative Development infringes on the petitioners’ rights under **Article 30** and **Article 40** in that it has effectively condemned the petitioners to servitude at the behest of the management committees of the cooperative societies and has taken away their right of choice over their property.

11. The petitioners aver that the policies, guidelines and directives issued by the Board have frustrated them as they have been formulated without their participation and involvement as follows;

(a) ***Circular Number 5*** titled, “***Coffee Export Bags,***” issued on the 15<sup>th</sup> February 2006 imposed the costs of the export bags on the growers without consultation with the stakeholders, thus occasioning great loss to farmers over the period of six years amounting to about Kshs.240,000,000.00 to the benefit of certain sectarian interests within the coffee industry.

(b) ***Circular Number 18*** removed the right of choice of millers and marketing agents from the farmer and made it a prerogative of the management committee of the co-operative societies, contrary to the ***Cooperative Societies Act***.

12. The petitioners attack the appointment by the Minister of six members of the Board by **Gazette Notice No. 15434** dated 1<sup>st</sup> December 2011 for a period of 3 years with effect from 2<sup>nd</sup> December 2011. They aver that the appointment was against the law and the Constitution on the following grounds;

(a) The Minister disregarded the values and principles of governance stated in **Article 10**.

(b) The Minister failed to ensure that the appointments were lawful, reasonable and procedurally fair as required under **Article 47(1)**.

(c) The Minister failed to discharge any of the responsibilities of leadership as set out in **Article 73**, therefore failing the leadership and integrity test as set out in **Chapter 6** of the Constitution.

(d) The Minister offended the requirement of the Constitution as regards the constitutional standards to be met in the procurement of public goods and services as stipulated in **Article 227**.

13. As a result of these grievances the petitioners seek the following reliefs in their amended petition dated 3<sup>rd</sup> February 2012;

(a) *A declaration that the petitioners' rights and freedoms under Articles 10(2), 36 and 47 of the Constitution of Kenya have been violated.*

(b) *A declaration that the amendments made to the Coffee Act, 2001 without following due process of the law including consultation of all stakeholders namely, Sections 2, 4(a), 7(1), 18 of the Coffee Act, 2001 and Rules 30 and 34 of the Coffee (General) Rules 2002, were made illegally, irregularly and unconstitutionally and accordingly ought to be struck out.*

(c) *A declaration that the petitioners are entitled to participate and to be included in the process of making any decisions that affects the coffee industry.*

(d) *An order of injunction to restrain the respondents whether by themselves or through servants and agents from sponsoring any further amendments to any section of the Coffee Act, 2001 and Rules made thereto without involving the petitioners and other stakeholders in the coffee industry.*

(e) *A declaration that the appointment by the 2<sup>nd</sup> respondent of the six (6) persons named in Gazette Notice Number 15434 dated 1<sup>st</sup> December 2011 and published in the Special Issue of Kenya Gazette Volume CXIII-Number 118, on 2<sup>nd</sup> December 2011 is illegal and unconstitutional.*

(f) *An order for the removal and de-gazettement of the directors of the 1<sup>st</sup> respondent as appointed on diverse dates by 2<sup>nd</sup> respondent.*

(g) *An order that, pending such amendment of the Coffee Act, 2001 as may become necessary arising out of this Honourable Court's decision in this petition, an order do issue directing that an interim Board of Director's of the 1<sup>st</sup> respondent be constituted on the basis of those provisions contained in the original sections 4(a) and 6 of the Coffee Act, 2001 before the same were amended in violation of the Law.*

(h) *This Honourable Court be pleased to issue any such orders and or directions as may be necessary having due regard to the circumstances pertaining and to the need for smooth operation of the Coffee sub-sector within the letter and spirit of the law and the Constitution of the Republic.*

(i) *Costs of the petition.*

14. The petitioner's case was supported by the affidavits of John Githinji Wangondu sworn on 17<sup>th</sup> November 2011 and 12<sup>th</sup> March 2012. There are also written submissions dated 23<sup>rd</sup> March 2012 and 4<sup>th</sup> May 2012.

### **Respondents' Case**

15. The Board opposes the petition on the basis of the reply to petition dated 16<sup>th</sup> January 2012 and two affidavits sworn by Loise W Njeru, the Board Managing Director, sworn on 9<sup>th</sup> January 2012 and 1<sup>st</sup>

March 2012. The 1<sup>st</sup> respondent has also filed written submissions dated 23<sup>rd</sup> April 2012.

16. In a nutshell, the Board argues that the matters litigated by the petitioners are, “*matters of policy, intended reforms, proposals and provisions in the Coffee Bill, 2001, which were not translated into the Coffee Act, 2001.*” Having been superseded by the Act itself, the proposal contained in the ***Sessional Paper*** have no force of law and therefore subsequent amendments to the ***Coffee Act, 2001*** were sanctioned by Parliament in accordance with the law.

17. The Board argues that in any event, the matters complained of by the petitioner amount to no more than directive principles of state policy, which are non-justiciable and that even if the matters litigated by the petitioners were justiciable, the amendments to the ***Coffee Act, 2001*** were not aimed at reversing and did not reverse, the policy contained in the ***Sessional Paper*** nor did they defeat the objectives of legal and institutional reform in the coffee industry.

18. The Board further contends that it has a consistent, inclusive and consultative approach with stakeholders in the coffee industry and that policies, guidelines, directives and amendments were made in consultation with stakeholders in the industry. It is further contended that even if there were no consultations, there was no constitutional requirement for State organs, State officers public officers and all persons to apply the national values and principles of governance and all persons to apply the national values and principles of governance set out in **Article 10** prior to the promulgation of the Constitution. The Board argues that the national values and principles of governance set out in **Article 10** are not a substitute for legal provisions in Acts of Parliament.

19. The Board’s case is that neither **Article 20** of the Constitution, which refers to freedom against slavery, servitude and forced labour, nor **Article 40** as to protection of the right to property has been infringed as alleged, or at all.

20. As regards the appointment of the members of the Board, it is contended that the law does not require members of its Board to be subjected to vetting or to an interview prior to appointment. It is contended that the appointments have nevertheless been made following extensive consultations in order to ensure that those appointed are persons having sufficient “*interest and expertise in the coffee industry*” as required by the ***Coffee Act, 2001***. Moreover, the Board takes the views that as a result of the appointment of Board members on 2<sup>nd</sup> December 2011, the petition has been “overtaken by events.”

21. The Board disputes the applicability of **Article 227** of the Constitution as to procurement of public goods and or services. The Board’s position is that no provision in **Article 73** of the Constitution has been violated in relation to the appointment of its Board members.

22. The 2<sup>nd</sup> respondent, the Minister of Agriculture, is represented by the Attorney General who has filed grounds of opposition dated 13<sup>th</sup> January 2012 and a replying affidavit of Dr Romano Kiome, the Permanent Secretary, Ministry of Agriculture, sworn on 21<sup>st</sup> March 2012.

23. The Minister’s case is that the appointment of new board members was in accordance with **Section 4** of the ***Coffee Act, 2001*** and was neither unconstitutional nor unlawful. The Minister further states that the Amendments were done “*with the participation of the people*” through the members of parliament who are the peoples’ representatives. It is the position of the Minister that the petition is frivolous, vexatious and an abuse of the Court process.

### **Preliminary Matters**

24. This case has been vigorously argued on behalf of the petitioner by Mr Regeru assisted by Ms Ithondeka and for the Board by Mr Nderitu. Ms Muchiri appeared on behalf of the Attorney General. The parties adopted their extensive written submissions which I shall allude to in the determination of the issues.

### ***Non-compliance with procedural directions***

25. The respondents raised several procedural issues which I consider preliminary and I shall deal with them first.

26. The first issue raised by Mr Nderitu regards the non-compliance of the Amended Petition with the draft amended petition, non-compliance with the time limited for service of the pleadings and deposition by the petitioners as ordered by the Court and non-compliance with the general provisions concerning how amendments to pleadings should be effected.

27. As this is a matter of enforcement of fundamental rights and freedoms, I take a liberal view of procedural matters having regard to the provisions of **Article 159(2)(d)** to ensure that parties are heard to the fullest extent and are not prejudiced in any manner. As counsel, abandoned this line of argument during the submissions, I shall say no more.

### ***Facts relied upon***

28. Mr Nderitu also complained that certain facts have been brought out in the further affidavits and submissions which have effectively denied the respondent the opportunity to respond thereto. I agree with the respondents that the submissions are not a forum for introducing new facts. The facts relied upon must be set out in the petition and affidavits.

29. I have considered the further affidavit of John Githinji Wangondu sworn on 12<sup>th</sup> March 2012 and in my view it contains legal arguments and the petitioner's view of the interpretation of particular provisions of the law. This court has deprecated this practice as it tends to obscure the facts and the real issues in contention (See *Meme v Republic* [2004] 1 KLR 645 *para 30*, *Tito Alai Okumu v Commissioner of Customs and Others Nairobi Petition No. 240 of 2011 (Unreported)* *para 2*).

30. I have however, set out in the introductory part of this judgment, the facts and matters of law which I consider material for determination. As it will become evident, the issues for determination are largely founded on an interpretation of the law and uncontested facts. I therefore do not find any prejudice occasioned to any of the parties.

### ***Locus standi***

31. The respondents attack the assertion that the petitioners purport to bring this suit on behalf of coffee stakeholders and farmers under **Article 22(2)** of the Constitution. The respondents do not deny that the petitioners have the right to institute these proceedings but they contend that the petitioners do not have *locus standi* to institute these proceeding on behalf of a class of persons.

32. The petitioners contend that they easily meet the requirements of **Article 22** and that they have the capacity in all respects to agitate this petition either in their personal capacity, in a representative capacity and in public interest.

33. **Article 22(4)(a)(b)** and **(c)** of the Constitution has the effect of broadening and giving constitutional foundation to the often controversial issue of *locus standi* in the agitation of cases involving enforcement of fundamental rights and freedoms. **Articles 22(2)**, which is in material terms similar to **Article 258(2)**, provides as follows.

**22 (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—**

**(a) a person acting on behalf of another person who cannot act in their own name;**

**(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; or*

(d) *an association acting in the interest of one or more of its members.*

34. I would agree with the respondents that petitioners have failed to provide the material basis on which they claim to institute those proceedings on behalf of a group or class of persons or the nature of public interest.

35. Although **Article 22** and **Article 258(2)** of the Constitution have broadened the horizons for *locus standi*, the provisions do not entitle any person to purport to litigate on behalf of others without demonstrating the interest they represent. For example, the petitioners have not shown that they have the consent of the various stakeholders in the coffee industry to pursue these proceedings on their behalf. A person who invokes the right to litigate on behalf of any other person or in public interest must demonstrate that capacity to so act.

36. Failure to set out the capacity in which a person institutes proceedings may not necessarily be fatal. It is however important for a party to set out clearly in what capacity he or she claims *locus standi* for several reasons. First, it enables the Court to frame appropriate relief in respect of the parties before the court. Second, where there are several interests involved the Court must give proper directions for the fair and efficient management of the litigation so that all interests are taken into account. Such a course will necessarily mean that a multiplicity of suit over the same issue will be avoided. Thirdly, identifying the interests is essential in determining the issue of costs.

37. In this case, the petitioners have not set out demonstrated that they are acting in any other capacity other than in their own interest. I shall therefore proceed to determine the matter on this basis.

### **Determination of Issues**

38. Having disposed of preliminary matters, I think there are three broad and interlinked issues for consideration arising from the pleadings, depositions and submissions.

**(i) Whether there has been a breach of the petitioner's fundamental rights and freedoms as alleged in the petition or at all.**

**(ii) Whether the amendments to the *Coffee Act, 2001* were made without due process of law including consultation of stakeholders and are therefore unconstitutional.**

**(iii) Whether the appointment by the 2<sup>nd</sup> respondent of six persons named in Gazette Notice No. 15434 dated 1<sup>st</sup> December 2011 is illegal and unconstitutional.**

### **Breach of fundamental rights and freedoms**

39. The petition is substantially one to enforce fundamental rights and freedoms protected under the Constitution. It is now well established that where an applicant seeks relief from the court for breach of fundamental rights and freedoms, he or she must set out with precision the rights violated and the manner in which the rights have been violated in relation to him.

40. The rationale for this requirement was elucidated in the case of ***Joseph Kimani Mwai v Town Clerk Kangema Nairobi Petition No. 1039 of 2007 (Unreported)***. The court observed that, "Our courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of rights, they must state the provision of the Constitution allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement. (See the cases of ***Anarita K Njeru v R (No. 1) (1979) KLR 154*** and ***Cyprian Kubai v Stanley Kanyonga Mwenda Nairobi HC Misc. No. 612 of 2002 (Unreported)***). The reason for this requirement is twofold; first the respondent must be in a position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by **section 84** of the Constitution is a special

*jurisdiction to enforce specific rights which are defined by each section of the bill of rights. It is not a general jurisdiction to enforce all rights known to man but specific rights defined and protected by the Constitution. It is not sufficient to rely on a broad notion of unconstitutionality but rather point to a specific provision of the Constitution that has been abridged. Unfortunately, the petitioner does not set out specific provisions of the Constitution infringed. It is true that the submissions point to specific provisions but it is the pleadings that enable the party to respond to specific allegations. I hold the view that unless specific provisions are cited or pleaded with sufficient particularity, the respondent, who is being accused of violation, may not be able to furnish evidence or bring facts which bring it within the specific exceptions, provisos or limitation. The nature extent of particularity must depend on each case but it must nevertheless enable the court identify the violation and enable the respondent defend himself.”*

41. According to prayer (a) of the amended petition, the petitioners aver that its rights under **Article 10(2), 36, and 47** of the Constitution have been infringed. The petition has also alleged the infringement of **Articles 30 and 40**. In their submissions, the petitioners have alleged and submitted extensively on the alleged breach of **Article 27** which protect a person’s right to equality and prohibits discrimination.

42. The petition which is the originating pleading must set out the violations of the Bill of Rights alleged and how these rights are infringed. The amended petition does not allege discrimination nor does it show how there is a breach of **Article 27**. The petitioners contend that the amendments to the **Coffee Act, 2001** and the **Coffee (General) Rules** are discriminatory in effect.

43. A party is not permitted to make a case not in the pleading or inconsistent with the pleading without proper amendment. The prosecution of a case not set out in the pleading is prejudicial to the respondents particularly where the arguments are made in submissions without a proper foundation in the pleading. This is prejudicial to the respondent and the proper course I adopt is to disregard the arguments made in support of a violation of **Article 27**.

44. Unfortunately, **Article 159(2)(d)** cannot be called in aid to assist the petitioners. The requirement to plead one’s case is not, in my view, an “*undue technicality*.” It is a requirement founded on the rules of natural justice and is intended to level the litigation playing field in order to avoid delay and other dilatory tactics by litigants.

45. **Articles 10** sets out the national values and principles of governance. These values are not merely statements or directives of state policy but are an integral part of the application of the provisions of the Constitution and must be given legal effect. In the case of **COFEK v Attorney General and Others Nairobi Petition No. 11 of 2012 (Unreported)**, the court observed that, “[45] *While I agree with counsel for the 3<sup>rd</sup> respondent that the values contained in Article 10 of the Constitution may not be of themselves justiciable, it must be remembered that a Constitution devoid of values and principles is like an empty tin. These values are what give real meaning to the dry letter of the law and provide a vision of the kind of society we would all like to build. They must be given full effect by every person and authority at all times.*”

46. In **Republic v The Attorney General & Other ex parte COFEK and Others Nairobi JR Misc. Appl. No. 185 of 2011 (Unreported)** the Court considered the effect of **Articles 10 and 232**, which sets out values of the public service, as read with **Article 259(1)**. **Article 259(1)** requires the court to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits development of the law and contributes to good governance. The Court (Justice W. Korir) stated, “*The above cited provisions speak to both the citizens and those who have been given responsibility of managing the affairs of this country. Greater responsibility is placed on the rulers when they are exercising their powers over the people of Kenya. The protection and enforcement of the Constitution is the duty of every citizen. A reading of the cited articles of the Constitution shows that a State officer like the Minister is expected to adhere to the rule of law, promote good governance, transparency, accountability, integrity and good administrative practices. Although Parliament is yet to enact to give full effect to some of the provisions of the Constitution, the Constitution is already speaking. It is alive and the sooner every Kenyan accepts and appreciates this fact the better for everybody.*”

47. Whether there is a breach of **Article 10(2)** must be determined in light of other provisions of the Constitution and the law which impose obligations on State organs, State officers, public officers or all persons and who apply and interpret the Constitution, enacts, apply or interpret any law or make or implement public policy decisions.

48. The petitioners have attacked **Circular No. 18** dated 5<sup>th</sup> October 2011 as infringing the petitioners' rights under **Article 30** and **40** of the Constitution. **Circular No. 18** sets out in detail how Co-operatives Societies involved in coffee industry are to appoint commercial millers and marketing agents. At the material part it states, "*The appointment of millers and marketing agents shall therefore be the prerogative of management committees who shall at all times act with due diligence and in the best interests of the co-operative society.*"

49. The issue raised in **Circular No. 18** regarding appointment of the millers and marketing agents to the exclusion of members of the co-operative was the subject of the judgment in **R v Commissioner for Cooperative Development ex parte Thika Coffee Mills and Another Nairobi JR Misc. Appl. No. 93 of 2007 (Unreported)**. In that case, the court held that a 2006 circular issued by the Commissioner of Cooperative Development requiring the appointment of millers and marketing agents by the management committees was *ultra vires* **section 4** and **27** of the **Co-operative Societies Act**.

50. This case though, is about the constitutionality of **Circular No. 18** and whether it is consistent with **Article 30** and **40** as pleaded in the amended petition and the determination is made on that basis.

#### ***Freedom from slavery, servitude and forced labour***

51. **Article 30** provides as follows:

**30. (1) A person shall not be held in slavery or servitude.**

**(2) A person shall not be required to perform forced labour.**

52. In the case of **Okenyo Omwansa & Another v Attorney General & Others Nairobi Petition No. 126 of 2011 (Unreported)**, the court held that the generally accepted definition of slavery is contained in the **Slavery Convention of 1927** at **Article (1)** which defines slavery as, "*the status or condition of a person over whose any or all powers attaching to the right of ownership are exercised.*" Servitude refers to "*slavery-like practices.*"

53. The definition of forced labour is set out in the **International Convention on Forced Labour 1930 (No. 29)**, which is part of our law by dint of **Article 2(5)** of the Constitution, and which defines forced labour at **Article 2(1)** as, "*all work or services which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.*"

54. I would also add that it is now well established that the international prohibition against slavery and servitude is one of the pre-emptory norms in international law (*jus cogens*) and which apply to Kenya as part of the general rules of international law by dint of **Article 2(5)** of the Constitution.

55. The petitioners, as coffee farmers have, the choice to grow coffee but if they must, they are subject to regulation for the greater or aggregate public good. They have not demonstrated that the regulation to which they are subject to as coffee farmers are such that have no power or control over their land or coffee to the extent that there is a breach of **Article 30**. The pleadings and the depositions do not show that the petitioners have been subjected to slavery, servitude or forced labour.

#### ***Freedom of association***

56. The petitioner has in, the amended petition, sought a declaration that **Article 36** has been violated. **Article 36**, in part, states as follows;

**36. (1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.**

**(2) A person shall not be compelled to join an association of any kind.**

57. The petitioners submit that the amendment to the definition of “small holder” is the *Coffee Act, 2001* requiring the farmer to register with the Co-operative Society to which he delivers coffee is a contravention of **Article 36** as it restricts the farmers’ freedom of association.

58. The petitioners have cited **Article 36** in the declaration sought but the amended petition does not set out how this right is infringed by the respondents. In the absence of such a plea and for the reasons I have stated above I am unable to make a finding despite the submissions made in this respect.

### ***Protection of right to property***

59. The petitioners have also alleged that there has been breach of **Article 40** of the Constitution in that their right over choice of property has been taken away. **Article 40** states as follows;

**40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—**

**(a) of any description; and**

**(b) in any part of Kenya.**

**(2) Parliament shall not enact a law that permits the State or any person—**

**(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**

**(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).**

**(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—**

**(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**

**(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—**

**(i) requires prompt payment in full, of just compensation to the person; and**

**(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law. (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.**

**(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to land.**

**(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.**

**(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.**

60. **Article 40(1)** sets out the general right of every Kenyan to acquire and own property. There is no allegation in the pleadings that the petitioners have been denied the right, either individually or in association with others to acquire or own property of any description in Kenya.

61. **Article 40(2)** limits the authority of Parliament to pass certain types of legislation affecting property. First, legislation that deprives a person of property arbitrarily and second, legislation that restricts enjoyment of any right to property in a manner that is discriminatory in terms of **Article 27(4)** of the Constitution. The petitioners do not complain of any such breach in the petition.

62. **Article 40(3)** and **(4)** deal with the deprivation of property by the state on terms specified, that is, for a public purpose or in the public interest and upon payment of compensation. There is no complaint in this matter to trigger the application **Article 40(3)** or entitle them to compensation.

63. The petitioners have failed to demonstrate how any of the rights to property have been infringed in terms of **Article 40**. I hold that the mere regulation of an industry may limit the right to property consistent with the provisions of the **Article 24** but it is unnecessary to consider such limitations as the petitioners have not demonstrated breach of **Article 40**.

### **Whether amendments to Coffee Act, 2001 are unconstitutional**

64. The Constitution promulgated on 27<sup>th</sup> August 2010 brought with it a new legal structure which was effective from that date. **Article 263** provides that the Constitution shall take effect on the date of promulgation while **Article 264** provides that on the date of promulgation the former Constitution subject to the **Sixth Schedule** shall stand repealed.

65. The effect of **Articles 263** and **264** is that the Constitution is not retrospective, it cannot invalidate, except by express provision, what was otherwise legal during the currency of the former Constitution. (See *Joseph Ihugo Mwaura v Attorney General Nairobi Petition No. 498 of 2009 (Unreported)* and *Du Plessis and Others v De Klerk and Another (CCT 8/95) [1996] ZACC 10*) Thus the requirements for consultation and public participation imposed by **Article 10** or any other provisions cannot be used to determine the constitutionality of statutes or rules passed under the former constitutional regime at the time they were enacted.

66. The petitioners' case relates to amendments to the *Coffee Act, 2001* enacted prior to 27<sup>th</sup> August 2010 and their legality must be determined under the former Constitution. Under **section 46** of the former Constitution, legislative power was exercised by Bills passed by the National Assembly and presented to the President for his assent. The only limitation placed on the exercise of legislative power is to be found in **section 48** which requires that certain Bills containing financial measures must originate from the government. In any other case, the legislative authority to enact bills, including effecting amendments to existing legislation, was within the competence of the legislature.

67. I therefore find that the enactment of the *Coffee Act, 2001* and all the subsequent amendments cannot be impugned on the basis of the provisions of the Constitution. It must follow that prayer (b) of the amended petition is dismissed.

68. Prayer (c) and (d) of the amended petition seek a declaration that the petitioners are entitled to participate in decisions affecting the industry and an injunction restraining the respondents from sponsoring amendments to the *Coffee Act, 2001* without involving the petitioners and other stakeholders respectively. These prayers cannot be granted as the court would be required to supervise executive and legislative processes. I have no doubt that these bodies are aware of their responsibilities under the Constitution and will act accordingly.

### **Whether the appointment by members of the Board is unconstitutional.**

69. I must agree with the respondents that **Article 227** as to procurement of public goods and or services in a manner that is fair, equitable, transparent, competitive and cost effective is not applicable to

appointment of members of the Board.

70. As regards **Article 73**, which is concerned with the responsibilities of leadership, I find and hold that the petitioners have not made out a case to demonstrate that the elements set out therein have been breached by the Minister or any other person in relation to appointment of the Board. **Article 73** contains several detailed provisions and it is important that a party who relies on these provisions to set out with particularity the provision infringed and how it is infringed. **Article 73** imposes specific obligations on a State Officer and therefore a vague and generalized averment, allegation or accusation that there is a violation of **Article 73** is inadequate and embarrassing and must be dismissed.

71. The enactment and promulgation of the Constitution did not *ipso facto* render existing legislation unconstitutional. **Section 7** of the **Sixth Schedule** to the Constitution provides that all laws shall be construed with the alterations, adaptation, qualifications and exceptions necessary to bring it into conformity with the Constitution. All laws must now be read through the eyes of the Constitution.

72. The effect of **Article 10(1)** is that any person giving effect to the provisions of the **Coffee Act, 2001** is obliged to apply the values and principles of the Constitution. Therefore, in exercising the power of appointment, the Minister is bound to apply the provisions of **Article 10** and **234**. In the case of **Community Advocacy and Awareness Trust and Others v Attorney General Nairobi Petition No 243 of 2011 (Unreported)**, the Court in relation to public appointments stated, “[73] 27<sup>th</sup> August 2010 ushered in a new regime of appointments to public office. Whereas the past was characterised by open corruption, tribalism, nepotism, favouritism, scrapping the barrel and political patronage, the new dispensation requires a break from the past. The Constitution signifies that the end of ‘jobs for the boys’ era. Article 10 sets out the values that must be infused in every decision making process including that of making appointments.”

73. The power of appointment of members of the Board is provided under **section 4(1)(a)** of the **Coffee Act, 2001**

**4(1) The Board shall consist of**

**(a) such number of members as may be appointed by the Minister on the basis of their interest and expertise in the coffee industry and approved by the relevant Parliamentary Committee.**

74. In response to the challenge over the appointment, the Permanent Secretary has stated as follows, “.....I deny that the role of the 2<sup>nd</sup> respondent is limited to publishing in the gazette the names of the elected members of the Board. I am advised by the state counsel on record that the 2<sup>nd</sup> respondent has power to appoint the members of the 1<sup>st</sup> respondent as provided under section 4 of the Coffee Act 2001. The 2<sup>nd</sup> respondent has already appointed new members of the Board on 2<sup>nd</sup> December 2011 for a period of three years.”

75. The Minister avers that she acted in compliance with the law and that the petitioners have not demonstrated what amounts to good governance, accountability and transparency. According to the submissions, **Article 47** is not applicable to the appointments and the Constitution has not been violated in any manner.

76. In approaching its task the Court is required to give effect to the Constitution. In the case of **Samura Engineering Ltd & Others v Kenya Revenue Authority Nairobi petition No. 54 of 2011 (Unreported)** the Court noted that, “[77] By placing the values of rule of law, good governance, transparency and accountability at the centre of the Constitution, we must now embrace the culture of justification which requires that every official act must find its locus in the law and underpinning in the Constitution.”

77. The culture of justification is now central to meeting the objects of our Constitution; that is a society based on the essential values of human rights, equality, freedom, democracy, social justice and rule of law. It is not enough for the Minister to state blandly that she acted in accordance with the law, she must

demonstrate that she acted in accordance with the Constitution once the formal challenge is launched. The Minister is obliged to place material before this court to show that she complied with the Constitution and that her acts were infidelity to the Constitution.

78. In *Jesse Wahome and Others v Kenya Engineers Registration Board and Others Nairobi Petition No. 149 of 2011 (Unreported)*, the court observed that “[11] *The obligation of the state is to “observe, respect, protect, promote and fulfil” the provisions of the Bill of Rights. The State cannot assert merely that its role is “merely supervisory.” While I appreciate that each of the entities that have been sued are independent statutory bodies, they do not exist independently from the State and nor can the State abdicate its responsibilities by interposing constitutional liability by statutory device. Under Article 260, “State” when used as a noun in the Constitution means the collectively of offices, organs and other entities comprising the government of the Republic of Kenya. All these bodies are bound by obligations imposed by the Bill of Rights. [12] The culture imposed by the Constitution is one of justification, every act, policy, measure taken by the state must be disclosed and justified in terms of the Constitution and this court is obliged to assess that act, policy or measure to determine whether it complies with the standards and requirements of the Bill of Rights.*”

79. The issue whether a minister can assert unlimited power to make an appointment was considered in the case of *Republic v Attorney General & Other ex parte COFEK and Others (Supra)* the court observed, “*The question is whether the Minister exercises untrameled power when appointing the Director-General. The Minister appears to say he has absolute power and he is not accountable to anybody, I think that this submission is fallacious. In appointing the Director-General of CCK the Minister is exercising administrative power. The said power is governed by two Acts of Parliament already cited. Whenever a public officer exercises administrative power, he should do so reasonably, rationally and within the confines of the law .... If a citizen of this country believes that the power bestowed upon a public officer has been abused, he can move the court by way of judicial review and ask for a review of the decision in question.*”

80. I agree with the reasoning in that case and it is firmly rooted in Constitution and in the provisions of **Article 47(1)** which entitles every person to “**administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**” The Minister, when exercising the statutory power of appointment, is taking administrative action which this court is entitled to review under the provisions of **Article 47(1)**.

81. The Board argues that the appointments have already been made and therefore the petition has been “overtaken by events.” This argument must be dismissed at once as to uphold it would be to undermine the Constitution itself. This court has power to grant relief under the Constitution where there is a violation and this power is not taken away merely because the act of appointment is complete.

82. **Section 4(1)(a)** of the *Coffee Act, 2001* provides that persons appointed to the Board are subject to approval by the relevant committee of the Parliament. No such act of approval by the legislative committee has been shown to the court and the instrument of appointment, the Gazette Notice, does not refer to approval by the committee of the Parliament as required by **section 4(1)(a)**. The appointment is faulted in this respect as lacking a “lawful” basis in light of **Article 47(1)**.

83. Although the Minister and Parliament ultimately make the appointment to the Board, it has not been shown that the process of identifying, “*persons with interest and expertise in matters of the Coffee industry,*” was open, competitive, fair or in compliance with the values and principles set out in the Constitution. Dr Kiome has not even demonstrated that the persons appointed to the Board are, “*persons with interest and expertise in matters of the Coffee industry,*” as required by the statute.

84. I therefore agree with the sentiments expressed by the court in the case of *David Kariuki Muigua v Attorney General and Another Nairobi Petition No. 161 of 2011 (Unreported)* in which the court declined to uphold the appointment of the petitioner as chairperson of the Standards Tribunal. In so doing the court (Justice Mumbi Ngugi) stated, “*There is no evidence that there was a competitive process that would enable public participation in the process and show the transparency and accountability required under the Constitution, thereby giving legitimacy to the appointment of the petitioner. Like his successor,*

*the petitioner was appointed on the basis of a Gazette Notice; the basis of the appointment, the criteria followed in appointing him and the other members of the Tribunal was, from all appearances and regrettably so, more in keeping with the old order that preceded and indeed gave impetus to the clamour for the new Constitution when public officers were appointed at the whim of the Minister or President. To uphold the appointment of the petitioner would be to give a seal of approval to the old order. It is imperative that all public appointments are made in accordance with constitutional values and principles.”*

85. I must also point out that even though authority is granted to the Minister to make appointment, she must use a means of appointment that gives effect to the Constitution. How the Minister achieves these constitutional purpose is within her power and the Court will only intervene when the appointing authority does not use a rational procedure intended to fulfill national values and principles (See **COFEK v The Attorney General and Other (Supra)**).

86. I therefore find and hold that appointment of members of the Coffee Board of Kenya by Gazette Notice No. 15434 does not meet the constitutional principles and values contained in **Article 10(2)**, is in breach of **Article 47(1)** and must be set aside.

87. The Minister is at liberty to exercise the statutory authority conferred by **section 4(1)(a)** of the **Coffee Act, 2001** in accordance with the values and principles of the Constitution.

### **Conclusion**

88. The petitioner has succeeded in part and I therefore award half the costs of this petition against the 2<sup>nd</sup> respondent who is responsible for the impugned appointment to the Board.

89. As this petition concerns the enforcement of fundamental rights and freedoms, I am not inclined to award costs to the 1<sup>st</sup> respondent as it was a necessary party to these proceedings.

90. Before I conclude, I must express my gratitude to counsel for their research and very eloquent arguments and submissions made in the prosecution and opposition of this petition. If I have not referred to all the authorities cited by counsel, it is not due to disrespect or lack of the appreciation for counsels' industry.

91. My final orders are therefore as follows;

**(a) I do not find any breach of the petitioners' rights and fundamental freedoms protected under Article 30, 36 and 40 of the Constitution.**

**(b) I hereby declare that the appointment of the six persons by the Minister of Agriculture to the Board of Directors of the Coffee Board of Kenya by Gazette Number 15434 dated 1<sup>st</sup> December 2011 is contrary to Article 10(2) and 47 of the Constitution and is therefore null and void.**

**(c) The petitioners are awarded half the costs of this petition as against the 2<sup>nd</sup> respondent.**

**DATED and DELIVERED at NAIROBI this 25<sup>th</sup> day of May 2012.**

**D.S. MAJANJA**

**JUDGE**

Mr N. Regeu with him Ms W. Ithondeka instructed by W. J. Ithondeka and Company Advocates for the petitioners.

Mr A. Nderitu instructed by Nderitu and Partners Advocates for the 1<sup>st</sup> respondent.

Ms Muchiri, Litigation Counsel, instructed by the State Law Office for the 2<sup>nd</sup> respondent.