



**ORION EAST AFRICA  
LIMITED.....PETITIONER**

**AND  
THE PERMANENT SECRETARY MINISTRY OF  
AGRICULTURE.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

## **JUDGMENT**

### **Introduction**

1. The petitioner is a company that distributes and sells pest control chemicals among them products known as alphasime and dimeton. It is not in dispute that these products are registered by the Pest Control Product Board (“PCPB”) under the *Pest Control Products Act (Chapter 346 of the Laws of Kenya)*. The two products contain a chemical known as dimethoate as an active ingredient and which is known to be highly effective in pest control.

### **The Facts**

2. The basic facts in the matter are not in dispute and are outlined in two affidavits sworn by Mike Rua who is the managing director of the petitioner. The first one, which is in support of the petition, is sworn on 27<sup>th</sup> March 2012 and the second one, a supplementary affidavit is sworn on 10<sup>th</sup> July 2012. There is also a replying affidavit sworn by Romano Kiome, the Permanent Secretary, Ministry of Agriculture (“the Permanent Secretary”), on 8<sup>th</sup> May 2012.

3. Dimethoate based products were without controversy until the Permanent Secretary received a letter dated 7<sup>th</sup> October 2011 from the Kenyan Embassy in Spain. The letter written by the Charge D’Affairs stated as follows;

*7<sup>th</sup> October 2011*

*The Permanent Secretary  
Ministry of Agriculture  
P O Box 30028  
Nairobi*

### **RE: THREAT TO KENYA EXPORT OF GREEN BEANS TO EUROPE**

*We have been informed by the Spanish Ministry of Health, Social Policy and Equality of the Kingdom of Spain, that it was taking measures to tighten control of entry of Green Beans into the Country.*

*The action was prompted by disclosure by Health Authorities in the United Kingdom to the European Commission (EU) that Dimethoate had been detected in Green Beans from Kenya which was found to be*

above allowable levels. The produce was from the Super Fresh Kenya Limited.

Urgent damage control measures are recommended.

Attached please find translated copy of the communication.

(Signed)

K Kasombo

Charge D’Affairs a.i

4. The communication attached to the letter stated that the authorities in the United Kingdom had detected dimethoate above the maximum allowable levels in green beans originating from “SUPER FRESH KENYA LTD” which occasioned a health alert.
5. The letter from the Kenya Embassy in Spain prompted the Ministry of Trade to write to Kenya Plant Health Inspectorate (“KePHIS”), Horticultural Crops Development Authority (“HCDA”) and Fresh Produce Exporters Association of Kenya (“FPEAK”) a letter dated 21<sup>st</sup> October 2011 in which it urged the organisations “to urgently take necessary damage control measures so as to avoid possible negative repercussions on the export of our green beans to the entire European Union....”
6. By a letter dated 1<sup>st</sup> November 2011, the Permanent Secretary wrote to the Managing Director, PCPB requesting the Board to ban the use of dimethoate in Horticulture. The letter stated as follows;

1<sup>st</sup> November, 2011

Mrs Gladys Maina

Managing Director

Pest Control Products Board

P O Box 13794

Nairobi

Dear Mrs Maina

**RE: LEGAL NOTICE BANNING DIMETHOATE USE IN HORTICULTURE**

As you are aware, Kenya is a major exporter of Horticultural produce to the European Union Markets. The country has received several notifications this year from the EU Directorate of Health and Consumer Protection (DG-SANCO) on MRL exceedences on dimethoate use in vegetables in Kenya. The situation is now threatening market access for thousands of vegetable farmers.

Considering the restrictions on dimethoate use in vegetables by EU Authorities, I hereby direct you to draft a legal notice banning use of dimethoate in vegetable production in Kenya for my consideration and signature.

Further I hereby direct that Pest Control Products Board in collaboration with the industry (FPEAK), HCDA and KePHIS, publish a notice in the local press informing the public about this decision.

ROMANO KIOME

PERMANENT SECRETARY

7. The proposed legal notice was never published but an advertising campaign against the use of

dimethoate was launched by the Ministry of Agriculture and supported by FPEAK, HCDA, KePHIS, PCPB, Kenya Agricultural Research Institute (KARI), Agrochemicals Association of Kenya (AAK) and United States Agency for International Development (USAID).

8. On 20<sup>th</sup> January 2012, an advert supported by the Ministry of Agriculture and its partners, appeared in the daily newspapers, titled, “*Soma Label*”. The advert read as follows;

**WARNING TO ALL VEGETABLE FRUIT FARMERS**

*Spraying DIMETHOATE has been banned by the markets*

*SOMA LEBO*

*IF THE INGREDIENTS CONTAIN DIMETHOATE, DON'T USE ON VEGETABLES*

*DIMETHOATE IS HARMFUL TO YOUR HEALTH*

*DIMETHOATE HAS BEEN BANNED BY EUROPEAN MARKETS*

*Although popular with farmers due to its effectiveness against insect pests in fruit and vegetable production, the use of Dimethoate poses serious risks to fresh produce and therefore human safety; and has been banned by the markets in Europe,*

*Dimethoate use was restricted in the European Union directive 914/414 of 2009. EU revised the allowed Maximum Residue Limit from the previous 0.2 ppm, to 0.02 ppm, which is effectively the Limit of Detection (LOD) in other words a technical ban.*

***European Supermarkets followed up this action with a direct ban on any use of Dimethoate on vegetables marketed in the EU.***

*In 2011, several consignments of Kenyan vegetables were refused entry into the market because they contained dimethoate and the company's contracts terminated.*

*The Ministry of Agriculture and FPEAK in conjunction with HCDA, KePHIS, PCPB, KARI and AAK therefore wishes to discourage all farmers against use of any dimethoate containing pesticide on vegetables and fruits. Currently there are about 25 products containing dimethoate in the Kenyan market. Farmers can easily verify if a product contains dimethoate by reading the label.*

***STOP THE USE OF DIMETHOATE ON VEGETABLES AND FRUITS TODAY!***

9. Naturally, as a dealer of dimethoate based products, the petitioner was aggrieved by the advert and the ensuing negative publicity that accompanied the campaign. For example, the Daily Nation of 31<sup>st</sup> January 2012 had an article titled “*Banned vegetable pesticide linked to rising cancer cases*” and another titled, “*More Kenyans at risk of “cancer chemical.”*” Both articles, discussed the effects of dimethoate, alphasime and dimeton. Another article titled, “*Farmers urged to shun pesticides containing “dimethoate”*” purported to set out the risks of these chemical products.

10. Aggrieved by these negative reports and the advertising campaign, the petitioner wrote to the Permanent Secretary, raising its concerns in a letter dated 2<sup>nd</sup> February 2012 where it noted that the reference to alphasime and dimeton in the advertising campaign was not based on any scientific fact and contravened the ***Pest Control Products Act***. The petitioner requested the ministry to withdraw the campaign or face legal proceedings. The letter stated in part, ‘... *Your advertisement was cold hearted and solely intended to deal a devastating blow to our business which you have succeeded in doing by stoking hostilities and creating descent between us and our customers/Kenyans of goodwill and continues to spiral out of control by affecting our entire operations and the cancellation of orders from our main market segments.*’

11. According to the petitioner, alphasime and dimeton are very popular products within the market and are safe to human and animal life and have no adverse effect on the environment. The petitioner avers that various parastatals among them Kenya Seed Company use the petitioner's products.

### **Petitioner's Case**

12. The petitioner's case is outlined in the petition dated 27<sup>th</sup> March 2012 where it contends that its fundamental rights and freedoms have been violated by the respondents.

13. Mr Ng'ang'a, counsel for the petitioner, submitted that the foundation of the petition is the decision taken by the Permanent Secretary and contained in the letter dated 1<sup>st</sup> November 2011 directing the PCPB to ban dimethoate based products. Counsel contends that although no legal notice was published, the advertising campaign was clearly based on the proposed ban and it did amount to a ban.

14. The petitioner avers that the certificate of registration of the dimethoate based products issued by PCPB was a representation that it was lawfully authorised to manufacture and freely offer for sale its dimethoate based products. As a result of the representation the petitioner avers that it invested heavily in setting up a manufacturing plant, purchase of raw materials and entered into supply contracts with customers. In taking administrative action, the 1<sup>st</sup> respondent, was constitutionally bound to act fairly, reasonably and within the confines of law.

15. Mr Ng'ang'a further submitted that the purported ban of use of the petitioner's dimethoate based products contravenes **Article 47(1)** to the extent that the decision was capricious, vindictive, callous and actuated by bad faith. Further, that the decision violated **Article 47(2)** in that no written reasons for the action have been furnished to the petitioner.

16. The petitioner therefore prays for the following reliefs in the petition;

(a) *A declaration that petitioner's fundamental rights to fair administrative action, Access to information, Equality and freedom from discrimination, protection of right to intellectual property and right to fair hearing have been violated transgressed on and trampled upon by the respondents.*

(b) *A declaration that the respondents purported ban of use of the petitioners dimethoate based Alphasime and Dimeton on vegetables and fruits is unconstitutional, null and void.*

(c) *An order of certiorari to issue to bring to this Honourable Court for the purposes of being quashed, the 1<sup>st</sup> respondent's decision to ban use of Dimethoate based pest control products on vegetables and fruits as communicated in the Daily Nation Newspaper of 30<sup>th</sup> January 2012 or any other such advertisement whatsoever carried out in the print, electronic and other media purporting to ban the use of dimethoate based pest control products in vegetables, fruits or any other crop.*

(d) *An order of prohibition to issue to prohibit the respondents by themselves, servants, agents or whomsoever from banning, purporting to ban, restrict or limit use of Dimethoate based pest control products on vegetables, fruits and other crops or in any manner interfering with the petitioner's right to manufacture, market, offer for sale, trade or in any other manner deal with its Dimethoate based pest control products.*

(e) *An order of mandamus do issue to compel the respondents by themselves, servants, agents or whomsoever to retract, countermand and/or reverse the media advertisement in the Daily Nation Newspaper of 30<sup>th</sup> January 2012 or any other notice made through any other media, communicating the decision to ban the use of Dimethoate based pest control products.*

(f) *An order for compensation for lost revenue of Kenya Shillings One Hundred Million (Kshs.100,000,000/-)*

(g) *Costs incidental to this suit.*

### **Respondents' Case**

17. The Permanent Secretary depones that there are 24 products registered in Kenya containing the dimethoate as an active ingredient. Out of these, the petitioner is licenced to deal in two products; alphadime and dimeton.

18. According to the respondents Kenya has substantial interests in the export of fruits and vegetables in the European Union market as these products earn the country substantial foreign exchange. The Permanent Secretary avers that whereas the products containing dimethoate have been in use in the horticulture sector in Kenya, it has since become untenable to access foreign markets for exported fruits and vegetables as dimethoate based insecticides have been banned in Australia, the European Union and Scandinavian countries.

19. The Permanent Secretary states that following the reduction of maximum residue levels of trace dimethoate insecticides found in exported vegetables and fruits to the European Union countries, fruits and vegetables from Kenya have been rejected as they contain high dimethoate levels.

20. The Permanent Secretary depones that contrary to the contention by the petitioner that the respondent has banned the use of dimethoate based pest control products in Kenya, there is no such ban in existence. Instead the respondent has undertaken its duty, as underscored within its constitutional and statutory mandate, to involve the stakeholders in the sector in a concerted effort to build a consensus in response to the prevailing trade conditions, offer advisory to the stakeholders including users of the product to facilitate informed choices and alerting the general consumers of the product of the prevailing trade conditions on the use of the product.

21. It is the respondents' case that it is legally empowered to advise the citizens of Kenya on agricultural best practices for the local and export markets and if the petition is allowed, it is likely to have the effect of jeopardizing the vegetable and fruits market in Europe, particularly because uninformed users may overlook minimum residue levels proscribed by the European Countries and export products which do not meet the prescriptions aforesaid and therefore affect market access on Kenya's horticulture.

22. The respondents also contend that members of the public have the constitutional right to access to information held by the state and that the Kenyan public as consumers have the constitutional right to information necessary to gain full benefits from goods and services and furthermore to the protection of their consumer and economic interests.

23. Mr Muiruri, counsel for the respondents also submitted that the petitioner's products were licenced for a specific purpose and were not to be used for fruits and vegetables and the advert was clear on that specific purpose.

24. Counsel urged the court to dismiss the petition on the ground that the Government had to deal with the issues raised by the export markets and it had to act fast and give exporters and farmers the necessary information. Counsel contended that the petition is frivolous and raises no constitutional matters and ought to be dismissed.

### **Determination and Disposition**

25. I have considered the oral and written submissions of the parties and this being a matter for the enforcement of fundamental rights and freedoms, I will restrict my findings to specific rights that have been breached. My assessment of the facts will demonstrate that this matter falls within the province of **Article 47** that is the right to fair administrative action.

26. The issue as I understand is that the sustained advertising campaign against dimethoate based products amounted to a stealth ban of the petitioner's products which ban had been alluded to in the letter

dated 1<sup>st</sup> November 2011 from the Permanent Secretary to the PCPB and the advertising campaign coming so soon after the ban on dimethoate products was proposed by the Permanent Secretary.

27. The purpose of **Article 47(1)** is to subject administrative action to constitutional discipline. The term “administrative action” is not limited to decisions; it is an expansive term which includes any act or omission that affects the rights and interests of the citizen. The 1<sup>st</sup> respondent asserts that there has been no ban of dimethoate based pest control products but in my view what is to be assessed is that action and in the circumstances of this case, the fact that a media campaign underwritten by the state to discourage the use of the pesticide may in fact amount to a ban and achieve the same effect as the ban that was supposed to be effected by the legal notice proposed by the Permanent Secretary.

28. The respondent contends that the media campaign was reasonable and based on several constitutional obligations. Firstly, **Article 35(3)** which provides that, “*the state shall publish and publicise any important information affecting the nation.*” Second, **Article 46** which provides inter alia that, “*consumers have the right to goods and services of reasonable quality; to the information procession for them to gain full benefit from the goods and services; to the protection of their health, safety and economic interest.*” Third, the respondent relies on **Article 42** which states; “*Every person has the right to a clean and healthy environment, which includes the right— (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) to have obligations relating to the environment fulfilled under Article 70.*”

29. Mr Muiruri cited the words of L’Heureux-Dube J., of the Canadian Supreme Court in *Ltee (Spraytech, Societed’arrosage) and Services des espaces v Hudson (Town) and Others* [2001] 2 SCR 241 where he stated that, “*Twenty years ago there was very little concern over the effect of chemicals such as pesticides on the population. Today, we are more conscious of what type of an environment we wish to live in and what quality of live we wish to expose our children [to]*” *This Court has recognized that “[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment .... Environment protection [has] emerged as a fundamental value in Canadian society.*” I agree with the sentiments expressed but I must state that pesticides in Kenya are regulated in accordance with the statutory regime contained in the ***Pest Control Products Act***.

30. Once pesticides are licensed, the licence holder has a legitimate expectation that it will distribute and market its product without unlawful interference from the State. The right to fair administrative action is intended to protect the individual from unreasonable administrative action such as the stealth ban instigated by the Ministry of Agriculture.

31. The Permanent Secretary contends that the advertising campaign does not affect the petitioner’s products as they were not licenced for use on fruit and vegetable. According to the certificate of registration No. PCPB (r) 0566 Alphadime 414EC is subject to the condition that it is an “*Insecticide for the control of bollworm, strainers, aphids and loopers in cotton, stem borer on Maize, aphids on Barley.*” Although the petitioner did not annex the certificate of registration in respect of Dimeton 400EC, the respondent contended that the product Alphadime 415EC is not used as a pesticide on fruits and vegetables and the petitioner’s own packaging states that it is “*[A]n insecticide/acaricide with systemic, contract and repelling mode of action that is effective for the control of a wide range of pests in cotton, barley and Maize.*”

32. I have considered the label for the product alphadime which is prepared in accordance with the ***Pest Control Products (Labelling, Advertising and Packaging) Regulations***. The label must be approved by the PCPB and it shows that alphadime may be used on french beans. The information brochures distributed by the petitioner also demonstrate that alphadime is used to control pests on vegetables like beans, cabbages, kales and tomatoes. Furthermore, the list of the 24 dimethoate based products licenced for use in Kenya shows that the products are used for pest control on crops ranging from tomatoes, kales, cabbages, potatoes and fruits. The assertion in the advert that, “*If the ingredients contain dimethoate, don’t use on vegetables*” is clearly at odds with the licencing regime.

33. **Section 3** of the *Pest Control Products Act* prohibits the manufacture, package, storage, display, distribution, use or advertisement of any pest control product except in accordance with conditions prescribed by regulations made under the Act. Contravention of this section attracts criminal sanction under **section 12** of the Act. **Regulation 11** of the *Pest Control Products (Registration) Regulations* entitles the PCPB to suspend and revoke of certificates of registration on the ground, “*that new information has become available to the Board which renders the pest control product unsafe or dangerous.*” In this case the PCPB has the legal tools to ensure that the petitioner does not offer its products for sale contrary to the conditions of the licence. The Board is also empowered to effect a ban on the petitioner’s products if the products are found to be unsafe and dangerous. The taking of administrative action by 1<sup>st</sup> respondent by underwriting an advert which achieves the effect of a ban is, in my view, breaches the right to fair and reasonable administrative action particularly where it has not been demonstrated that the provisions of the regulatory statute have been breached.

34. Further, my assessment of the facts shows that dimethoate and or dimethoate products have not been banned in Kenya, a fact admitted by the respondents. There is also no evidence that has been placed before the court to show that dimethoate based products have been banned in Europe. The main concern of the European Union, as evidenced by the annexures to Romano Kiome’s deposition, was not the use of dimethoate per se but the residue level found in certain products being exported by a specific company.

35. The concerns raised by the dimethoate residue levels were raised and dealt with in a meeting held in by the Dimethoate Task Force Meeting on 13<sup>th</sup> September 2011. The Task Force urged members of the AAK selling dimethoate products to review their labels and be specific on the crops and pests addressed. The task force also noted that it was the responsibility of the AAK member companies and the relevant companies to create awareness on the dangers posed by the wrong use of dimethoate in horticultural products.

36. The “Soma Lebo” campaign, by specifically giving prominence to a purported ban by the European markets, is misleading in character and where it is underwritten by the government it suggests to the general public that in fact, the dimethoate products have been banned. The fact of government involvement gives the campaign more gravitas and most Kenyans are likely to believe the government than interrogate the information. The effect of the campaign is evidenced by a memorandum dated 2<sup>nd</sup> December 2011 sent by AAK to its members addressing the “*Dimethoate Banning.*” The memorandum stated in part that, “*Agrochemicals Association of Kenya (AAK) through Dimethoate Task Force Committee set up by Dimethoate distributors has received information that Dimethoate has been banned. It is in this regard that AAK would like to tell its members that this information has not been confirmed to be true. AAK would, therefore, like to assure its members that Dimethoate has not been banned and that it is addressing the issue through the legal system.....*”

37. The actions of the Ministry of Agriculture were on the basis I have outlined unfair and unreasonable. In the circumstances, I find and hold that the purported ban of the petitioner’s dimethoate products through the advertisement campaign as evidenced by the “*Soma Lebo*” advert appearing in the Daily Nation of 20<sup>th</sup> January 2012 is a breach of the petitioner’s right to fair administrative action protected under **Article 47(1)**.

### **Reliefs**

38. The petitioner has sought several reliefs including the quashing of the newspaper publications. Under **Article 23**, this court has the jurisdiction to frame appropriate remedies that will vindicate the petitioner rights and fundamental freedoms breached. As these adverts have already been published, prayer (c) will not serve any purpose.

39. The petitioner has prayed for the sum of Kshs. 100,000,000.00 as compensation for lost revenue. Lost revenue is in the nature of special damages and it must be pleaded with particularity and proved accordingly. No evidence was led to prove the loss and therefore the claim is dismissed.

40. I am aware that the 1<sup>st</sup> respondent has a duty and obligation to inform and educate the public on the proper use of pesticides and therefore any relief I issue must take this into account. The obligation of the Ministry of Agriculture must take into account the rights of the holder of a product licence issued by the relevant statutory authority.

41. In the circumstances, the relief that is suitable to vindicate the petitioner rights shall be as follows;

(a) I declare that the purported ban of the petitioner's dimethoate products effected through the advertisement campaign as evidenced by the "*Soma Lebo*" advert appearing in the Daily Nation of 20<sup>th</sup> January 2012 was a breach of the petitioner's right to fair administrative action protected under **Article 47(1)**.

(b) The 1<sup>st</sup> respondent be and is hereby restrained from interfering with the sale, distribution or in any manner with the petitioner's duly licenced products; alphasime and dimeton contrary to the provisions of the ***Pest Control Products Act (Chapter 346 of the Laws of Kenya)***.

(c) The 1<sup>st</sup> respondent shall bear the costs of the petitioner.

**DATED and DELIVERED at NAIROBI** this 28<sup>th</sup> day of September 2012

**D.S. MAJANJA**

**JUDGE**

Mr M. Ng'ang'a instructed by Mbugua Ng'ang'a and Company Advocates for the petitioner.

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