Law Society of Kenya v Attorney General & 3 others (Environment and Planning Petition 2 of 2023) [2023] KEELC 20682 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20682 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND PLANNING PETITION 2 OF 2023

OA ANGOTE, J

OCTOBER 12, 2023

(FORMERLY PETITION NO 007 OF 2023)

BETWEEN

LAW SOCIETY OF KENYA ..... PETITIONER

AND

THE HON ATTORNEY GENERAL ..... 1ST RESPONDENT

NATIONAL BIOSAFETY AUTHORITY(NBA ..... 2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 3RD RESPONDENT

KENYA AGRICULTURAL AND LIVESTOCK RESEARCH ORGANIZATION (KARLO) ..... 4TH RESPONDENT

Release, cultivation and placing in the market of genetically modified maize could not commence until an environmental impact assessment license was obtained

The petition challenged the lifting of the ban on open cultivation and importation of genetically modified maize. The court found that although the Biosafety Act did not provide that, strategic environmental assessment and environmental and social impact assessment reports must be availed before the National Biosafety Authority approved the project, be it in terms of trials or release to the market, the reports must be availed. Further, an environmental impact assessment licence had to be issued by the National Environment Management Authority before the project could commence (whether trials or release to the market).

Reported by Kakai Toili

Environmental Law *– National Biosafety Authority (NBA) – requirements to be met before the NBA could approve a project - strategic environmental assessment (SEA) and environmental and social impact assessment (ESIA) reports and environment impact assessment (EIA) licence - whether it was mandatory for the SEA and ESIA reports to be availed before the NBA could approve a project - whether after obtaining approval from the NBA a party could commence a project before obtaining an EIA licence - Biosafety Act, Cap 320, Part V.*

Environmental Law *- precautionary principle - nature and purpose - what was the nature and purpose of the precautionary principle.*

Constitutional Law *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms - right to information – claim that information was not sought in writing from a State agency - whether one could claim a violation of the right to information where the information sought was not requested in writing – Constitution of Kenya, 2010, articles 22 and 35; Environmental Management and Co-ordination Act, Cap 387, section 3A.*

Constitutional Law *– national values and principles of governance – public participation – public participation by the Cabinet - whether the Cabinet was required by law to engage the public before arriving at its decisions – Constitution of Kenya, article 10.*

Statutes *– statutory instruments – types of statutory instruments – Kenya Gazette and Cabinet Despatch - whether a Cabinet Despatch was a statutory instrument - what was the nature and purpose of the Kenya Gazette – Statutory Instruments Act, Cap 2A, section 2.*

Civil Practice and Procedure *– pleadings – petitions - whether courts while determining a petition could determine issues which were not contained or pleaded in the petition.*

Words and Phrases *– environmental impact assessment – process of identifying, predicting, evaluating and mitigating the biophysical, social and other relevant effects of development proposals prior to major decisions being taken and commitments made - International Association for Impact Assessment.*

Brief facts

The petitioner's case was that on October 3, 2022, the Executive issued an order directing the lifting of the ban on open cultivation and importation of genetically modified maize (BT Maize). The petitioner further stated that the lifting of the ban was followed by the 2nd respondent's, the National Biosafety Authority's (NBA) approval of the 4th respondent's, the Kenya Agricultural and Livestock Research Organization (KARLO) application for environmental release and placement into the market of BT Maize and its varietal derivatives in Kenya. It was deponed that the use of biotechnology in agriculture had a number of risks that were social, economic, health and environmental related.

It was also the petitioner's case that as increasing numbers of genetically modified (GM) crops were released into the environment, the likelihood of unintended ecological effects on both agricultural and natural systems increased. The petitioner thus sought for among other orders; a declaration that the right to a clean and healthy environment had been contravened by the actions and omissions of the respondents; a declaration that the systematic denial of access to information to the petitioners by the respondents on the health and ecological effects of BT Maize and what precautionary measures were to be taken violated the petitioners right to information; and an order of *mandamus* stopping any further open cultivation, importation and exportation of BT Maize pending an environmental impact assessment (EIA) on open cultivation of BT Maize on the environment.

Issues

i. Whether after obtaining approval from the National Biosafety Authority a party could commence a project before obtaining an environmental impact assessment licence.
ii. Whether it was mandatory for strategic environmental assessment and environmental and social impact assessment reports to be availed before the National Biosafety Authority could approve a project.
iii. Whether a Cabinet Despatch was a statutory instrument?
iv. Whether courts while determining a petition could determine issues which were not contained or pleaded in the petition.
v. Whether one could claim a violation of the right to information where the information sought was not requested in writing.
vi. What was the nature and purpose of the Kenya Gazette?

vii. Whether the Cabinet was required by law to engage the public before arriving at its decisions.
viii. What was the nature and purpose of the precautionary principle?

Held

1. The subject of genetically modified organisms (GMOs) was widely recognized but often lacked a comprehensive understanding among the general public. According to the World Health Organization, GMOs could be defined as organisms (that was plants, animals or microorganisms) in which the genetic material (DNA) had been altered in a way that did not occur naturally by mating and/or natural recombination. The technology was often called modern biotechnology or gene technology, sometimes also known as recombinant DNA technology or genetic engineering. It allowed selected individual genes to be transferred from one organism into another, sometimes between nonrelated species. Food produced from or using GMOs were often referred to as GM foods.
2. The Cabinet, established under article 52 of the Constitution, made up the Executive arm of the Government responsible for among other functions formulating Government policies. A Cabinet Despatch amounted to communication of a policy position by the Government pursuant to a Cabinet meeting. Nowhere was such a Despatch indicated to be founded on any provision of any Act or made in the exercise of any legislative powers. The impugned Cabinet decision was not a statutory instrument. The assertion that the Despatch was void for not complying with the Statutory Instruments Act, 2013 was therefore without merit.
3. Parties were bound by their pleadings. By its nature, a supplementary affidavit was meant to respond to any issues that may be raised in a replying affidavit and was not an avenue for raising new issues. However, in exceptional circumstances, the court may in exercise of its discretionary powers admit new evidence by way of further/supplementary affidavit.
4. Unlike the first objection which merely called upon the court to identify the nature of the despatch, questions as to the legality of the Cabinet composition on account of the constitutionality or lack thereof of the Cabinet composition was not a matter which the court could interrogate, the same being a substantive issue and having not been raised in the petition. The same therefore failed.
5. For a party to succeed in a claim of violation of a constitutional right, such party must set out clearly the violation in respect of which he sought redress. Article 22(3)(d) of the Constitution provided that in determining matters brought under article 22, the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.
6. The right to access information was a fundamental and cornerstone principle in environmental law. It served as a crucial mechanism for promoting transparency, and accountability in matters related to the environment and was necessary to meet the goals of environmental information and promote sustainable development.
7. Pursuant to article 35(3) of the Constitution, the State was obligated to publish and publicise any important information affecting the nation. Those constitutional provisions were buttressed by the Access to Information Act, 2016, which was enacted to give effect to article 35 and to provide a framework for disclosure of information by public and private entities to the public based on constitutional principles relating to accountability, transparency and public participation and access to information.
8. Section 3A of the Environmental Management and Co-ordination Act, 2015 equally provided that every person had a right to access any information that related to the implementation of the Act that was in the possession of the 3rd respondent, the National Environment Management Authority (NEMA), lead agencies or any other person. Section 3A(2) stated that a person desiring information should apply to NEMA or the relevant lead agency and may be granted access on payment of a prescribed fee. Section 8 of the Access to Information Act provided that a request for information should be made in writing. Indeed, section 3A(2) provided that a person desiring information should apply to NEMA or the relevant lead agency and may be granted access on payment of a prescribed fee.

9. The petitioner should have asked in writing for the information in respect of the process that led to the lifting of the ban of GMO in October, 2022, and the subsequent approval that was granted to KARLO. No party had alluded to any written request by the petitioner to the respondents to avail information in respect of the lifting of the ban. Having not sought for the information in writing, the petitioner could not claim that its right to information under article 35 of the Constitution had been infringed. The claim that the respondents were in breach of article 35 therefore failed.
10. The Kenya Gazette was an official publication of the Government. It contained notices of new legislation, notices required to be published by law or policy as well as other announcements that were published for general public information. It was used by the Government as an official way of communicating to the general public, acting as a formal and transparent means of announcing Government actions, providing citizens with information, opportunities for feedback, and a way to hold the Government accountable.
11. In the context of public participation, the gazette notice served a dual purpose. On one hand, it was a means of communicating Government decisions and policies while on the other hand, it was an avenue through which the Government called for engagements prior to decision making. Whereas the Kenya Gazette served as a means to call for public engagements, that was usually subject to legislation providing for the same, like the Regulations under review.
12. Whereas Government programs and initiatives were not necessarily required to be gazetted, any legal or regulatory aspects of such programs that had a direct impact on the public or required formal legal documentation may be published in the Kenya Gazette to ensure transparency and compliance with the law. The specific requirements for gazetting Government programs may vary depending on the nature of the program and its legal implications.
13. Public participation was considered a critical pillar of what had been variously described as participatory democracy deliberative or discursive democracy and even radical democracy. Whereas the concept found footing in several provisions of the Constitution, it had not been coded comprehensively through legislation. The essential features of public participation had been developed overtime through case law.
14. The NBA complied with the Biosafety (Environmental Release) Regulations, 2011, when it informed the public, including the petitioner, to raise environmental concerns before reaching a decision to grant approval for environmental release of BT Maize in Kenya in the gazette notice and adverts in the newspapers. There was evidence on record that indeed, as per the adverts, the NBA had a session with the public at KICC and received their views.
15. The petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescription of the law, which it failed to do. There was public participation and awareness after the NBA received the application for environmental release, cultivation and placing on the market 810 maize and its varietal derivatives in Kenya on June 18, 2015 by KALRO and African Agricultural Technology Foundation (AATF).
16. The court had not been shown any law or authority that required the Cabinet to engage the public before arriving at its decisions. In any event, there was no public participation before the ban of GMOs was imposed by the Cabinet in the year 2012.
17. The legal regime for the issuance of EIA licenses was anchored in the Constitution, where article 69(f) required the State to establish systems of EIA, environmental audit and monitoring of the environment. Those systems were set out in the Environmental Management and Co-ordination Act which, as read with the relevant provisions of the Environmental (Impact Assessment and Audit) Regulations 2003 had set out the framework of EIA, environmental audit and monitoring of the environment and the procedures and processes involved in securing the same.
18. EIA was a systematic examination conducted to determine whether or not a programme, activity or project would have any adverse impacts on the environment. The Environmental Management and

Co-ordination Act defined strategic environmental assessment (SEA) as a formal and systemic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives. The NEMA Guidelines (2011) defined SEA as a range of analytical and participatory approaches to integrate environmental consideration into policies, plans, or programmes and evaluate the interlinkages with economic and social considerations.

19. Under section 7(2)(a) of the Biosafety Act, 2009, the NBA had the mandate to consider and determine applications for approval of the transfer, handling and use of GMOs. Section 28 of the Biosafety Act provided for a risk assessment upon receipt of a complete application as well as an audit risk assessment. It was after the NBA had done a risk assessment and conducted public participation that the requirement of an environmental and social impact assessment (ESIA) and SEA kicked in.

20. Considering the complexity of biotechnology and the mandate given to the NBA by both the international and domestic laws to exercise general supervision and control over the transfer, handling and use of GMOs with a view to ensuring safety of human and animal health; and to provide and to consider and determine applications for approval for the transfer, handling and use of GMOs, and related activities, it must perform those functions to its satisfaction.

21. In carrying out its mandate, Part V of the Biosafety Act provided that the National Biosafety Authority must consult with regulatory bodies. Although the Biosafety Act did not provide that an ESIA or SEA report must be availed before the NBA approved the project, be it in terms of trials or release to the market, the reports must be availed, and an EIA licence issued by NEMA pursuant to the provisions of the Environmental Management and Co-ordination Act before the project could commence (whether trials or release to the market). That was what section 58 of the Environmental Management and Co-ordination Act required.

22. Despite the NBA having given KALRO approval for the release and placement into the market of MON 810 event in maize varieties in Kenya for purposes of cultivation, food, feed and processing, import, export and transit on October 12, 2022, KALRO required an EIA license from NEMA to undertake the project. Before an EIA license could be issued allowing the approved project, ESIA and SEA reports must be prepared by NEMA experts.

23. The approval of all projects requiring EIA licenses, including construction, was always done by bodies stipulated in the law, before NEMA, whose objective was to supervise and coordinate environmental activities, could authorize the preparation of EIA, ESIA and SEA reports by its experts, and then issue EIA licenses. That was the same scenario that should be applicable in the approval processes of national performance trials (NPTs) and environmental release, cultivation and placing in the market of GMOs. The approval of the National Biosafety Authority under the Biosafety Act had to come first before EIA, ESIA and SEA reports could be prepared and a license issued, if at all. The two processes could not be carried out simultaneously.

24. No evidence had been placed before the court by the petitioner to show that KALRO was already undertaking cultivation of food, feed and processing, import, export and transit of MON 810 event in maize varieties in Kenya without an EIA licence. The NBA having given its approval for environmental release, cultivation and placing in the market of BT Maize to KALRO, KALRO could not commence the project until it obtained an EIA license from NEMA. The allegation that the cultivation, importation and exportation of GMO maize was being undertaken without an EIA licence was prematurely made, the project having not commenced.

25. The right to clean and healthy environment was recognized as indispensable for the survival of humanity. Article 42 of the Constitution guaranteed every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations. Article 69, set out the State's obligations with respect to the environment, including protecting genetic resources and biological diversity and eliminated processes and activities that were likely to endanger the environment. Article 69 further provided for the obligation of every citizen to cooperate with the

Government and any other person to conserve and protect the environment as well as use natural resources and ensure ecologically sustainable development.

26. The precautionary principle provided guidance for governance and management in responding to uncertainty. It provided for actions to avert risks of serious or irreversible harm to the environment or human health in the absence of scientific certainty about that harm. Widely accepted in sustainable development and environmental policy, the principle represented a formalization that delaying action until harm was certain would often mean delaying until it was too late or too costly to avert it.

27. The Environmental Management and Co-ordination Act defined the precautionary principle as the principle which postulated that where there were threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation. The precautionary principle recognized the limitations of science in being able to accurately predict the likely environmental impacts and thus called for precaution in making environmental decisions where there was uncertainty. That principle required that all reasonable measures be taken to prevent the possible deleterious environmental consequences of development activities. The principle had four central parameters namely;

    1. taking preventive action in the face of uncertainty;
    2. shifting the burden of proof to the proponents of an activity;
    3. exploring a wide range of alternatives to possible harmful actions; and
    4. increasing public participation in decision-making.

28. The court had not been called upon to answer the question about whether or not GMOs in general and BT Maize in particular was safe. What the court was called upon to determine was the effectiveness of the existing laws and regulations in as far as identifying, mitigating and addressing potential risks taking into account key environmental principles and concerns, and in particular the precautionary principle in sustainable development.

29. The biosafety governance in Kenya was on two levels; international and national. Internationally, Kenya was a party to the Convention on Biological Diversity, the Cartagena Protocol and Nagaya-Kuala Lumpur Supplementary Protocol. The Convention on Biological Diversity, generally, contained a version of the precautionary principle in the preambular text, which provided some guidance on how the serious or irreversible harm mentioned in the Rio Declaration should be interpreted in the biodiversity context.

30. The Biosafety Act, 2009, was the lead piece of legislation governing biosafety in Kenya. There were four regulations under the Act, *to wit* the; Biosafety (Contained Use) Regulations, 2011; Biosafety (Environmental Release) Regulations, 2011; Biosafety (Import, Export and Transit) Regulations, 2011 and the Biosafety (Labelling) Regulations, 2012. The Regulations were concerned with ensuring that potential adverse effects of GMOs were addressed to protect human health and the environment when conducting contained use; and to ensure that potential adverse effects of genetically modified organisms were addressed to protect human health and the environment when conducting environmental release.

31. The Regulations under the Biosafety Act ensured safe movement of GMOs into and out of Kenya while protecting human health and the environment and ensured that consumers were made aware that food, feed or a product was genetically modified so that they could make informed choices, and facilitate the traceability of genetically modified organism products to assist in the implementation of appropriate risk management respectively. Guidelines had also been put in place to supplement the Regulations.

32. The lead agency in matters biosafety was the NBA. The NBA was a State corporation whose main objective under the Act, among others, was to regulate all activities involving GMOs in food, feed, research, industry, trade and environmental release.

33. It was not clear why all the approvals had not been challenged by the petitioner if indeed there was a concern that GM foods posed a serious risk to the environment and human health.
34. The petitioner had not challenged the constitutionality of the laws governing GMOs, both international and domestic. The regulatory barriers that governed importation and cultivation of GMOs remained in force, and the same were presumed to be constitutional until the contrary was proved. From the evidence, Kenya had put in place robust frameworks with inbuilt strictures which must be met before the various agencies could consider and determine applications for approval of the transfer, handling and use of GMOs.
35. The existing legal and institutional framework had been set up for the rigorous evaluation of GMOs and GM foods relative to both human health and the environment. From the evidence, the NBA and other agencies had the capacity in the identification of foods that should be subject to risk assessment and recommendation of appropriate approaches to safety assessment. The environmental assessments alluded to operated as precautionary measures aimed at protection of the natural environment from any side effects that may be witnessed as a result of the release of GMOs to the market. The safeguards by the NBA fell within the confines of precautionary principle as interpreted by Kenyan courts.
36. The court had not been shown any evidence to show that the respondents, and the institutions it was supposed to collaborate with had breached the laws, regulations and guidelines pertaining to GM food, and in particular the approval of the release in the environment, cultivation, importation and exportation of BT maize.

Petition dismissed.

Orders

N*o order as to costs.*

Citations

Cases

Kenya

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2. *Astute Africa Investments & Holding v Spire Bank Kenya Limited & another* Civil Case 455 of 2017; [2018] KEHC 3360 (KLR) - (Explained)
3. *Baadi, Mohamed Ali & others v Attorney General & 11 others* Petition 22 of 2012; [2018] eKLR - (Explained)
4. *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others;Kenya Tobacco Control Alliance & another (Interested Parties);Mastermind Tobacco Kenya Limited (The Affected Party)* Petition 5 of 2017; [2019] KESC 15 (KLR) - (Explained)
5. *Commission for Human Rights & Justice (CHRJ) & another v Chief Officer, Medical Services County Government Of Mombasa & 3 others* Constitutional Petition E003 of 2022; [2022] KEHC 12994 (KLR) - (Explained)
6. *Commission for the Implementation of the Constitution v Parliament of Kenya & another* Petition 496 of 2013; [2013] eKLR - (Explained)
7. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated); [2014] eKLR - (Explained)
8. *Kasing'a, Ken v Daniel Kiplagat Kirui & 5 others* Petition 50 of 2013; [2015] KEHC 1181 (KLR) - (Explained)
9. *Kenya Shell Limited v Kobil Petroleum Limited* Civil Application 57 of 2006; [2006] eKLR; [2006] 2 KLR 251 - (Mentioned)

10. *Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education Science and Technology & 5 others* Petition 399 of 2015; [2015] KEHC 2109 (KLR) - (Explained)
11. *Kitur, Bernard Kibor v Alfred Kiptoo Keter & another* Petition 27 of 2018; [2018] KESC 18 (KLR) - (Explained)
12. *Kwanza Estates Ltd v Kenya Wildlife Services* Civil Case 133 of 2012; [2013] KEHC 4762 (KLR) - (Explained)
13. *Matindi v Cabinet Secretary National Treasury & Planning & 4 others* Constitutional Petition E280 of 2021; [2023] KEHC 1144 (KLR) - (Explained)
14. *Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* Presidential Election Petition 4 of 2017; [2017] KESC 45 (KLR) - (Explained)
15. *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014(Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); [2015] eKLR - (Explained)
16. *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
17. *Murango, John Mungai & another v Jeremiah Kiarie Mukoma* Civil Appeal 187 of 2012; [2015] KECA 374 (KLR) - (Explained)
18. *National Assembly of Kenya v Kina & another* Civil Appeal 166 of 2019; [2022] KECA 548 (KLR) - (Mentioned)
19. *Njenga v Council of Governors & 3 others* Environment and Land Petition 37 of 2017; [2020] KEELC 3929 (KLR) - (Explained)
20. *Odinga & 7 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 1 (KLR) - (Explained)
21. *Ombati v Chief Justice & President of the Supreme Court & another; Kenya National Human Rights and Equality Commission & 2 others (Interested Party)* Petition E242 of 2022; [2022] KEHC 11630 (KLR) - (Explained)
22. *Republic v Attorney General; Law Society of Kenya(Interested Party); Ex-parte: Francis Andrew Moriasi* Judicial Review Miscellaneous Application 364 of 2018; [2019] KEHC 7013 (KLR) - (Explained)
23. *Republic v Kenya Revenue Authority Ex Parte Cooper K-Brands Limited* Miscellaneous Application 458 of 2013; [2016] eKLR - (Explained)
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South Africa

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Canada

Monsanto Canada Inc v Schmeiser 2004 SCC 34; [2004] 1 SCR 902 - (Explained)

Australia

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Regional Court

1. *Guerra & others v Italy* Application No 14967/89; (1998) 26 EHRR 357; [1998] ECHR 7 - (Explained)
2. *Oneryildz v Turkey* (2005) 41 EHRR 20 - (Explained)
3. *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication No. 155/96 - (Explained)

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Statutes

Kenya

1. Access to Information Act (cap 7M) sections 8, 14 - (Interpreted)
2. Appellate Jurisdiction Act (cap 9) sections 1A, 3B- (Interpreted)
3. Biosafety (Contained Use) Regulations, 2011 (cap 320 Sub Leg) In general - (Cited)
4. Biosafety (Environmental Release) Regulations, 2011 (cap 320 Sub Leg) regulation 12 - (Interpreted)
5. Biosafety (Import, Export and Transit) Regulations, 2011 (cap 320 Sub Leg) In general- (Cited)
6. Biosafety (Labelling) Regulations, 2012 (cap 320 Sub Leg) In general - (Cited)
7. Biosafety Act (cap 320) sections 7 (2)(a); 18; 19; 20; 21; 22; 23; 27; 28; 30; 31; 38; 41; 50; 52; 53; part III, V, VI; Schedule 5- (Interpreted)
8. Civil Procedure Act (cap 21) sections 1A, 1B - (Interpreted)
9. Commission on Administrative Justice Act (cap 7J) section 3 - (Interpreted)
10. Constitution of Kenya articles 1; 2 (2); 3; 4; 7 (2); 10; 12 (2)(b); 19 (1); 20 (1), (2), (3), (4); 21(1), (2);33; 35 (1), (3); 42; 43; 46; 52; 69 (1); 70 (1), (3); 94 (5)- (Interpreted)
11. Environment and Land Court Act (cap 8D) section 8- (Interpreted)
12. Environmental (Impact citation. Assessment and Audit) Regulations, 2003 (cap 387 Sub Leg) regulations 17, 22, 23- (Interpreted)

13. Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006 (cap 387 Sub Leg) regulation 4- (Interpreted)
14. Environmental Management and Co-Ordination Act (cap 387) sections 2; 3 (1); 3A; 42; 48; 57A; 58- (Interpreted)
15. Evidence Act (cap 80) sections 107(1), (2); 109- (Interpreted)
16. Fair Administrative Action Act (cap 7L) section 2- (Interpreted)
17. Statutory Instruments Act (cap 2A)sections 6, 11 - (Interpreted)
18. Supreme Court Act (cap 9B) section 3- (Interpreted)

Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 articles 9 (10; 24
2. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000 article 23
3. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 1998 article 2 (4)
4. Convention on Biological Diversity, 1992 articles 1, 13
5. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 article 12 (2)(b)
6. Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety In general
7. Rio Declaration on Environment and Development, 1992 Principles 10, 15, 17
8. Stockholm Declaration, 1972 In general
9. Conference on Environment & Development Rio de Janerio, Brazil, 3 to 14 June 1992 (Agenda 21) Preamble ; Chapter 3
10. Declaration on the Rights of Peasants and Other People Working in Rural Areas, 2018 In general

Advocates

Mr. Muchangi for Petitioner
Mr. Gumbo and Mr. Motari and Odhiambo for 1st and 2nd Respondents.

JUDGMENT

Introduction

1. In the petition dated January 16, 2023, the petitioner seeks the following reliefs:

    a. A declaration that the petitioners and publics' right to a clean and healthy environment guaranteed by article 42 of the *Constitution*, article 12(2)(b) of the *International Covenant on Economic, Social and Cultural rights*(ICESR) and article 24 of the *African Charter on Humans and Peoples Rights* (ACHPR) have been contravened by the actions and omissions of the respondents.

    b. A declaration that the systematic denial of access to information to the petitioners by the respondents on the health and ecological effects of BT Maize and what precautionary measures to be taken violated the petitioners right to information as provided under article 35(1)(a), (b) and (3) of the *Constitution*.

    c. An order of *mandamus* stopping any further open cultivation, importation and exportation of BT Maize pending an Environmental Impact Assessment on open cultivation of BT Maize on the environment.

d. An order of *mandamus* be issued against the respondents directing them to develop and implement regulations adopted from best practices with regards to prevention of unintended transgene transfer between BT Maize and conventional landraces.

e. An order of *mandamus* be issued against the 1st, 2nd and 4th respondents to take steps towards ensuring that regulations dealing with licensing, setting up, operation, supervision of the activities as well as independent scientific monitoring of all entities dealing in biotechnology are designed, enacted and implemented to provide effective deterrence against the threats to protected rights under the *Constitution*.

f. Permanent conservatory orders to compel the respondents to adopt the precautionary principle in environmental management with respect to preventing unintended transgene transfer between genetically modified maize and non-genetically modified maize.

g. An order of compensation/restitution under the "polluter pay" for any consumer health and/or environmental damage and for the loss of life or economic loss.

h. Any other relief the court deems fit.

The Petitioner's Case

2. In support of the petition, Ms Florence Wairimu Muturi, the Chief Executive Officer (CEO) of the petitioner swore an affidavit dated January 13, 2023. She deponed that on October 3, 2022, the Executive issued an order directing the lifting of the ban of open cultivation and importation of Genetically Modified Maize (BT Maize).

3. It was deposed by the petitioner's Chief Executive Officer (CEO) that the lifting of the ban of open cultivation and importation of Genetically Modified Maize aforesaid was followed by the 2nd respondent's approval of the 4th respondent's application for environmental release and placement into the market of BT Maize and its varietal derivatives in Kenya for purposes of cultivation, food, feed and processing(FFP), import, export and transit for a period of 10 years.

4. It was deponed that the 4th respondent had initially received a conditional approval for environmental release of the BT Maize only for the purposes of conducting National Performance Trials (NPT) and collecting compositional data and that the use of biotechnology in agriculture has a number of risks that are social, economic, health and environmental related.

5. It is the petitioner's case that as increasing numbers of genetically modified crops are released into the environment, the likelihood of unintended ecological effects on both agricultural and natural systems increases and that the potential hazards identified by the European Food Safety Authority include exacerbating weed problems, displacement and extinction of native plant species.

6. According to the petitioner's Chief Executive Officer (CEO), a major environmental concern regarding the cultivation of genetically modified crops is unintended transgene transfer to conventional crops as transgenes and conventional genes are subject to the same underlying biological processes of selection, mutation and recombination by hybridization and backcrossing.

7. It was the deposition of the petitioner's Chief Executive Officer (CEO) that genetically modified organisms often contain recombined genes acquired from different species to enable the expression of new traits such as round up pesticide ready seeds; that the unintended gene transfer could raise biosafety issues to human and animal health and the environment and that there is a high possibility of spread of the transgene (also known as transgene spread) to neighboring conventional crops resulting

in additional environmental risks to maize genetic diversity, non-target species and increased resistant risk.

8. The petitioner's Chief Executive Officer (CEO) stated that Kenyans further risk unknowingly cultivating and consuming GMO maize as a result of unintended gene transfer in violation of the consumer right of informed choice and that farmers also risk unknowingly infringing seed proprietary rights as in the Canadian case of *Monsanto Canada Inc v Percy Schmeider* [2004] 1 SCR 902, 2004 SCC 34.

9. Ms Muturi noted that new challenges arise in risk assessment as genetically engineered (GE) plants can persist and propagate in the environment as well as produce viable offspring; that the next generation effects can be influenced by heterogeneous genetic backgrounds and unexpected effects can be triggered in interaction with environmental conditions and that consequently, the biological characteristics of the original events cannot be regarded as sufficient to conclude on the hazards that may emerge in the following generations.

10. The petitioner's Chief Executive Officer (CEO) deposed that lifting the ban without proper public participation, awareness and risk assessment on the negative impacts of GMO on the environment derogates the universal precautionary principle; that it further runs contra to the *Constitution* which provides for public participation as a national value and a fundamental human right.

11. In respect to the right of a clean and healthy environment, it was deponed that Kenya recently signed the United Nations General Assembly(UNGA) resolution declaring the right of a healthy environment as a human right and enjoining states to ensure their people have access to a clean, healthy and sustainable environment and that article 42 of the *Constitution* as read with section 3(1) of the *EMCA* provides that every person in Kenya is entitled to a clean and healthy environment and enjoins everyone to conserve the environment and ensure ecological sustainable development of natural resources.

12. In this regard, it was deposed, the respondents are constitutionally bound to pass laws and regulations and take other measures to protect the environment for the benefit of the petitioner; that the Cartagena Procotol enjoins state parties to adopt the precautionary principle or precautionary approach to biotechnology uncertainty and advocates for precautionary action to avoid serious or irreversible harm and that the precautionary principle does not require proof of scientific certainty of environmental harm as a prerequisite for taking action to avert it.

13. It was deponed that pursuant to section 8 of the *Environment and Land Court Act*, one of the guiding principles of the court includes the principle of sustainable development, including the precautionary principle; that the directive lifting the ban has not been gazetted in breach of the rules requiring easy accessibility of Government directives, regulations or law in an intelligible manner and evinces the fact that the public was not properly informed of the directive nor accorded sufficient time to read, understand and engage the respondents on the same.

14. According to Ms Muturi, the petitioner's CEO, under article 35(3), of the *Constitution*, the Government is under a duty to publish and publicize information on the possible impact of open cultivation of BT Maize and that the purported public consultations via media advert amounts to mere public relations exercise.

15. It was deposed by the petitioner's CEO that following the decision of the European Court of Justice in the case of *Guerra & others vs Italy*[1988]ECHR 7, ECHR 1998-1,there is international consensus that Governments have a duty to collect, disclose and disseminate environmental information and that the right to information in the environmental context is also provided for in the *Rio Declaration*, which Kenya is a party to.

16. It was deposed that the *Aarhus Convention-Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters* provides for early and effective information and public participation in decision making regarding the deliberate release into the environment and placing in the market of genetically modified organisms and that the right to public participation has been considered generally as a minimum requirement for the existence of environmental democracy, namely, the tripartite of the so called access rights in environmental matters, being access to information, participation in decision making and access to justice.

17. It was deponed that the impugned directive was issued without following due procedure and/ or process as stipulated by the *Statutory Instruments Act*, 2013 which require regulation making authorities to undertake appropriate consultations before making statutory instruments; and that the Act also states that the regulation making authority shall make appropriate instrument impact assessment with key stakeholders.

18. According to the petitioner, the labelling requirements will increase the cost of production hence increase the cost of goods and exporters of agricultural goods, such as baby corn, and stand to incur additional costs in testing and verification for their non GM markets and that the National Biosafety framework lacks provisions on principles of best practices and procedures to avoid the unintentional presence of transgenes in conventional landraces vis how to minimize as far as possible, the probability of unintentionally introducing transgenes into conventional maize fields.

19. Further, it was deposed, the National Biosafety Framework lacks effective programs for testing for the presence of transgenes and establishment of an effective response strategy to deal with cases where a transgene is discovered in supposedly non-transgenic maize; that the respondents have acted outside the realm of the law and the *Constitution* in their decisions, acts, directives and directions complained of and that the same should be quashed.

20. The deponent, while conceding that the National Biosafety Framework makes provisions for the recall of any GMO's following a risk assessment after an environmental release, noted that the small holder agriculture, open pollinated varieties and seed saving and exchange culture would make it impossible to "clean up" the biotechnology pollution due to its self-propagating nature, hence the need for the adoption of the precautionary principle.

21. The petitioner's CEO stated in her affidavit that the respondents' acts and omissions have violated a number of constitutional rights, to wit; the right to a clean and healthy environment, the right to public participation and awareness, the right to information, the consumer right of choice and absence of parliamentary approval.

22. It was deponed that the entire process of lifting the ban on open cultivation and importation of GMO suffers the following procedural infirmities, to wit: inadequately done Environmental Impact Assessment and Social Assessment (ESIA), non-adherence to EIA License requirements; absence of Strategic Environmental Assessment(SEA); open cultivation of BT Maize before issuance of EIA License; and failure to facilitate adequate public participation as required by the *Constitution* and the *EMCA*.

23. It was deponed that contrary to section 57A of *EMCA*, no SEA was conducted prior to the approval of the open cultivation of BT Maize; that well defined goals should have been earlier incorporated in the assessment of the directives viability with the principles of sustainable development which requires a precautionary approach with regard to human health, environmental protection and sustainable utilization of natural resources.

24. The petitioner posited that there are significant concerns such as inadequate assessment of threats to small scale farmers intending to retain non GM identity, effects of non-target species such as butterflies and bees and other soil micro-organisms as well as additional costs to horticulture exporters in labelling, testing, verification and certification requirements imposed on GMO products.

25. According to the petitioner, the aforesaid justifies multi stakeholder consultations, EIA, SEA and RIA prior to the authorization of open cultivation and importation of BT Maize in line with the precautionary principle; that the petitioners will prove that the respondents violated various provisions of the *Constitution* and statute law that bestow upon them responsibilities of safeguarding the welfare of the petitioners and the public in general, namely articles 10, 26, 35, 42, 43; section 57A, 58 of the *EMCA* and section 6 & 11 of the *Statutory Instruments Act*.

26. The petition was opposed by the Hon Attorney General who entered appearance on his own behalf and on behalf of the 2nd and 4th respondents. The 3rd respondent only filed grounds of opposition. They did not file any substantive pleadings and/or submissions.

2nd Respondent's Reply

27. The petition was opposed vide the replying affidavit of Dr Roy Mugiira, the Chief Executive Officer of the National Biosafety Authority, the 2nd respondent herein, who deponed that in 2003, Kenya signed the *Cartagena Protocol on Biosafety* to the *Convention on Biological Diversity* subsequent to which on the 28th September, 2006, it enacted the National Biotechnology Policy serving as the green light for the use of biotechnology in the country.

28. It was deposed by the Chief Executive Officer of the National Biosafety Authority, the 2nd respondent, that following the recommendations of the policy, Parliament enacted the *Biosafety Act*, 2009 which establishes the National Biosafety Authority (NBA) as Kenya's premier authority for overseeing biotechnology.

29. The Chief Executive Officer of the National Biosafety Authority (NBA), the 2nd respondent, deponed that in the discharge of its mandate, the NBA has a robust legal framework governing research, trade, use, and any other dealing in GMO's and their derived products including the Convention on Biological Diversity, 1992.

30. The other legal framework, it was deposed, include The *Cartagena Protocol on Biosafety, 2000*; The *National Biotechnology Development Policy, 2006;* The *Biosafety (Contained Use) Regulations, 2011*, The *Biosafety (Import, Export and Transit) Regulations, 2011*; The *Biosafety (Environmental Release) Regulations, 2011* ;The *Biosafety (Labelling) Regulations, 2012*; *Guidelines for the Environmental Risk Assessment of Genetically Modified Crops, 2022* and *Guidelines for the Safety Assessment of Foods Derived from Genetically Modified Crops in Kenya, 2022*.

31. Dr Mugiira, the 2nd respondent's CEO, deponed that in the year 2012, the country imposed a ban on GMO's and that the ban was informed by the recommendations by the then Minister of Health, Beth Mugo, who presented concerns about the safety of GM foods citing a study by French researchers, "*the seralini study"* published in the Food and Chemical Toxicology(FCT) Journal on 19th September, 2012.

32. According to the 2nd respondent, the President endorsed Beth Mugo's recommendation as supported by KEMRI and decreed that a ban be imposed on open cultivation of GM crops, and the importation of food crops and animal feed produced through biotechnological innovations and that this decision

made it "illegal" to handle or import any food containing GMOs into the country without the approval of the 2nd respondent.

33. It was deponed that by a letter dated December 19, 2012, Beth Mugo appointed a taskforce to review and evaluate scientific information on the safety of GMO's on human health and that on October 16, 2013, President Uhuru Kenyatta issued a directive for the establishment of a taskforce to review all matters relating to GM foods and their safety as well as advising the Government on the way forward.

34. Dr Mugiira averred that he is aware the "*Seralini study*" extensively cited by the Ministry of Health was retracted by the publisher and deemed flawed on several methodological and ethical grounds and that the study has been faulted by several international organizations such as the European Food and Safety Organization(EFSA), the French Academies of Agriculture, Medicine Pharmacy, Science, Technology and Veterinary Medicine.

35. It was deposed by Dr Mugiira, the 2nd respondent's CEO, that academicians in the world of bio-technology have also raised concerns against the study, including Klaus Ammann, a Professor at the University of Bern and a member of the Biosafety committee of the Swiss Government and that in its March 2013 issue, FCT published over two dozen critical responses to the study, some of which called for retraction of the article and that in January 2014, the publication was retracted by the publisher on the grounds that the research was inconclusive.

36. It was deposed that the Seralini study having been the only basis for banning the GM goods, its retraction resulted in immense pressure on the Government to lift the ban; that the lifting of the ban was informed by the recommendation of the taskforce that had been set up to review matters related to GMO's and after consideration of various experts and technical reports on adoption of biotechnology, including reports of the NBA, World Health Organization, the Food and Agriculture Organization (FAO), United States of America's Food and Drug Administration (FDA), and the European Food Safety Authority (EFSA).

37. The decision to lift the ban, it was deposed, was made to address the food security situation in the country which as can be gleamed from the report conducted under the patronage of the National Drought Management Authority (NDMA) and that the situation requires intervention and one such strategy includes employing innovation in crop genetic improvement technologies like genetic engineering and genetic modification (GM) technology which positively influences the farmer's incomes, economic access to food and increased tolerance of crops to various biotic and abiotic stresses.

38. According to Dr Mugiira, the Chief Executive Officer of the National Biosafety Authority (NBA), the 2nd respondent, GM technology has potential to offer increased robust sustainable agricultural production in the face of population growth, climate change and shrinking natural resources and that GM have various advantages including; resistance to pathogens and reduced use of pesticides/ insecticides; increased crop yield or shorter harvest time; improved nutrient composition; reduction in toxigenicity and improved food safety.

39. It was deposed that the use of GM seeds offer many advantages such as disease resistance, cold resistance, drought tolerance, herbicide resistant and nutrition availability; that Kenya follows the Codex Guidelines for the Conduct of Food Safety Assessment of Foods(Codex Guidelines) which ensures the safety of GM foods; that extensive research presented in various scientific reports, peer reviewed articles and books demonstrate that there are no harmful effects on health attributable to the consumption of GMO's and that GMO's are favorable to the health of animals and the environment.

40. Dr. Mugiira deponed that the petition is scandalous, vexatious, incompetent and full of legal and factual nullities; that the Cabinet decision did not remove all regulatory barriers as implied by the

Petitioner and that from a reading of the Cabinet decision, it is apparent that the existing legal and regulatory framework was acknowledged, the corollary being that cultivation and importation of GM crops must adhere to the dictates of the existing legal framework.

41. It is the 2nd respondent's case that consistent with the policy on GM, on November 1, 2022, he issued a notice to dealers in products derived from Genetically Modified Organisms through the local dailies recognizing the Cabinet decision; that vide the notice, he drew the attention of persons wishing to deal with products derived from GMO's to the provisions of section 18, 19, 20, 21, 22, 23, 50 and 52 of the *Biosafety Act*, 2009 as read together with the enabling regulations and that the foregoing provisions govern the applications for contained use, activity, introduction of GMO's into the environment, importation, transit and placing on the market of GMO's in Kenya.

42. Dr Mugiira deponed that contrary to the petitioners' assertion, there is a robust institutional and regulatory framework that ensures safe development, transfer, handling and the use of GMOs, regulates transactions in seed including production, processing, testing, certification and marketing and supervises all activities related to the environment.

43. It was his deposition that the framework further regulates all plant health related matters including variety release, seed inspection and certification and ensures adequate levels of protection in the use of Living Modified Organisms(LMO's) that may have diverse effects on conservation and sustainable use of biological biodiversity and that each new GM product is evaluated and assessed on a case by case basis and is subjected to rigorous scientific scrutiny in line with the existing frameworks.

44. According to Dr Mugiira, the petitioner mischaracterized the true intent and meaning of the cabinet decision with the aim of misguiding the court and that in truth, the Cabinet decision activated the application and implementation of the existing legislative and regulatory framework which were quiescent because of the 2012 ban on GMO's; that the allegation concerning breach of access to information is not only unripe for determination but in breach of the doctrine of exhaustion and that the allegations of breach of consumer rights and alleged lack of public participation are baseless.

45. It was deposed by Dr Mugiira that there is scientific consensus that there are no significant harmful effects on health of both food and feed attributable to the consumption of GMO's and that genetic modification of crops can improve nutritional quality and reduce the need for agricultural inputs such as fertilizers, pesticides and water, which is particularly useful for smallholder farmers who may not have easy access to these inputs.

46. The deponent stated that pursuant to section 7(2)(a) of the *Biosafety Act*, 2009, the 2nd respondent has the mandate to consider and determine applications for approval of the transfer, handling and use of genetically modified organisms and that in execution of the said mandate, it has established internal regulatory procedures and/or guidelines, inter alia; Environmental Release and/or Placing on the Market of GMOs Procedure and Receiving, Administrative Screening and Acknowledging GMO and applications procedure.

47. It was deponed that the internal procedure provides for submission of the application to the authority, receipt in accordance to the standard operating procedures on receiving, administrative screening and acknowledging of GMO applications as envisaged under section 26(1) of the Act and that upon satisfaction that the application is complete, the same is circulated to the relevant regulatory agencies for information, comments or reasoned objections, and to biosafety expert reviewers for scientific review and socioeconomic considerations.

48. Dr Mungiira deposed that section 28 of the *Biosafety Act* also provides for a risk assessment upon receipt of a complete application as well as an audit risk assessment and that notably, the 2nd respondent

conducts multi-agency stakeholder engagements through recognized regulatory agencies to bolster the available risk assessment mechanisms to ascertain human safety before the GM products are released into the market.

49. On the aspect of public awareness and education, it was deponed that pursuant to section 29 of the *Biosafety Act*, the 2nd respondent is required to take into account any relevant representations submitted by members of the public; and that internal procedures require it to publish summary information of the application in at least two newspapers with nationwide circulation within 21 days.

50. Subsequently, it was deposed, the 2nd respondent receives feedback from the regulatory agencies, biosafety expert reviewers and public comments within 30 days after which the secretariat analyses the reports and undertake further review assessments to ensure that all safety concerns from the public are sufficiently addressed.

51. It was deponed that where the initial summary risk assessments are indicative that there are environmental and/or safety concerns that requires further tests, the 2nd respondent allows pre-trial tests to be conducted in contained environments as a precautionary measure before release of the GM products to the market.

52. According to section 30 of the *Biosafety Act*, it was deposed, the 2nd respondent is required to communicate its final decision of approval or rejection of the application to the applicant within one hundred and fifty days (150) of the receipt of the application; that such approval is required to be specific to the activity authorized and if granted, subject to conditions as maybe prescribed by the appropriate regulatory agency and that the 2nd respondent followed the aforementioned procedures in approving the BT Cotton, BT Cassava and BT Maize.

53. In respect to BT Maize, it was submitted, the 2nd respondent received an application for environmental release, cultivation and placing on the market of insect protected 810 maize and its varietal derivatives in Kenya on June 18, 2015 by the 4th respondent and African Agricultural Technology Foundation (AATF) and that prior to the making the Environmental Release Application, the applicant in collaboration with various partners, including the International Maize and Wheat Improvement Center, conducted several contained and confined field trials in Kenya at KALRO Biosafety Level II Greenhouse to mitigate any environmental risks.

54. That upon receipt and screening of the application, it was deponed, the 2nd respondent made a call for public comments; that specifically, it placed an advertisement on the Standard and Nation newspapers and Kenya Gazette on July 24, 2015 *vide* Gazette No. 5390 and that on August 21, 2015, it conducted public participation activities through public forums to collect views and comments from the public and stakeholders and that they also engaged various regulatory agencies and relevant stakeholders by requesting for views and comments before approval for release of the product into the market.

55. It was deposed that by example, on June 11, 2021, the Kenya Plant Health Inspectorate Service issued its recommendation for release of BT Maize varieties inter alia, WE1259B, WE3205B, WE5206B having met the release criteria; that subsequently, NBA conducted risk assessment with specific focus on its molecular characterization, food safety assessment and environmental risk assessment and that through the report, the Authority made recommendations for approval of the application to KALRO for purposes of conducting national trials subject to other pre-conditions.

56. That upon satisfaction, it was deposed, the 2nd respondent approved the environmental release, cultivation and placing on the market of BT maize and its varietal derivatives for purposes of conducting National Performance Trials (NPTs), which involves carrying out tests to ascertain safety of the BT Maize varieties; that the approval was on condition that the applicant strictly complies with

provisions of the *Biosafety Act* and regulations and that all relevant government policies, laws and other regulatory agencies relevant to the approval were complied with.

57. It was deposed by Dr Mugiiri that the applicant ensures proper labeling of BT Maize seeds, foods, feeds and other related products in line with the Biosafety (Labelling) Regulations and any other guidelines that may be provided by the authority from time to time; that the aforementioned shows how the 2nd respondent has utilised the existing legal framework in approving GMOs to ensure safety of GMOs and more importantly, has acted and will continue to act in a manner consistent with the provisions envisaged under the aforementioned robust legal framework to safeguard the right to healthy environment contrary to the petitioner's allegations.

58. On the alleged violation of the precautionary principles, it was deponed that the allegations that indigenous seeds and foods will be contaminated through alien gene unintended transfer from GM crops to other varieties of the same crop raising biosafety issues to human and animal health and the environment are baseless.

59. It was deponed that recent scientific publications indicate that while traditionally-bred varieties have benefits such as lower cost of seed, fit the current biosafety frameworks and have no restriction of export of product, they are associated with risks such as their susceptibility to yield loss due to lack of effective resistance against insects; that the potential benefits of GM varieties outweigh the risks and that farmers are at liberty to cultivate the crops of choice whether GM, conventional or organic.

60. It was deponed that the 2nd respondent is in strict adherence to precautionary principles; intergenerational and intra-generational equities; and has put in place robust measures contrary to the petitioner's baseless claims.

61. As to whether there was violation of consumer rights , as claimed by the petitioners, Dr Mugiiri's response was that all technologies researched and deployed by various innovators coexists and do not harm the existing farming systems and that currently, different innovations such as hybrid seeds, open pollinated seeds farming, farm saved seeds farming, organic farming have all co-existed side by side and the addition of GM technology in the tool kit is not expected to alter co-existence strategies of different farming systems.

62. It is the 2nd respondent's case that the existing legal and institutional framework have been set up for the rigorous evaluation of GM organisms and GM foods relative to both human health and the environment; that the NBA has capacity in the identification of foods that should be subject to risk assessment and to recommend appropriate approaches to safety assessment; that in any event, the petitioner falls short of demonstrating by way of evidence how and whether the intended gene transfer will affect the indigenous crop.

63. On the assertions that the government failed, neglected and/or refused to disclose the contents of the 2012 Report that led to the ban of GMOs in Kenya, Dr Mugiira stated that the same is premature for failure to follow the dispute resolution mechanisms provided under the *Access to Information Act* and that section 14 of the *Access to Information Act* provides that an applicant may apply in writing to the Commission on Administrative Justice (CAJ) requesting a review of the decisions of a public entity in relation to a request for access to information.

64. On the contention of lack of public participation, it was deponed that the 2nd respondent is governed by, *inter alia*; The *Convention on Biological Diversity* and the *Cartagena Protocol on Biosafety*, 2000 which require it to conduct public participation, education and awareness, to ensure that cultivation and importation of GM foods adheres to the dictates of the existing framework including internal procedures and public participation thresholds stipulated in the *Biosafety Act, 2009* and that the 2nd

respondent has since achieved this through a transparent and participatory approach that involves stakeholders, civil society organizations, and the general public in several aspects.

65. It was deponed that the 2nd respondent consistently conducts public awareness campaigns on GMOs through mainstream media, including featuring its staff on television and radio; that its website also has a media centre where it releases press statements to provide information to the general public and that consequently, the allegation regarding lack of public participation is not only baseless but also devoid of merit since GM crops have always been dealt with transparently and subjected to public participation in a manner that satisfies both qualitative and quantitative test, which does not imply that every individual must express their views.

66. Dr Mugiiri deponed that the alleged violation of parliamentary approval and alleged procedural infirmity is borne of out of a misapprehension of the Cabinet decision; that the petitioner has mischaracterised the tenor and import of the Cabinet decision thus erroneously classifying the Cabinet decision dated October 3, 2022 as a statutory instrument capable of being governed by the Statutory Instrument Act and that the said Cabinet decision is not subject to the said Act.

Petitioner' Reply

67. Vide a supplementary affidavit filed on September 14, 2023, Ms Muturi, the petitioner's CEO deponed that the claim that the petition alleges that the cabinet decision removed all regulatory barriers is inaccurate and should be expunged from the record and that it is fallacious to state that the impugned decision was informed by the findings on the taskforce set up to "Review Matters Relating to Genetically Modified Foods and Food safety (the 2012 GMO Task Force).

68. It was deponed that the said report is yet to be made public and has not been deliberated upon by the respective departmental committees in parliament and that she is further aware that parliament questioned the legitimacy of the impugned decision during the House proceedings of November 22, 2022.

69. Ms Muturi deponed that the 2nd respondent's affidavit is replete with copy paste content and in particular paras 4-60 are a replica of the statement of response filed in the case of *Cerhort v AG of the Republic of Kenya* in Reference No 3 of 2023 in the East Africa Court of Justice.

70. It was deponed that despite the 2nd respondent's contention that there is a robust regulatory framework, there are several challenges posed by regulatory overlaps and the absence of synergy within the National Biosafety Authority as well as regulatory constraints in the context of conflicts of interest and overlapping personal mandates shared with affiliated entities such as KARLO, NEMA and KEPHI which have been the subject of discussions and speeches.

71. Ms Muturi deponed that she is aware that the existing bio governance framework makes no provision to address adventitious mixing GM and non-GM crops, co-existence measures between GM and non-GM mixed cropping system, compensation and restitution issues arising from adventitious mixing of GM and non-GM Crops.

72. Ms Muturi deponed that she is guided by the scholarly article by Prof Mbote where she cites the inadvertent patent infringement suit in the *Monsato Canada Inc v Schmeiser* case observing that it has far reaching consequences for farmers in Kenya due to the absence of clear legal framework that outlines liability, compensation, and restitution procedures in cases of adventitious contamination of non GMO by GMO due to horizontal gene flow.

73. It was deposed that Yann Devos, Matty Demont and Koen Dillen, Dirk Reheul, Mathias Kaiser *et al* in their article "*Coexistance of Genetically Modified(GM) and non-GM Crops in the European Union*"

outline several co-existence strategies within maize cropping systems including isolation distances, pollen barriers, crop rotation and the establishment of GM crop-free or GM crop production regions which strategies collectively address challenges and aim of maintaining crop purity.

74. It was deponed that the industry myth of scientific consensus of GMO safety was debunked by a statement made by over 300 scientists, academics and legal experts who stated that the scarcity and contradictory nature of scientific evidence published to date prevents conclusive claims of safety or lack of safety of GMO's and that decisions on the future of food and agriculture should not be based on misleading and misrepresentative claims by an internal circle of likeminded stakeholders that a scientific consensus on GMO's exists.

75. According to the petitioner's CEO, the 2nd respondent's failure to undertake risk assessment analysis through an EIA and SEA and conduct proper prior public participatory risk analysis renders the assertion baseless and that the allegation that the claim for breach to access to information is in breach of the exhaustion doctrine has no foundation as the doctrine is inapplicable where public authorities are obligated by law to provide information to the public.

76. It was deposed that the 2nd respondent's attempts to dismiss the ecological concerns represents a blatant fallacy known as argumentum ad ignorantiam and that it is deceptive for the 2nd respondent to promote cultivation of GM food as a comprehensive solution of Kenya's food related challenges while overlooking the irreversible environmental effects associated with biotechnological interventions displaying a hasty generalization.

77. According to the petitioner, rather than the panacea to food security that the 2nd respondents claim GMO to be, it has been shown to aggravate food security by holding farmers in debt cycles that reduce their ability to produce more food; that in Burkina Faso, farmers abandoned cultivation of GM Cotton seeds citing higher prices of the GM cotton seeds and its poor quality as compared to their indigenous cotton counterparts; that Lesotho and Mozambique have taken to milling GM seeds to prevent introduction of seeds into their local farming systems and that Zimbabwe only allows GM if the grain is milled upon entry.

78. That while the 2nd respondent asserts the safety of GM Maize, it was deposed, it is crucial to underscore the necessity of thorough research and risk assessment and that in the article *Starlink Corn: A Risk Analysis(EPA)* by Luca Bucchini and Lynn R. Goldman(2002), the U.S Environmental Protection Agency had restricted the use of GM corn to animal feed due to concerns about the potential of allergenicity.

79. It was deposed that while subsequent studies may have alleviated some worries, the legacy of Loseys findings underscores the need for rigorous evaluation and responsible management of BT crops; and that during a 2018 interview with the Bussiness Daily, Jesus Madrazo, the Vice President of the Monsato Company acknowledged that technology alone was insufficient to fully mitigate the intricate challenge of food security.

80. According to the petitioner's CEO, the article titled "*Impact of GMO's on Environment and Human Health*" published in Recent Research in Science and Technology, Vol 5(5), pp 26-27 provides authoritative evidence that consumers freedom to choose is at risk due to genetic pollution, and the contamination of organic farms with GMO's raises significant environmental and health concerns and that this highlights the potential threat posed by the unchecked spread of GMO's.

81. It was deposed that the aforesaid article provides compelling and well substantiated evidence that supports the assertion that GMO's have the potential to pose significant environmental and health risks including genetic pollution and gene escape; that this underscores the need for robust regulatory

mechanisms and environmental safeguards; that the National Biosafety Guidelines for Environmental Release and Placing on the Market of GMO[2022] identifies vertical gene transfer persistence and invasiveness than its conventional counterparts; Horizontal gene transfer(HGT) and impact on non-target organisms (NTO)eg insect or nematodes as some of the risks of open cultivation of GM Crops.

82. It was deposed that the contention that the 3rd and 4th respondents failed to conduct an EIA and ESIA nor issuance of an EIA license stands unchallenged and it contravenes not only the precautionary principle but is a threat to the fundamental rights to a clean and healthy environment.

83. Ms Muturi noted that a prime example of the institutional lack of synergy they assert is the requirement under section 28 of the National *Biosafety Act*, 2009, for an Environmental Risk Assessment (ERA) study report as well as an Environmental Impact Assessment (EIA) and ESIA under the *Environmental Management and Co-ordination Act* (Revised Edition 2012 [1999]) and Legal Notice No 149 as a prerequisite to approvals for GMO commercialization and cultivation.

84. It was deponed that the demand for EIA and ERA for the same purposes leads to unnecessary regulatory redundancy; that the contentions presented centering on the alleged participatory environmental risk assessment, are lacking in substantial evidence; that whereas reliance is placed on a participant list, the list does not reveal whether the attendees were representatives picked from every part of the country and walks of life, well informed in advance about the meeting and issues of discussion and that in addition, the alleged attendees' did not give their particulars, like identification card numbers, to show that they actually attended the meeting.

85. It was Ms Muturi's further deposition in this regard that in stark contrast, other GMOs like GM Cotton and Cassava show more meaningful and evidence-based public consultations; that the 2nd respondent has not demonstrated that they published notices in the Standard and Nation Newspapers and Kenya Gazzette at least twice a week for two successive weeks, nor that they made announcements at least once a week for two consecutive weeks on a radio with nationwide coverage in both local and official languages as required by the regulations.

86. It was the petitioner's deposition that the assertions addressing the approval of BT Maize, are riddled with inaccuracies, deliberate omissions of material facts, and evident signs of questionable legal tactics, including what appears to be the manipulation of public documents in an attempt to obscure incriminating evidence; that, the 2nd respondent, has intentionally omitted pages 13, 14, 15, 16, 17, 18, 20, 22, 24, 26, and 28 from the Environmental Risk Assessment Report [RBM-52, purported copy of the Risk Assessment Report dated August 2015], suppressing any evidence of adverse environmental impacts associated with BT Maize.

87. According to Ms Muturi, the aforesaid deliberate exclusions and omissions raise concerns about transparency and the deliberate manipulation of information, potentially perpetuating the fallacy of a 'scientific consensus' while withholding critical data on the environmental impacts of GMOs; that the version of the same Environmental Risk Assessment (ERA) pertaining to BT Maize, submitted by the 2nd respondent to the *Convention on Biological Diversity* (CBD) online Clearing House, reveals certain critical facts that the 2nd respondent sought to obscure from this court.

88. She added that the 2nd respondent's approval required an EIA report on the National Performance Trial (NPT) sites across the nation, including Kakamega, Kibos, Alupe, Embu, Mwea, and Kadara, where three superior high-yielding and insect-pest-resistant BT hybrids (WE1259B, WE3205B, and WE5206B) were recommended for release by the National Performance Trials Committee (NPTC) of KEPHIS in June 2021.

89. It was deposed that the representatives from vital food-producing regions significantly affected by the proposed co-existence of genetically modified (GM) and non-GM cropping systems should have been actively engaged in this critical assessment; that there is no proof of contained trials or pre-release environmental impact assessment from the NPT areas in accordance with the recommendations of the impugned ERA Report Annexures and petitioners Annexure 'FWM-11.

90. According to the petitioner, there is no answer to the contention that no participatory Environmental Impact Assessment [EIA] studies were undertaken and the 2nd respondent has not submitted any application made to NEMA for the issuance of a license for approval; that although the respondents have alluded to KEPHIS and NBA approving the environmental release and placing in the market of BT Maize [Mon 801], their statutory mandate does not extend to exercising supervision and coordination over matters relating to the environment, in particular approvals of projects requiring EIA and their approvals are of no consequence.

91. That rather than offering a substantive response to the allegation of failure to conduct a participatory EIA study, it was deposed, the 2nd respondent's deposition remains notably vague and lacks essential particulars, leaving unanswered questions concerning who,' how,' and the degree of satisfaction achieved during this critical process.

92. Ms Muturi deponed that the assertions by the 2nd respondent of compliance with the requisite regulatory framework are false, as evidenced by the failure to conduct a proper, prior, public-participatory environmental risk assessment; that the precautionary principle, as a cornerstone of environmental law, necessitates taking preventive measures when faced with uncertain or potentially harmful environmental consequences and that in the context of the open cultivation of GM crops, the violation of this principle is evident for lack of public participation.

93. According to Ms Muturi whereas the 2nd respondent alluded to the Labeling Regulations as sufficient to safe guard the public, they have various limitations; that for instance, Makokha and Kyalo (2015) posit that inadequate education and participation has been facilitated to raise the requisite awareness for informed choice and subsequently, the majority of the consumers remain largely unaware of the risks of GMOs.

94. It was deponed that additionally, the lack of clear guidelines on testing and sampling procedures, essential in accurately detecting contamination and apportioning liability undermines the 2nd respondent's ability to effectively assess and manage the presence of GM crops in non-GM crops and that ultimately, the inadequacy of consumer protection provisions, coupled with the absence of testing, sampling, and co-existence provisions within the law and addressing these deficiencies is imperative to ensure robust consumer protection and regulatory coherence in the context of biotechnology and genetically modified organisms.

95. It was submitted that articles 10, 94, 118, 196 and 201 provide a robust legal foundation for advocating parliamentary approval of the decision to lift the GMO ban and underscore democratic values, parliamentary oversight, public participation, and adherence to financial and legislative principles and that the significant policy changes in the decision to lift the GMO ban is marred by glaring procedural deficiencies-including the lack of stakeholder consultation, non-compliance with biosafety regulations, bypassing parliamentary oversight, inadequate scientific rigor, disregard for international agreements, and the absence of regulatory clarity.

96. According to the petitioner, the Bavarian Higher Administrative Court, Germany in line with EU Council Directive 2001/110/EC has ruled that GM maize pollen was a noral component of honey with the result that it must indeed be classified as an 'ingredient' and comes within the scope of the regulation

and must be subject to the authorization for foodstuffs containing ingredients produced from GMOs. This, it was submitted, applies irrespective of whether the pollen is introduced intentionally or adventitiously into the honey, and irrespective of the proportion of genetically modified material contained in the product in the honey.

97. Finally, it was deposed that the petitioner need not prove loss or injury to enforce the right to a clean and healthy environment; that it is immaterial that the issue of scientific proof on environmental damage is uncertain as that does not militate against the applicants right to a clean and healthy environment and that the 3rd and 4th respondents bear the onus to prove that the open cultivation and importation of BT Maize would have no negative impact on the environment and as such is not a threat of violation of the petitioners' universal right to a clean and healthy environment.

The 2nd Respondent's Reply

98. In response to the supplementary affidavit, the 2nd respondent, through Dr Roy B Mugiira, deponed that the supplementary affidavit is bad in law and made it bad faith to the extent that it seeks to introduce new issues that materially seek to build a new case different from the petition and that the same contradicts the rule that parties are bound by their pleadings.

99. It was deposed that the petition creates a false position that Kenya lacks sufficient legal and institutional framework to guarantee the safety of the environment and human health through risk assessment before the approval of the GMO, which is untrue and that the Petitioner In The Affidavit affirms that its main argument is that the executive decision, through the Cabinet Despatch constitutes a substantial policy shift with potential socio-economic implications for the human health and the environment.

100. It was deposed that the petitioner has deliberately misapprehended the process of the 2012 ban and the 2022 Cabinet Despatch and that for clarity, the 2022 Cabinet Despatch was a creation of a multi-agency report following massive research, risk assessments and multi stakeholder engagements in due regard to the existing legal framework governing the importation, marketing and distribution of GMOs.

101. It was deponed that the petitioner's averment is a perfect demonstration of the petitioner's lack of appreciation of the 2nd respondent's relevant pertinent background in response to the petitioner's allegations which are largely pari materia with the allegations made in the reference; and that subsequently, the background adopted in both responses demonstrates with clarity Kenya's robust legal and institutional framework that guarantees safety of the environment, human health and precautionary measures that must be satisfied before approval of GMOs application by the 2nd respondent.

102. It was argued that the allegations that the Cabinet was not duly constituted, not vetted nor gazzeted at the time the Cabinet Despatch was made, subsequently rendering the same illegitimate, was not raised by the petitioners in the petition and constitutes a breach of the elementary principle against raising of new issues in a supplementary affidavit and that the above notwithstanding, the law does not contemplate a vacant cabinet and even during the transition period, the outgoing cabinet members remain in office and continue with the execution of their duties until the incoming members are gazzeted.

103. It was deposed that the 2nd respondent, while discharging its mandate, operates within a multi-agency framework that guarantees synergies with relevant stakeholders as provided under section 27(4) read together with section 38 of the *Biosafety Act* and demonstrated in the respondent's replying affidavit during approval process of BT Maize and BT Cotton.

104. According to the 2nd respondent, the allegations allegedly illuminating the regulatory constraints facing the National Biosafety Authority in the context of conflict of interest and overlapping personal mandates with affiliates such as KARLO, NEMA and KEPHI, are borne out of the misunderstanding of the current legal regime governing the importation, cultivation and distribution of GMOs within our jurisdiction and the current Biosafety regulatory regime which secures the right to public participation, education awareness and the right to access to information as earlier highlighted.

105. It was submitted that the petitioner's allegations are predicated upon a misunderstanding of the process of approvals of GMO applications in Kenya which lays great emphasis on the safety of the environment, animal and human health through various risk assessments; and that the allegations are also predicated upon lack of appreciation of the current Biosafety legal framework that guarantees risk assessments through multi-agency participation as demonstrated herein above.

106. That contrary to the petitioners allegations, it was deposed, the 2nd respondent has guidelines on managing low level presence(LLP) and adventurous presence(AP) in seed, grain, food and feed; and that the 2nd respondent also has guidelines for the coexistence between Genetically Modified and conventional crops in Kenya to ensure that the issue of gene flow is sufficiently addressed.

107. Dr Mugiira reiterated that the 2nd respondent approves GMOs on a case by case basis based on consensus scientific findings; that it issues information to the interested applicants upon request as envisaged under the *Access to Information Act*; that as advised by counsel, there exists a remedial avenue that must first be explored whenever there is breach or threatened breach of this right and to the extent that the same has not been explored, these allegations remain moot for want of process;

108. That the above notwithstanding, it was deposed, ecological concerns are always addressed through various risk assessments conducted by the aforementioned stakeholders to ensure safety of the environment and human health and that the stakeholders such as KIPI, NEMA, KEPHIS and the State Department for public health work together to address allegations made hereunder.

109. It was deposed that the Cabinet Despatch was made to realize the state's obligation under article 21 of the *Constitution* which particularly requires the state to put up measures to achieve progressive realization of the rights under article 43 of the *Constitution*, specifically the right to food in the midst of drought and famine.

110. The 2nd respondent's Chief Executive Officer deponed that the Cabinet Despatch was predicated upon scientific interventions and research which guaranteed safety of BT maize and other authorized GM products as demonstrated in the replying affidavit and that the 2nd respondent conducts meaningful public participation exercises and education awareness as envisaged under article 7(2) as read together with section 53 of the *Biosafety Act*.

111. Finally, it was deposed that the 2nd respondent ensured compliance with all the EIA and ESIA risk assessments from the relevant agencies before approval and that the 2nd respondent has adopted general guidelines for co-existance between genetically modified and conventional crops in Kenya with the sole purpose to manage co-existence and guarantee consumers and farmers the possibility of choosing what to consume or produce among GM and non-GM products.

The Petitioner's Submissions

112. The petitioner filed submissions on September 14, 2023. counsel submitted that vide the decision of October 3, 2022, the Cabinet reversed its previous decision of November 8, 2012, which had imposed a prohibition on open cultivation of genetically modified crops and the importation of food crops and

animal feeds produced through biotechnology innovations and that the reversal effectively lifted the ban on genetically modified crops.

113. It was submitted that this decision has given rise to significant concerns in the realm of environmental governance, considering that the scientific uncertainties on potential adverse effects of open cultivation of transgenic maize; moreso that the findings of the 2012 GMO Taskforce, initiated to" review matters relating to genetically modified foods and their safety", which originally led to the ban, has not been made public up to date.

114. The petitioner's counsel submitted that the Executive fiat ignored statutory procedures outlined in the *Environmental Management & Coordination Act* No 8 of 1999 (*EMCA*) as evinced by the failure to conduct an Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA) or secure an EIA license before implementing the new policy regarding GM food/feeds.

115. It was submitted that the respondents have contravened article 10 of the *Constitution* by neglecting to establish a framework for public participation; that the respondents have encroached upon their rights regarding environmental matters, namely: (a) the right to access information, (b) the right to participate in decision-making, and (c) the right to access justice; and that the respondents failure to conduct a comprehensive prior public-participatory risk analysis constitutes a violation of the fundamental human right to a clean, healthy, and sustainable environment.

116. Counsel submitted that on the July 28, 2023, the United Nations General Assembly unanimously adopted Resolution A/76/L.75, recognizing the human right to a clean, healthy, and sustainable environment; that it also acknowledged the interconnectedness of this right with existing international law and that *EMCA* defines the environment as encompassing the physical factors of the surroundings of human beings, including land, water, atmosphere, and climate, as well as the biological factors of animals and plants.

117. It was submitted by the petitioner's counsel that in the context of this case, a clean and healthy environment is one that is free from irreversible biotechnological effects resulting from horizontal gene flow, such as out-crossing between GM crops' pollen and non-GM crops and considers the effects on non-target species like bees and butterflies, the depletion of the local gene pool, and inadvertent contamination of non-GM crops.

118. Counsel submitted that the basic principles for the protection of the environment in Kenya are rooted in constitutional and statutory law; that one of the national values and principles of governance as outlined in the *Constitution* is sustainable development; that article 42 grants every person the right to a clean and healthy environment, which is mirrored in section 3(1) of the *Constitution* while article 69(1) mandates the state to take proactive steps to protect and conserve the environment.

119. It was submitted that one of the procedural infirmities regards the lack of an Environmental Impact Assessment (EIA) Study; that the requirement of an EIA for transgenic matters are outlined in various statutes and regulations to wit section 42 and 58 of the *EMCA*, regulation 4 of the *Environmental Management And Coordination(Conservation of Biological Diversity And Resources, Access To Genetic Resources And Benefit Sharing) Regulations, 2006* and that the need for EIA was succinctly expressed in principle 17 of the *1992 Rio Declaration*.

120. It was submitted that in *Kwanza Estates Limited v Kenya Wildlife Services*[2013] eKLR, this court pronounced that an EIA is a systematic examination conducted to determine whether a program, activity, or project will have adverse impacts on the environment; that the evidence presented before this court establishes that the respondents not only breached the provisions of section 58

of the Environmental Management and Coordination Act but also violated article 69(1)(d) of the *Constitution*.

121. Counsel also relied on the case of *Kasinga v Daniel Kiplagat Kirui & 5 others* [2015]eKLR, in which the court stated that where a procedure for environmental protection, as provided by law, is not adhered to, an assumption may be drawn that the project violates the right to a clean and healthy environment or, at the very least, has the potential to harm the environment and that the relevant provisions of *EMCA* and its regulations unequivocally require an EIA report before the implementation of a policy of this magnitude due to its significant environmental, social-economic impacts.

122. On the assertion of alleged breach of public participation and awareness, it was submitted that section 7(f) and 54 of the National *Biosafety Act* obligates the 2nd respondent to promote awareness and education among the general public in matters relating to biosafety through the publication of guidance documents and other materials aimed at improving the understanding of biosafety and that regulation 12 of The *Biosafety (Environmental Release)Regulations, 2011* obligates the 2nd respondent to promote public awareness and participation on the proposed environmental release.

123. It was submitted that the 2nd respondent did not fully adhere to the prescribed procedures for public participation; that specifically, there appears to have been insufficient public participation in the formulation of the government policy to lift the decade-old ban on open cultivation and commercialization of GM Maize and that this assertion is grounded in the provisions of regulation 17 of the Environmental Management and Coordination Act (*EMCA*), which requirements were not adequately met giving rise to concerns regarding the adequacy of public participation in the process.

124. It was submitted that the three-Judge bench in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 Others* [2015] eKLR, referenced the definition of public participation as provided by principle 10 of the *Rio Declaration on Environment and Development (1992)*, which emphasizes that environmental issues are best handled with the participation of all concerned citizens, at the relevant level; that the petitioner's contention of inadequate public participation remains uncontested; and that the list of 81 attendees relied on by the Respondents is insufficient as the public participation event was a one-day exercise, taking place in only one out of the 47 counties.

125. According to the petitioner, the attendees comprised of 30 individuals who are staff and/or affiliated to National Biosafety Authority, KARLO, African Agricultural Technology Foundation (AATF) and the list lacks disclosure regarding whether attendees were selected from various regions and backgrounds or if they were adequately informed about the meeting and its agenda in advance.

126. According to counsel, in the case of *Mohamed Ali Baadi & others v Attorney General &11 Others*[2018]eKLR, the court stated that the standard of ascertaining whether there is adequate public participation in environmental matters, is the reasonableness standard, which must include compliance with prescribed statutory provisions as to public participation and, the question is not one of substantial compliance with statutory provisions but one of compliance.

127. The petitioner submitted that the South African Constitutional Court in *Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others*, CCT 86/08 [2010] ZACC5 stated that engagement with the public is essential as it allows for the community to express concerns, fears and even make demands and that participation is integral to the legitimacy of a democratic state and a decision made without consulting the public can never be an informed decision.

128. It was submitted that a key principle to be considered in this case is the precautionary principle which is defined under section 2 of the *EMCA* as the principle which requires that where there are threats of damage to the environment, whether serious or irreversible, immediate, urgent and effective measures should be taken to prevent environmental degradation notwithstanding the absence of full scientific certainty on the threat to the environment

129. Counsel for the petitioner submitted that whereas the respondents contend that section 86 of the *EMCA* gives the respondents powers to identify materials and processes that are dangerous to human health and the environment, and to issue guidelines, and prescribes measures for the management of the materials and processes so identified, in the context of the Petitioners grievances regarding the lifting of the ban on open cultivation of GM Maize (BT Maize), the precautionary principle is highly relevant.

130. It was submitted that in the case of BT Maize, this implies a thorough evaluation of potential environmental risks, including cross-contamination and ecosystem disruption, before allowing open cultivation; that the principle mandates that the absence of conclusive scientific evidence should not be used as a justification for postponing measures to prevent environmental degradation; that it is essential to assess whether there is a sufficient scientific basis to support the safety of open BT Maize cultivation and that it is the responsibility of developers or actors to demonstrate that their actions will not harm the environment.

131. Counsel submitted that the petitioners are concerned with the violation of consumer rights and are concerned about genetic contamination and ecological risks; that genetic contamination occurs when genetically modified organisms (GMOs) unintentionally mix with non-GMO crops, which contamination can undermine organic production and result in economic loss for farmers.

132. It was submitted that an illustrative case is the *Percy Schmeiservs, a Monsanto* Canada legal battle; that in this case Percy Schmeiser was a Canadian organic canola farmer whose crops were contaminated by genetically modified canola pollen from neighboring fields; that the National *Biosafety Act* and Regulations in Kenya lack clear provisions for liability and compensation related to genetic contamination and that this gap raises concerns about the legal recourse available to affected parties in cases of genetic contamination.

133. Counsel underscored the importance of protecting consumer rights in ensuring food safety, choice, and transparency; that consumers have the right to know whether the products they purchase contain GMOs and that clear liability and compensation provisions can provide consumers with a safety net in case of unforeseen harm resulting from GMOs.

134. As regards the role of transparent labeling, it was submitted that the same is crucial to empower consumers to make informed choices; that examples like the European Union's "Right to Know" movement emphasizes the growing demand for clear GMO labeling; that transparent labeling aligns with consumer protection principles and enables individuals to opt for non-GMO products if they wish; that the Percy Schmeiser case serves as a cautionary tale of the potential consequences of genetic contamination and that addressing genetic contamination and ensuring consumer protection should be integral components of any GMO regulatory framework.

135. In conclusion, counsel for the petitioner submitted that as a country, we stand at a pivotal juncture where the welfare of our environment, the health of our citizens, and the sanctity of our democratic principles hang in the balance; that throughout this litigation, the petitioners have meticulously examined the deficiencies in the regulatory framework, the absence of robust environmental impact assessments, the disregard for public awareness and participation, and the potential violations of statutory instruments.

The 1st and 2nd Respondent's Submissions

136. The 1st and 2nd respondents' counsel filed submissions on September 12, 2022. Counsel set out three issues for determination, being whether the Cabinet decision dated October 3, 2022 was capable of overriding and/or usurping the existing statutory framework regulating the cultivation and importation of GM products; whether there is violation of the *Constitution* and International law; and whether the petitioner's supplementary affidavit sworn on September 14, 2023 should be struck out.

137. It was submitted that pursuant to article 4 of the *Constitution*, Kenya is a sovereign Republic governed by democratic principles such as respect for the rule of law and separation of powers doctrine and that this doctrine as was held in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, apart from proscribing organs of government from interfering with each other's functions, also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government.

138. Counsel for the 1st and 2nd respondents submitted that such powers are, however, not a license to take over functions vested elsewhere; that there must be judicial, legislative and executive deference to the repository of the function; that in this regard, according to article 94(5) of the *Constitution*, 2010, Parliament is vested with the sole mandate to make laws and that in exercise of the above mandate, the Kenyan Parliament has put in place a robust yet comprehensive legal framework to govern research, trade, use and any other dealing in GMOs and their derived products.

139. It was submitted that the 2nd respondent, established through *Biosafety Act*, 2009, is Kenya's premier bio governance authority; that pursuant to section 7(2)(a) of the *Biosafety Act*, 2009, the 2nd respondent has the mandate to consider and determine applications for approval of the transfer, handling and use of GMOs and that in execution of this mandate, the 2nd respondent has established internal regulatory procedures and/or guidelines.

140. Counsel for the 1st and 2nd respondents submitted that the decision of October 3, 2022 did not remove all regulatory barriers to be complied with before cultivation and importation of GMO's; that the same was in accordance with the recommendation of the Taskforce to review matters relating to genetically modified foods and food safety and that it was further in fidelity with the guidelines of the National Biosafety Authority on all applicable international treaties.

141. It was submitted that this was affirmed by the 2nd respondent's CEO, who, consistent with the above Cabinet Decision, on November 1, 2022, issued a 'Notice to Dealers in Products Derived from Genetically Modified Organisms ("GMOs")' through the local dailies recognizing the Cabinet Decision and that in any event, the Cabinet Decision was incapable of usurping, repealing and/or overriding the statutory frameworks regulating the importation, cultivation and distribution of GMOs together with its derived products.

142. Reliance in this respect was placed on the case of *Republic v Kenya Revenue Authority ex parte Cooper K-Brands Limited* [2016] eKLR wherein the court cited the cases Richardson vs Mellish (1824) 2 Bing 229 and *Kenya Shell Limited vs Kobil Petroleum Limited* Civil Application No Nai 57 of 2006 [2006] 2 KLR 251 where it was held that public or Government policy cannot without more override the express provisions of the law.

143. According to counsel for the 1st and 2nd respondents, the petitioner has not challenged the constitutionality of the laws governing GMOs; that the regulatory barriers that govern importation and cultivation of GMOs remain in force and that it is a cardinal constitutional law principle that statutes should be presumed to be constitutional until the contrary is proved. To buttress this

position, counsel cited the Court of Appeal decision in *National Assembly of Kenya v Kina & another* [2022]KECA 548 (KLR).

144. On the issue of violation of the right to a clean and healthy environment and breach of the precautionary principle, it was submitted that the 2nd respondent has put in place robust frameworks with inbuilt strictures which must be met before they consider and determine applications for approval of the transfer, handling and use of genetically modified organisms.

145. It was submitted that while discharging its mandate under section 7(2)(a) of the *Biosafety Act*, 2009, the 2nd respondent has adopted guidelines that governs the procedures for Environmental Release and/or Placing on the Market of GMOs, procedure for Receiving, Administrative Screening and Acknowledging GMO all of which are intended to guarantee protection of the right to a clean and healthy environment and that the 2nd respondent has so far complied with aforesaid procedures in approving BT Cotton, BT Cassava and BT maize as demonstrated.

146. It was submitted that environmental assessments operate as precautionary measures aimed at protect the natural environment from any side effects that may be witnessed as a result of the release of GMOs to the market; that comparatively, various States such as the United States of America (USA), Canada, Argentina, South Africa, Portugal, Germany, Honduras and Spain have since approved Bt maize for consumption having satisfied the above prescribed precautions and that the above safeguards by the 2nd respondent fall within the confines of precautionary principle as interpreted by our courts.

147. It was counsel's submissions that there is no evidence to demonstrate that the steps prescribed under regulations 17, 22 and 23 of the *Environmental (Impact Assessment and Audit) Regulations 2003* were not adhered to and that the 2nd respondent has always achieved this constitutional principle by deploying a transparent and participatory approach that involves stakeholders, civil society organizations, and the general public.

148. It was submitted that courts have ruled that for public participation to be adequate, it must be both qualitative and quantitative, which does not imply that every individual must express their views. Reliance was placed on the cases of *Ombati vs Chief Justice & President of the Supreme Court & another; Kenya National Human Rights and Equality Commission & 2 others (interested party)* (Petition E242 of 2022) [2022] KEHC 11630 (KLR) where the court noted that public participation does not dictate that everyone must give their views on an issue of environmental governance.

149. Counsel also relied on the case of *Commission for the Implementation of the Constitution v Parliament of Kenya & another* (2013) eKLR, where Lenaola J (as he was then), while discussing what amounts to public participation, held that what matters is that at the end of the day, a reasonable opportunity is afforded to members of the public and any interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity, it was submitted, will depend on the circumstances of each case.

150. It was submitted that the 2nd respondent's approach to public participation in approving applications for cultivation of GM crops meets the legal requirements and ensures that the public is adequately informed and engaged in the decision-making process.

151. Counsel submitted that the prayer in relation to access to information is premature as there exists a statutory alternative dispute resolution mechanism rendering the allegation a non-starter and that under section 14 of the *Access to Information Act*, a party aggrieved and/or alleging a violation of right to access to information is required to first make an application to the Commission on Administrative Justice established by section 3 of the *Commission on Administrative Justice Act*.

152. It was submitted that while appreciating the above provisions, the court in *Commission for Human Rights & Justice (CHRJ) & another v Chief Officer, Medical Services County Government Of Mombasa & 3 others* (Constitutional Petition E003 of 2022) [2022] KEHC 12994 (KLR) (21 September 2022) while discussing section 14 of the *Access to Information Act* noted that whereas the word deployed in the above provision is "may" which is not mandatory, there was nothing before him to show that the Petitioner made any effort to invoke the said procedure.

153. It was submitted that in any event, as was held in *Commission for Human Rights & Justice (CHRJ) & another vs Chief Officer, Medical Services County Government Of Mombasa & 3 others* (*supra*) the grant or refusal to provide the information is an administrative action within the meaning of section 2 of the *Fair Administrative Action Act* (the FAA Act).

154. Counsel submitted that the alleged violations of the consumers right of choice are on account of Kenyans risking unknowingly cultivating and consuming GMO maize as a result of unintended gene transfer in violation of the consumer right of choice are not only baseless but also devoid of material expert evidence supporting the said claims.

155. It was submitted that the 2nd respondent has put in place adequate measures to safeguard consumers' rights as envisaged under article 46 of the *Constitution of Kenya* especially as new GM products are evaluated and assessed on a case-by-case basis.

156. It was submitted on behalf of the 1st and 2nd respondents that where there is a natural activity that has significant trans-gene transfer, the 2nd respondent maintains, in line with its statutory mandate, a biosafety clearing house to serve as a means through which information is made available to facilitate the exchange of scientific, technical, environmental and legal information on, and experience with, living modified organisms to avert any negative environmental effect.

157. According to counsel for the 1st and 2nd respondents, the petitioner has fallen short of demonstrating by way of evidence how and whether the intended gene transfer will affect the indigenous crop; that in any event, the petitioner has not presented any evidence to justify its claim that GMOs causes increased resistance of weeds and pest to agrichemicals, resulting in increased use of chemicals.

158. On the question of violation of parliamentary approval and alleged procedural infirmity, it was stated that the same stem from a misapprehension of the Cabinet Decision dated October 3, 2022 and that the same is not a statutory instrument capable of being governed by the Statutory Instrument Act.

159. Counsel submitted that the petitioner's supplementary affidavit sworn on September 14, 2023 should be struck out, as paragraphs 7, 11(4)(6)(7), 48, 49 and 51 all the way to paragraphs 58 of thereof raise fresh issues not alleged in the petition with a deliberate intent to re-characterize the petitioner's petition in flagrant violation of the basic principle that govern the role of supplementary affidavits, namely, that a supplementary affidavit shall not be used to introduce fresh or new issues.

160. It was submitted that this position was affirmed by Supreme Court decision in *Bernard Kibor Kitur v Alfred Kiptoo Keter & another* [2018] eKLR at para 80 wherein the court stated that a substituted petitioner while filing a supplementary affidavit must not introduce new issues, as this would advance a new case, different from the original petitioner's case.

161. Similarly, it was submitted, in *Astute Africa Investments & Holding v Spire Bank Kenya Limited & another* [2018] eKLR, the court noted that the general purpose of a supplementary affidavit is to allow the plaintiff to respond to the 1st defendant's replying affidavit or in the alternative to buttress and/or clarify the averments in the supporting affidavit and that the court affirmed that a plaintiff/applicant

cannot use its supplementary affidavit as a means to introduce new facts or raise issues that were not at the core of the suit or the application.

162. It was submitted that the petitioner's allegations on violation of the right to access to information is not only premature but also inimical with the exhaustion of remedies doctrine as contemplated under section 14 of the *Access to Information Act* and that the 2nd respondent has robust public participation frameworks that guarantee enjoyment of this revered principle as embodied under article 10 of the *Constitution*.

163. Counsel for the 1st and 2nd respondents submitted that the existing legal framework for GM crops is robust and uncontested; that the requirements of the *Biosafety Act* in relation to importation and cultivation of GM crops were complied with and all actions were legal, reasonable and procedurally fair and that the petitioner has not adduced any evidence to demonstrate that GMO products threaten and/or violate the right to clean and healthy environment, consumer right and precautionary principle.

164. In conclusion, counsel urged that the court dismisses the petition as the cabinet decision dated October 3, 2022 did not usurp, repeal and/or override the existing statutory regulatory safeguards that govern importation, cultivation and distribution of GM products and that the 2nd respondent has demonstrated that there is a lot of scientific evidence to the effect that the GMOs are safe for human health.

Petitioner's Supplementary Submissions

165. The petitioner filed supplementary submissions on September 25, 2023. Counsel submitted that the allegations of introduction of new matters lack any factual nor legal basis as the issues were been canvased in the petition and supporting affidavit and that the supplementary affidavit was necessary to address and clarify new matters introduced by the respondent's replying affidavit.

166. Counsel submitted that the guidelines on managing Low-Level Presence (LLP) and Adventitious Presence (AP) Situations in Seed, Grain and derived products in Kenya' alluded to paragraph 16 of the further affidavit are none existent as evidenced by lack of any annexure nor reference to any particular guideline and the same is intended to mislead the court.

167. It was submitted that the allegations related to the role of stakeholders, including KIPI, NEMA, KEPHIS, and the State Department of Public Health, are not new matters but are integral to the concerns raised in the original petition and that these allegations are essential for establishing the necessity of a robust regulatory framework to ensure public safety.

Analysis and Determination

168. In the petition dated January 16, 2023, the petitioner has sought for the following reliefs:

i. A declaration that the petitioners and publics' right to a clean and healthy environment guaranteed by article 42 of the *Constitution*, article 12(2)(b) of the *International Covenant on Economic, Social and Cultural rights*(ICESR) and article 24 of the *African Charter on Humans and Peoples Rights* (ACHPR) have been contravened by the actions and omissions of the Respondents.

j. A declaration that the systematic denial of access to information to the petitioners by the respondents on the health and ecological effects of BT Maize and what precautionary measures to be taken violated the petitioners right to information as provided under article 35(1)(a), (b) and (3) of the *Constitution*.

k. An order of *mandamus* stopping any further open cultivation, importation and exportation of BT Maize pending an Environmental Impact Assessment on open cultivation of BT Maize on the environment.

l. An order of *mandamus* be issued against the Respondents directing them to develop and implement regulations adopted from best practices with regards to prevention of unintended transgene transfer between BT Maize and conventional landraces.

m. An order of *mandamus* be issued against the 1st, 2nd and 4th respondents to take steps towards ensuring that regulations dealing with licensing, setting up, operation, supervision of the activities as well as independent scientific monitoring of all entities dealing in biotechnology are designed, enacted and implemented to provide effective deterrence against the threats to protected rights under the *Constitution*.

n. Permanent conservatory orders to compel the respondents to adopt the precautionary principle in environmental management with respect to preventing unintended transgene transfer between genetically modified maize and non-genetically modified maize.

o. An order of compensation/restitution under the "polluter pay" for any consumer health and/or environmental damage and for the loss of life or economic loss.

p. Any other relief the court deems fit.

Contextual Background

169. In her recent article "*Governing Modern Biotechnology in Kenya: Law, Policy and Politics*," in Patricia Kameri-Mbote, Robert Kibugi and Nkatha Kabira (eds) *Environmental Governance in Kenya: Implementing The Constitutional Framework* (University of Nairobi, Faculty of Law 2023), Professor Kameri Mbote has pointed out that Kenya's policy on GMO has been ambivalent.

170. The distinguished Professor in environmental law and policy states that even though Genetically Modified Organism (GMO) research has been going on in the country since the 1990s, there remains strong suspicion of the technology. This, according to Professor Mbote, has been exemplified by the contradictory stances that different groups have taken over time.

171. Professor Mbote posits that Hon Beth Mugo, the then Public Health Minister, in bringing the issue of banning GMO in Kenya before the Cabinet, recommended the ban on GM products reportedly citing the Seralini study that linked cancer in rats to the consumption of GM foods. She states that the then President accepted her recommendation and decreed the ban without consulting the National Biosafety Authority.

172. Professor Gilles-Eric Seralini had published an article titled '*Long Term Toxicity of a Roundup Herbicide and a Roundup-tolerant Genetically Modified Maize*' in Food and Chemical Toxicology journal in November 2012. Professor Mbote states that the paper became a favourite reference for anti-GMO activists and was often cited as evidence that GMO foods are harmful.

173. She observes that some scientists, however, criticized the paper as based on a fatally flawed study, with many raising concerns on the methodology, design and objective of the study. One year after the publication, the Food and Chemical Toxicology journal retracted the Seralini paper, announcing that while the findings in the paper were not incorrect, they were inconclusive and, therefore, falling below the threshold of publication for the journal.

174. Despite the retraction of the *Seralini* paper, Professor Mbote observes that the 2012 moratorium on the importation of GM food in 2012 remained intact. She observes, and correctly so, that the cabinet, through a cabinet Despatch, vacated its earlier decision of November 8, 2012 prohibiting the open cultivation of genetically modified crops and the importation of food crops and animal feeds produced through biotechnology innovations.

175. This decision also authorized the importation and cultivation of *bacillus thuringiensis* maize (hereinafter BT Maize). The Petitioner has impugned the said cabinet decision for violating the right to a clean and heathy environment, the right to public participation and awareness, the right to information, and consumers' right of informed choice among other alleged violations of the law.

176. The petitioner assert that the Government has consequently violated the provisions of articles 1, 2(2), 3, 19(1), 20(1), 20(2), 20(3), 20(4), 21(1), 21(2), 33, 35, 42, 43 and 69 of the *Constitution of Kenya* and various international conventions, protocols, and instruments, to wit the *Convention on Biological Diversity, 1992*, *Cartagena Protocol on Biodiversity* and *International Covenant on Economic, Social and Cultural Rights*(ICERC).

177. The other legal instruments that the petitioner alleges have been infringed upon are the *United Nations Declaration on the Rights of Peasant and Other People Working in Rural Area*; *African Charter on Humans and Peoples Rights*(ACHPR), *Rio Declaration on Environment and Development*, *Convention on Access to Information, Public Participation in Decision-Making and Access to justice in Environmental Matters*.

178. The petitioner also alleges that the executive directive suffers from procedural infirmities in conceptualization and implementation, to wit, improper or lack of Environmental and Social Impact Assessment (ESIA), and Strategic Environmental Assessment(SEA), and failure to adhere to EIA license requirements.

179. The 1st and 2nd respondents on their part maintain that there exists a robust international and regulatory framework that ensures the safe development, transfer, handling, and use of GMO's and that the respondents have adopted a systematic and structured approach to the assessment of potential risks through problem formulation, risk assessment and decision making.

180. They assert that the statutory framework in place ensures the safety of both the environment as well as of each individual to international and national standards and that in any event, no scientific evidence of any adverse effects of BT Maize has been adduced by the petitioner.

181. The subject of Genetically Modified Organisms is widely recognized but often lacks a comprehensive understanding among the general public. In this context, it is imperative to provide a short background to facilitate a more nuanced examination of the issues at hand.

182. According to the World Health Environment, genetically modified organisms (GMOs) can be defined as organisms (*ie*, plants, animals or microorganisms) in which the genetic material (DNA) has been altered in a way that does not occur naturally by mating and/or natural recombination.

183. The technology is often called "modern biotechnology" or "gene technology", sometimes also known as "recombinant DNA technology" or "genetic engineering". It allows selected individual genes to be transferred from one organism into another, sometimes between nonrelated species. Food produced from or using GM organisms are often referred to as GM foods.

184. The United Nations Convention on Biological Diversity,1992 defines biotechnology as the use of living systems and organisms to develop or make products, or any technological application that uses

biological systems, living organism or derivatives thereof to make or modify products or processes for specific uses.

185. Genetic modification of crops involves adding a specific stretch of DNA into the plant's genome, giving it new or different characteristics. The new DNA becomes part of the GM plant's genome which the seeds produced by these plants will contain. BT Crops are a type of genetically modified crops, genetically altered to express one or more proteins from the bacterium Bacillus thuringiensis.

The Legal Framework

186. Internationally, the *Convention on Biological Diversity, 1992* (CBD) was the first instrument that addressed GMOs. The Convention's tripartite objectives as spelt out in article 1 are to provide a comprehensive and holistic approach to the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

187. The *Cartagena Protocol on Biosafety* to the Convention on Biological Diversity, (2000) and the Nagoya - Kuala Lumpur Supplementary Protocol on Liability and Redress, (2010) elaborates the provisions of the Convention on Biological Diversity.

188. On June 11, 1992, Kenya became a signatory to the *Convention on Biological Diversity*, formally ratifying it in 1994. An important milestone was reached when Kenya, at the UNEP headquarters in Nairobi during the 5th Conference of Parties in May 2000, became the inaugural nation to sign the *Cartagena Protocol on Biosafety* (CPB).

189. This commitment was solidified when Kenya ratified the Protocol in 2002. The *Cartagena Protocol on Biosafety* officially came into effect on September 11, 2003. Additionally, Kenya demonstrated its dedication to biosafety by adopting the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on October 15, 2010.

190. Subsequent and pursuant to the Protocol, on September 28, 2006, Kenya enacted the *National Biotechnology Policy, 2006* which charted the vision of the country towards the development and safe application of biotechnology applications and genetic engineering, in various fields such as agriculture, environment, human and animal health.

191. Following the recommendations of the policy, the *Biosafety Act*, 2009 was enacted. Its objectives encompass promoting responsible GMO research, minimizing risks associated with GMOs, ensuring the safe handling and use of GMOs that could potentially harm human health and the environment, and establishing a transparent, science-based, and predictable framework for reviewing and deciding on GMO-related activities.

192. The law also established the National Biosafety Authority (NBA), whose functions are to exercise general supervision and control over the transfer, handling and use of GMOs with a view to ensuring safety of human, animal health and the environment. The functions of the NBA under the Act include:

    a. Considering and determining applications for approval for the development, transfer, handling and use of genetically modified organisms, and related activities in accordance with the provisions of the *Biosafety Act*;

    b. Co-ordinating, monitoring and assessing activities relating to the safe development, transfer, handling and use of genetically modified organisms in order to ensure that such activities do not have adverse effect on human health and the environment;

c. Co-ordinating research and surveys in matters relating to the safe development, transfer, handling and use of genetically modified organisms, and to collect, collate and disseminate information about the findings of such research, investigation or survey;

d. Identifying national requirements for manpower development and capacity building in biosafety;

e. Advising the Government on legislative and other measures relating to the safe development, transfer, handling and use of genetically modified organisms;

f. Promoting awareness and education among the general public in matters relating to biosafety;

g. Establishing and maintaining a Biosafety Clearing House (BCH) to serve as a means through which information is made available to facilitate exchange of scientific, technical, environmental and legal information on, and experience with, living modified organisms;

h. To exercise and perform all other functions and powers conferred on by the Act.

193. Different regulations were established under the *Biosafety Act* which are *Biosafety (Contained Use) Regulations, 2011*; *Biosafety (Import, Export and Transit) Regulations, 2011*; *Biosafety (Environmental Release) Regulations, 2011*; and *Biosafety (Labelling) Regulations, 2012*. The framework also includes *Guidelines for the Environmental Risk Assessment of Genetically Modified Crops, 2022* and *Guidelines for the Safety Assessment of Foods Derived from Genetically Modified Crops in Kenya, 2022*.

Whether the cabinet despatch dated October 3, 2022 is a statutory instruments and subject to the procedure under the *Statutory Instruments Act*

194. The petitioner has mounted a challenge to the cabinet despatch of October 3, 2022. They urge that the impugned directive was issued without following due procedure and/or process as stipulated by the *Statutory Instruments Act*, 2013 which requires regulation making authorities to undertake appropriate consultations before making statutory instruments and that the Act also provides that the regulation making authority shall make appropriate instrument impact assessment with key stakeholders. They cite breaches of sections 6, 11(1) and 11(4) of the Act.

195. In response, the respondents maintain that the petitioner has mischaracterized the cabinet decision dated October 3, 2022 as a statutory instrument capable of being governed by the Statutory Instrument Act and that the said cabinet decision is not subject to the said Act.

196. The *Statutory Instruments Act*, 2013, defines a statutory instrument as:

> " any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued."

197. In discussing what constitutes a statutory instrument, the court in the case of *Republic v Attorney General; Law Society of Kenya (Interested Party); ex-parte: Francis Andrew Moriasi* [2019] eKLR stated thus;

> " 26. From the definition given above of statutory instruments, and the powers granted to the respondent, it is therefore the case that not all the guidelines, orders, or directions given by the Respondent are legislative in character and

therefore statutory instruments. There may be guidelines and directions that are purely executive in character, in the sense that their objectives are solely administrative in guiding implementation of standards in laws and policies...

27. There is no reference in the circular dated March 1, 2018 to any statutory provision empowering the said Guidelines, or to indicate that the same were being made in exercise of any legislative powers. It is thus my finding that the said circular was not made in exercise of the legislative powers granted to the Respondent, and that its purpose was clearly stated to be explanatory. It is therefore not a statutory instrument as envisaged by the *Statutory Instruments Act*, and was therefore not subject to the procedure set out in the said Act as regards enactment of statutory instruments, including the requirements of consultation and publication."

198. In *Matindi v CS, National Treasury & Planning & 4 others* (Constitutional Petition E280 of 2021) [2023] KEHC 1144 (KLR) (Constitutional and Human Rights) (17 February 2023) (Judgment), the court stated thus;

> "Therefore, any instrument purporting to exercise powers made under another Act is a statutory instrument."

199. The cabinet, established under article 52 of the *Constitution of Kenya*, makes up the executive arm of the government responsible for among others formulating government policies. A cabinet despatch amounts to communication of a policy position by the government pursuant to a cabinet meeting. Nowhere is such a despatch indicated to be founded on any provision of any Act or made in the exercise of any legislative powers.

200. The court therefore finds that the impugned cabinet decision is not a statutory instrument. the petitioner's assertion that the despatch is void for not complying with the *Statutory Instruments Act*, 2013 is therefore without merit.

201. Vide the supplementary affidavit, the petitioner mounts a second challenge to the propriety of the cabinet despatch, questioning its legality on account of the fact that the cabinet had not been duly vetted and gazzeted at the time the despatch was made. The respondent is opposed to this challenge stating that it did not form part of the petition and is as such a new issue contrary to the law governing pleadings.

202. The 1st and 2nd respondents state that nonetheless, a vacuum in cabinet is not contemplated and during transitionary periods, the outgoing cabinet is deemed to be duly in place until the incoming cabinet takes over. Considering the pleadings, it is apparent that this issue was not pleaded in the petition. Has it been properly brought by way of supplementary affidavit?

203. It is trite that parties are bound by their pleadings. Courts have in several cases upheld the importance of adhering to this principle. In *Joshua Mungai Mulango & another v Jeremiah Kiarie Mukoma* [2015] eKLR the Court of Appeal held as follows:

> "Parties are bound by their pleadings. The court is bound to determine a dispute on the basis of the pleadings filed by the parties and the evidence adduced on the basis of such pleadings. In an adversarial system such as ours, it is the parties who set the agenda for the trial by their pleadings. The need for this cannot be gainsaid. For the purpose of ensuring certainty and finality, a party cannot be allowed to resile from its pleadings without due amendment. Each party knows the case he has to meet and cannot be taken by surprise. The purpose and

importance of the rules in this regard clearly is to ensure that litigation is conducted in a framework that will guarantee fair play without prolixity and needless escalation of litigation costs."

204. By its nature, a supplementary affidavit is meant to respond to any issues that may be raised in a replying affidavit and is not an avenue for raising new issues. However, the courts have held that in exceptional circumstances, the court may in exercise of its discretionary powers admit new evidence by way of further/supplementary affidavit. The Supreme Court in the case of *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 others* [2013] eKLR stated thus;

> "The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small and limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter. However, if the evidence...is such as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence."

205. Unlike the first objection which merely called upon the court to identify the nature of the despatch, questions as to the legality of the cabinet composition on account of the constitutionality or lack thereof of the cabinet composition is not a matter which this court can interrogate, the same being a substantive issue and having not been raised in the petition. The same therefore fails.

Whether the Petitioner has established the constitutional, and international law violations

206. It is trite that for a party to succeed in a claim of violation of a constitutional right, such party must set out clearly the violation in respect of which he seeks redress. This was the holding in *Anarita Karimi Njeru v Republic* (1976 – 80) 1 KLR 1272 where Trevelyan and Hancox, JJ stated that:

> "We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

207. The Court of Appeal in *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR in re-affirming the principle as set out in the *Anarita Karimi* case(*supra*) had this to say;

> "We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point. However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in *Anarita Karimi Njeru* (*supra*) underscores the importance of defining the dispute to be decided by

the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to article 159 of the *Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (*supra*) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."

208. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR addressed the issue of the burden of proof on a petitioner in a constitutional petition as follows: -

> " Although article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic* (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement."

209. There is also the issue of discharging the burden of proof under sections 107(1), (2) and 109 of the *Evidence Act*. The provisions state as follows: -

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> And
>
> 109. Proof of particular fact
>
> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

210. Article 22(3)(d) of the *Constitution* provides that in determining matters brought under article 22, the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. The court will be guided by the above principles in the determination of the alleged violations of the petitioner's rights.

Right to access information

211. The right to access information is a fundamental and cornerstone principle in environmental law. It serves as a crucial mechanism for promoting transparency, and accountability in matters related to the

environment and is necessary to meet the goals of environmental information and promote sustainable development. Principle 10 of the Rio Declaration on Environment and Development, 1992, provides as follows:

> " Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision – making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

212. Article 9(1) of *Africa Charter on Human and Peoples Rights* states that every individual has the right to receive information.

213. The drafters of our Constitution recognized the paramount significance of this right and conscientiously incorporated article 35 which guarantees the right of every citizen to: access information held by the state; and information held by another person and required for the exercise or protection of any right or fundamental freedom.

214. Pursuant to article 35(3), the state is obligated to publish and publicise any important information affecting the nation. These constitutional provisions are buttressed by the *Access to Information Act*, 2016 which was enacted to give effect to article 35 of the *Constitution* and to provide a framework for disclosure of information by public and private entities to the public based on constitutional principles relating to accountability, transparency and public participation and access to information.

215. Section 3A of the *Environmental Management and Co-ordination Act*, 2015 (*EMCA*) equally provides that every person has a right to access any information that relates to the implementation of the Act that is in the possession of the Authority, lead agencies or any other person. Section 3A(2) states that a person desiring information should apply to the National Environmental Management Authority (NEMA) or the relevant lead agency and may be granted access on payment of a prescribed fee.

216. Discussing the provision of article 35 of the *Constitution*, the Supreme Court in *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR stated thus;

> " Article 35(1)(a) and (b) of the *Constitution*, read with section 3 of the *Access to Information Act* would thus show without unequivocation that all citizens have the right to Access Information held by the state, or public agencies including bodies such as the 2nd respondent."

217. Under this head, the petitioner seeks a declaration that the systematic denial of access to information on the health and ecological effects of BT Maize and the relevant precautionary measures contravenes their right to information. They allege that the government has failed to disclose the contents of the 2012 report that led to the ban on GMO's in Kenya and the new information leading to the lifting of the ban.

218. In response, it was submitted that this assertion is premature for failure to follow the dispute resolution mechanisms provided under the *Access to Information Act*; that section 14 of the *Access to Information*

Act provides that an applicant may apply in writing to the Commission on Administrative Justice (CAJ) requesting a review of the decisions of a public entity in relation to a request for access to information and that the Petitioner has in filing this petition offended the doctrine of exhaustion which requires that a party exhausts all available dispute resolution mechanisms provided by the law before filing a dispute in court.

219. The European Court of Human Rights in the case of *Oneryildz vs Turkey* (2005) 41 EHRR 20 held that there is a positive obligation on the part of public authorities to supply information about the risks involved in living in close proximity to an environmentally sensitive use, particularly one which poses a risk to their right to life.

220. Section 8 of the *Access to information Act* provides that a request for information should be made in writing. Indeed, section 3A(2) of the *EMCA* provides that a person desiring information should apply to NEMA or the relevant lead agency and may be granted access on payment of a prescribed fee. The issue of the ban of GMO and the appointment of the task force has been in the public domain since 2012.

221. Indeed, the evidence before this court shows that the 2nd respondent made an announcement by way of a gazette notice and newspaper announcements on August 8, 2015 on GM Maize, a fact the petitioner knew or ought to have known. Further, the impugned cabinet despatch lifting the ban of GMO was made in October, 2022, a fact the petitioner knew or to have known.

222. That being the case, the petitioner should have asked in writing for the information in respect of the process that led to the lifting of the ban of GMO in October, 2022, and the subsequent approval that was granted to the 4th respondent, Kenya Agricultural and Livestock Research Organisation (KARLO). Considering the parties' averments, it is noted that no party has alluded to any written request by the petitioner to the Respondents to avail information in respect of the lifting of the ban.

223. Having not sought for the information in writing, the petitioner cannot claim that its right to information under article 35 of the *Constitution* has been infringed. The claim that the respondents are in breach of article 35 of the *Constitution* therefore fails.

Public participation and awareness

224. Article 2, sub-section 4 of the *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 1998* defines the public as:

> " means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups."

225. According to C Nadal, *Pursuing Substantive Environmental Justice: The Aarhus Convention as a 'Pillar' of Empowerment*, Environmental, Law Rev 1, 28, at p 31 (2008), in the environmental context and considering environmental justice concerns, the public are "not simply passive immutable victims of environmental injustice but instead are, and should be perceived as, active self-determining actors.

226. The need for public participation in international environmental matters was first recorded in Principle 10 of the Rio Declaration on Environment and Development of 1992 which is drawn as follows:

> " Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate

access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making process. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

227. The preamble to chapter 3 of *Agenda 21* notes that it is critical to the effective implementation of the objectives, policies and mechanisms agreed to by governments in all programme areas of Agenda 21. It goes on to provide as follows:

> "One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work. Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures."

228. In the context of bio governance, article 13 of the *Convention on Biological Diversity, 1992* provides for the promotion of public education and awareness whereas article 14 provides that where appropriate, public participation should be undertaken for environmental impact assessments.

229. Article 23 of the *Cartagena Protocol* equally mandates states to promote and facilitate public awareness, education and participation concerning the safe transfer, handling and use of living modified organisms in relation to the conservation and sustainable use of biological diversity, taking into account risks to human health.

230. Under article 10 of the *Constitution*, public participation is a fundamental principle of governance. article 69 specifically references the public participation in environmental management by requiring the state to encourage public participation in the management, protection and conservation of the environment.

231. These constitutional dictates are reinforced by the provisions of the Environment Management and Coordination Act and the *Environment and Land Court Act*, both of which require the Environment and Land Court to be guided by the requirements for public participation in development of policies, plans and processes for the management of the environment.

232. The Supreme Court of Kenya had occasion to delve into the discourse on public participation in the case of *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR.

233. The court after an extensive deliberation of several judicial pronouncements cutting through the superior courts stated thus;

> "From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County

Governments. Consequently, while courts have pronounced themselves on this issue, in line with this court's mandate under section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:

Guiding Principles for public participation

(i) As a constitutional principle under article 10(2) of the *Constitution*, public participation applies to all aspects of governance.

(ii) The public officer and or entity charged with the performance of a particular duty bears the *onus* of ensuring and facilitating public participation.

(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means

(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation

(v) Public participation is not an abstract notion; it must be purposive and meaningful.

(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

(ix) Components of meaningful public participation include the following; a. clarity of the subject matter for the public to understand; b. structures and processes (medium of engagement) of participation that are clear and simple; c. opportunity for balanced influence from the public in general; d. commitment to the process;e. inclusive and effective representation; f. integrity and transparency of the process; g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."

234. According to the petitioner, the conceptualization and implementation of the lifting of the ban was done without adequate public participation as required by the *Constitution* and *EMCA* and in contravention of procedural dictates.

235. They contend that the Environmental and Social Impact Assessments(ESIA) was not properly done, and if any, the EIA License requirements were not adhered to; that the Strategic Environmental Assessment(SEA)was not properly done to account for all public spaces and that open cultivation of BT Maize was approved before the issuance of EIA License.

236. The respondents maintain that they duly undertook public participation. They assert that their legal and regulatory frameworks all have provisions prescribing public participation awareness and that they have always followed these provisions through a transparent and participatory approach involving stakeholders, civil society organizations and the general public; and that they conduct public consultations through mass media seeking comments and public hearings.

237. The 2nd respondent has laid out the process that it undertook after the application of BT Maize leading up to the approval process. The 2nd respondent's CEO deposed that as guided by their internal procedures, they published summary information of the application in the Standard and Nation Newspapers as well as the Kenya Gazzette on July 24, 2015 and that on August 21, 2015, they conducted public participation activities through public forums to collect views and comments from the public.

238. It was submitted by the respondents that they engaged various regulatory agencies and relevant stakeholders by requesting for their views and comments; that pursuant to their internal procedures, they received comments from the public which they duly considered and that they also engaged various regulatory agencies and relevant stakeholders by requesting for views and comments before approval for release of the product into the market.

239. Indeed, The *Biosafety (Environmental Release) Regulations, 2011* provides at regulation 12 that The NBA shall promote public awareness and participation on the proposed environmental release. The regulation further provides that in carrying out public awareness and participation, the authority shall publish guidance documents. Regulation 12(3) provides that the Authority (NBA) shall—

(a) by notice in the Gazette;

(b) in at least two newspapers of wide circulation; and

(c) on its website, make available to the public, non-confidential information on applications for environmental release of genetically modified organisms.

240. According to regulation 12(4), any person may within thirty days of the publication of a notice submit written comments on the proposed decisions for any application for placing a genetically modified organism on the market.

241. The 2nd respondent adduced into evidence the Risk Assessment Report, a requirement under the provisions of section 27 of the *Biosafety Act*. In the Report, the 2nd respondent has stated that they published summary information of the application in the Standard and Nation Newspapers as well as the Kenya Gazzette on July 24, 2015 and that on August 21, 2015, they conducted public participation activities through public forums to collect views and comments from the public.

242. Indeed, the 2nd respondent has annexed the evidence of the Gazette Notice of July 24, 2015 which reads in part as follows:

> "...The *Biosafety Act*, 2009 provides that the public participates in the decision making process through submissions to the Authority. It is in compliance with this provision we request the public to participate through sending of comments, concerns, and/or objections. The authority therefore will make the final decision on the application based on risk assessment, socio-economic considerations and comments from the public.
>
> In the event of the authority reaching a decision to grant approval for environmental release of Bt Maize in Kenya, due process governing and official release and communication of seed and plant varieties in Kenya and shall apply consistent with national policy, legislation and guidelines for handling genetically modified crops in Kenya.
>
> All interested parties and persons should submit written environmental concerns to this Application to reach the undersigned not later than 30 calender days from the date of this publication.
>
> More information on the application as well as guidelines for public publication can be accessed in the Authority's website.www.biosafety/kenya.go.ke."

243. The Kenya Gazette is an official publication of the government. It contains notices of new legislation, notices required to be published by law or policy as well as other announcements that are published for general public information. It is used by the government as an official way of communicating to the general public, acting as a formal and transparent means of announcing government actions, providing citizens with information, opportunities for feedback, and a way to hold the government accountable.

244. In the context of public participation, the Gazette notice serves a dual purpose. On one hand, it is a means of communicating Government decisions and policies while on the other hand, it is an avenue through which the Government calls for engagements prior to decision making. Whereas the Kenya Gazzete serves as a means to call for public engagements, this is usually subject to legislation providing for the same, like the Regulations under review.

245. Whereas government programs and initiatives are not necessarily required to be gazetted, any legal or regulatory aspects of such programs that have a direct impact on the public or require formal legal documentation may be published in the Kenya Gazette to ensure transparency and compliance with the law. The specific requirements for gazetting government programs may vary depending on the nature of the program and its legal implications.

246. Public participation is now considered a critical pillar of what has been variously described as 'participatory democracy deliberative or discursive democracy and even 'radical democracy. Whereas the concept finds footing in several provisions of the *Constitution*, it has not been coded comprehensively through legislation. The essential features of public participation has been developed overtime through case law.

247. In *Samow Mumin Mohamed & 9 others v Cabinet Secretary, Ministry of Interior Security and Co-Ordination & 2 others* [2014] eKLR Lenaola and Majanja JJ, while dealing with the issue of whether

there was violation of the petitioners fundamental rights and freedoms and whether there was public participation before Gazette Notice was published designating refugees to specified areas held:

> " As regards Gazette Notice, the Cabinet Secretary has the power, under section 16(2) of the Refugee Act, to designate specific areas as Refugee camps. In *Law Society of Kenya v Attorney General and others* Nairobi Petition No 318 of 2012; [2013] eKLR, the court held that,
>
> > "[52] The burden of proof of showing that there has been no public participation or that the level of public participation within the process does not meet constitutional standards is on the petitioner." The reason for this is that once the Cabinet Secretary has exercised a statutory power, the court is entitled to presume that all the antecedents including public participation have been complied with. According to the case of *Raila Odinga v IEBC & others* SCK Petition No 5 of 2013; [2013] eKLR, "This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. "Omnia praesumuntu rite esse acta" - All acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescription of the law, other than making a bare allegation that there has been no public participation, the petitioners have not established that Gazette Notice No 1927 of 2013 is void for want of public participation."

248. I am in agreement with the above position. The 2nd Respondent complied with the *Biosafety (Environmental Release) Regulations, 2011* when it informed the public, including the Petitioner, to raise environmental concerns before reaching a decision to grant approval for environmental release of Bt Maize in Kenya in the gazette notice and adverts in the newspapers. There is evidence on record that indeed, as per the adverts, the 2nd respondent had a session with the public at KICC and received their views.

249. As was held in the case of *Samow Mumin Mohamed & 9 others* (*supra*), the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescription of the law, which it failed to do. That being the case, it is the finding of the court that there was public participation and awareness after the 2nd respondent received the application for environmental release, cultivation and placing on the market 810 maize and its varietal derivatives in Kenya on 18th June,2015 by the 4th respondent and African Agricultural Technology Foundation (AATF).

250. As to whether there was public participation before the Cabinet Despatch of 0ctober, 2022, I have not been shown any law or authority that requires the Cabinet to engage the public before arriving at its decisions. In any event, there was no public participation before the ban of GMOs was imposed by the Cabinet in the year 2012.

Environmental and Social Impact Assessment and Strategic Environmental Assessment

251. The next ambit of the objection relates to the alleged failure by the Respondents to conduct an Environmental and Social Impact Assessment and Strategic Environmental Assessment and the failure to comply with EIA licence requirements.

252. It was deponed by the petitioner that the entire process of lifting the ban on open cultivation and importation of GMO suffers procedural infirmities to wit, inadequately done Environmental and Social Impact Assessment (ESIA), non-adherence to EIA License requirements; absence of Strategic Environmental Assessment (SEA) and open cultivation of BT Maize before issuance of EIA license;

253. Principle 17 of the *Rio Declaration* provides that;

> " Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."

254. The legal regime for the issuance of EIA licenses is anchored in the *Constitution of Kenya*, where article 69 (f) requires the State to establish systems of environmental impact assessment, environmental audit and monitoring of the environment.

255. These systems are set out in *EMCA* which, as read with the relevant provisions of the Environmental (Impact Assessment and Audit) Regulations 2003 ("the regulations") have set out the framework of environmental impact assessment, environmental audit and monitoring of the environment and the procedures and processes involved in securing the same.

256. Section 58 of the *EMCA* provides that applicants of low, medium or high-risk projects must undertake and submit to NEMA a comprehensive Environmental Impact Assessment (EIA) report before they can be issued with any licence or approval to proceed with the project. The EIA must be conducted and the report prepared by individual experts authorized by NEMA.

257. This requirement is replicated in regulation 4 of the *Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006* which states that a person shall not engage in any activity that may lead to the introduction of any exotic species defined in the Act without an Environmental Impact Assessment Licence issued by the Authority under the Act.

258. Environmental Impact Assessment (EIA) is a systematic examination conducted to determine whether or not a programme, activity or project would have any adverse impacts on the environment. On the other hand, EIA has been defined by the International Association for Impact Assessment (IAIA) as

> "the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made."

259. The *EMCA* defines Strategic Environmental Assessment (SEA) as 'a formal and systemic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives. The NEMA Guidelines (2011) define SEA as

> "a range of analytical and participatory approaches to integrate environmental consideration into policies, plans, or programmes and evaluate the interlinkages with economic and social considerations."

260. As already pointed out, under section 7(2)(a) of the *Biosafety Act*, 2009, the 2nd respondent has the mandate to consider and determine applications for approval of the transfer, handling and use of genetically modified organisms. Section 28 also provides for a risk assessment upon receipt of a complete application as well as an audit risk assessment. In my view, it is after the 2nd respondent has done a risk assessment and conducted public participation that the requirement of an Environmental and Social Impact Assessment (ESIA) and Strategic Environmental Assessment (SEA) kicks in.

261. Indeed, considering the complexity of biotechnology, and the mandate given to the 2nd respondent by both the international and domestic laws to exercise general supervision and control over the transfer, handling and use of genetically modified organisms with a view to ensuring safety of human

and animal health; and to provide and to consider and determine applications for approval for the transfer, handling and use of genetically modified organisms, and related activities, it must perform these functions to its satisfaction.

262. In carrying out its mandate, part V of the Act provides that the National Biosafety Authority must consult with regulatory bodies which include the Department of Health; Department of Veterinary Services; Kenya Bureau of Standards; Kenya Plant Health Inspectorate Services; Kenya Industrial Property Institute; Kenya Wildlife Services; Pest Control Board and National Environment Management Authority.

263. Although the *Biosafety Act* does not provide that an ESIA or SEA report must be availed before the 2nd respondent approves the project, be it in terms of trials or release to the market, the said reports must be availed, and an EIA licence issued by NEMA pursuant to the provisions of *EMCA* before the project can commence (whether trials or release to the market). That is what section 58 of *EMCA* requires.

264. What this means is that despite the 2nd respondent having given the Kenya Agricultural and Livestock Research Organization (KALRO), the 4th respondent, approval for the release and placement into the market of MON 810 event in maize varieties in Kenya for purposes of cultivation, food, feed and processing, import, export and transit on October 12, 2022, KALRO requires an EIA license from NEMA to undertake the project. It is trite that before an EIA license can be issued allowing the approved project, ESIA and SEA reports must be prepared by NEMA experts.

265. To put this into context, the approval of all projects requiring EIA licenses, including construction, is always done by bodies stipulated in the law, before NEMA, whose objective is to supervise and coordinate environmental activities, can authorize the preparation of EIA, ESIA and SEA Reports by its experts, and then issue EIA licenses.

266. That is the same scenario that should be applicable in the approval processes of "National Performance Trials (NPTs)" and "Environmental Release, Cultivation and Placing in the Market" of GMOs. The approval of the National Biosafety Authority under the *Biosafety Act* has to come first before EIA, ESIA and SEA Reports can be prepared and a license issued, if at all. The two processes cannot be carried out simultaneously, which seems to be the petitioner' s argument.

267. No evidence has been placed before this court by the petitioner to show that KALRO, the 4th respondent, is already undertaking cultivation of food, feed and processing, import, export and transit of MON 810 event in maize varieties in Kenya without an EIA licence. Indeed, neither NEMA, the 3rd respondent, nor KALRO, alluded to this.

268. The 2nd respondent having given its approval for "Environmental Release, Cultivation and Placing in the Market" of Bt Maize to the 4th respondent, the 4th respondent cannot commence the project until it obtains an EIA license from NEMA.

269. That being the case, it is the finding of this court that the allegation that the cultivation, importation and exportation of GMO maize is being undertaken without an EIA licence was prematurely made, the said project having not commenced.

The Right to a clean and healthy environment

270. The right to clean and healthy environment has been recognized to be indispensable for the survival of humanity. The global recognition of the importance of a clean and healthy environment took a significant step forward in 1968, when the UN General Assembly adopted a resolution acknowledging the connection between environmental quality and fundamental human rights.

271. However, it was not until 1972, during the UN Conference on the Human Environment, Stockholm, that the right to a healthy environment was explicitly recognized in an international document, the *Stockholm Declaration, 1972*. The Stockholm Declaration, which contain 26 principles, placed the environmental issues at the forefront of international concerns.

272. The global recognition of the right to a clean and healthy environment was bolstered by the UN Human Rights Council and General Assembly, which passed in October 2021 and June 2022, respectively, resolutions formally recognizing the right to a healthy environment as an international human right.

273. In Kenya, article 42 of the *Constitution* guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations. Article 69, sets outs the state's obligations with respect to the environment, including protecting genetic resources and biological diversity and eliminate processes and activities that are likely to endanger the environment.

274. Article 69 of the *Constitution* further also provides for the obligation of every citizen to cooperate with the government and any other person to conserve and protect the environment as well as use natural resources and ensure ecologically sustainable development.

275. In enforcing environmental rights, article 70(1) provides that one may apply to court for redress if the right to a clean and healthy environment under article 42 has been, is being or is likely to be denied, violated, infringed or threatened. Article 70(1) thus gives every Kenyan access to the court to seek redress in environmental matters.

276. Article 70(3) of the *Constitution* provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury before seeking redress for breach of the right to a clean and healthy environment. This provision is replicated in section 3(3) of the *EMCA* which allows any person who alleges that the right to a clean and healthy environment has been, or is being infringed or violated to apply to the Environment and Land Court in the public interest.

277. As to what constitutes "environment," the *Environmental Management and Co-ordination Act* (*EMCA*) states that it includes the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment."

278. The broad scope of the right to clean and healthy environment was first affirmed by the court in the case of *Peter K Waweru v Republic*, [2006] eKLR where the court stated, *inter alia*;

> " The right of life is not just a matter of keeping body and soul together because in this modern age, that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures including man; it is inherent from the act of creation, the recent restatement in the Statutes and the Constitutions of the world notwithstanding. This right and the other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible."

279. In discussing the right to a clean and healthy environment, the court in the case of *Adrian Kamotho Njenga v Council of Governors & 3 others* [2020] eKLR, persuasively stated thus;

> " Article 42 of the *Constitution* guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by article 69. The right extends to having

the obligations relating to the environment under article 70 fulfilled. Unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment."

280. The African Commission on Human and People's Rights in the case of *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Communication No 155/96 held that environmental rights recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual, and as a consequence, the state is required under the *African Charter* to take reasonable measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.

281. Tied to the petitioner's allegations on the right to a clean and healthy environment are claims of breach of the precautionary principle. The precautionary principle provides guidance for governance and management in responding to uncertainty. It provides for actions to avert risks of serious or irreversible harm to the environment or human health in the absence of scientific certainty about that harm.

282. Widely accepted in sustainable development and environmental policy, the principle represents a formalization that delaying action until harm is certain will often mean delaying until it is too late or too costly to avert it. One of the most important expressions of the precautionary principle internationally is in the *Rio Declaration*. Principle 15 thereof provides in part that;

> " In order to protect the environment, the precautionary principle shall be widely applied by states according to their capabilities. where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation."

283. Borrowing heavily from principle 15, the *EMCA* defines the precautionary principle as the principle which postulates that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty should not be used as a reason for postponing cost effective measures to prevent environmental degradation.

284. In the Australian case of *Leatch v National Parks and Wildlife Service and Shoalhaven City Council* 8 1 LG ERA 270 Stein J defined it as follows:

> " In my opinion the precautionary principle is a statement of common sense and has already been applied by decision makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainly or ignorance exists, concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities) decision makers should be cautious."

285. Arie Trouwborst, '*The Precautionary Principle in General International Law: Combating the Babylonian Confusion*' (2007) 16 Review of European Community & International Environmental Law, states that under the precautionary principle, the benefit of any such doubt is to go to the environment. In dubio pro natura.

286. The precautionary principle recognizes the limitations of science in being able to accurately predict the likely environmental impacts and thus calls for precaution in making environmental decisions where

there is uncertainty. This principle requires that all reasonable measures be taken to prevent the possible deleterious environmental consequences of development activities.

287. The principle has four central parameters namely; taking preventive action in the face of uncertainty; shifting the burden of proof to the proponents of an activity; exploring a wide range of alternatives to possible harmful actions; and increasing public participation in decision-making.

288. The petitioner's gravamen as regards the right to a clean and healthy environment as set out in the Petition is that as increasing numbers of genetically modified crops are released into the environment, the likelihood of unintended ecological effects on both agricultural and natural systems increases and that the potential hazards identified by the European Food Safety Authority include exacerbating weed problems, displacement and extinction of native plant species.

289. According to the petitioner, a major environmental concern regarding the cultivation of genetically modified crops is unintended transgenes transfers to conventional crops as transgenes and conventional genes are subject to the same underlying biological processes of selection, mutation and recombination by hybridization and backcrossing.

290. It was the deposition of the petitioner's Chief Executive Officer (CEO) that genetically modified organisms often contain recombined genes acquired from different species to enable the expression of new traits such as round up pesticide ready seeds; that the unintended gene transfer could raise biosafety issues to human and animal health and the environment and that there is a high possibility of spread of the transgene (also known as transgene spread) to neighboring conventional crops resulting in additional environmental risks to maize genetic diversity, non-target species and increased resistant risk.

291. The petitioner states that Kenyans risk unknowingly cultivating and consuming GMO maize as a result of unintended gene transfer in violation of the consumer right of informed choice; that farmers also risk unknowingly infringing seed proprietary rights and that the new challenges arise in risk assessment as genetically engineered (GE) plants can persist and propagate in the environment as well as produce viable offspring.

292. According to the petitioner, the lifting of the ban without proper public participation, awareness and risk assessment on the negative impacts of GMO on the environment derogates the universal precautionary principle.

293. In the petitioner's opinion, the entitlement to a clean and healthy environment under article 42 and section 3(1) of the *EMCA* enjoins the respondents to pass laws and regulations and take other measures to protect the environment for its benefit; and that the National Biosafety framework lacks provisions on principles on best practices and procedures to avoid the unintentional presence of transgenes in conventional landraces *vis a vis* how to minimize as far as possible, the probability of unintentionally introducing transgenes into conventional maize fields.

294. In response, the respondents maintain that they are cognizant of their obligations to observe, respect, protect and fulfil the fundamental right of a clean and healthy environment as guaranteed in the *Constitution*; that in compliance with this constitutional edict, the 2nd respondent has put in place robust frameworks with inbuilt strictures which must be met before they consider and determine applications for approval of the transfer, handling and use of genetically modified organisms and that in this way, consumers are duly protected.

295. The petitioner has heavily submitted on the potential adverse environmental, health and socio-economic effects allowing open cultivation of BT Maize. The respondents take the opposing view and

believe that the open cultivation of Maize will among others be a solution to the pressing food crisis facing Kenya.

296. Both parties have heavily submitted on their positions in respect to the safety and viability or otherwise of the GMO products in general and BT Maize in particular. In this respect, they have heavily relied on newspaper excerpts, articles and scientific publications. The court, through the aforesaid submissions has developed a deeper understanding of the nuances surrounding the GM discourse in Kenya and globally.

297. While appreciating the parties' efforts in this respect, it is noted that the court has not been called upon to answer the question of whether or not GMO's in general and BT Maize in particular is safe. Indeed, as succinctly stated by the late justice J.L Onguto in *Kenya Small Scale Farmers Forum vs Cabinet Secretary Ministry of Education, Science and Technology & 5 others* [2015] eKLR:

> "There are real and perceived risks of genetically modified organisms (GMOs). I state so too because genetically modified organisms (GMOs) may also have negative effects. It is dependent on which side of the divide one is. Political and economic considerations may lead a person to conclude that genetically modified organisms (GMOs) positively assist the human species. Yet another person's religious considerations may lead to a vilification of genetically modified organisms (GMOs) altogether. There is no consensus on the benefits, (dis)advantages, risks and effect of genetically modified organisms and foods generally. This battle has raged on since 1975, when the first recombinant deoxyribonucleic acid (DNA) molecules were used through biotechnology to manipulate natural genes. This battle continues."

298. What the court is called upon to determine is the effectiveness of the existing laws and regulations in as far as identifying, mitigating and addressing potential risks taking into account key environmental principles and concerns, and in particular the precautionary principle in sustainable development.

299. In doing so, the court will consider regulatory gaps, if any, as alleged by the petitioner under the parameters of the precautionary principle, to wit: taking preventive action in the face of uncertainty; shifting the burden of proof to the proponents of an activity; exploring a wide range of alternatives to possible harmful actions; and public participation in decision-making.

300. The Biosafety Governance in Kenya is on two levels; international and national. Internationally, Kenya is a party to the *Convention on Biological Diversity* (CBD), the Cartagena Protocol and Nagaya-Kuala Lumpur Supplementary Protocol.

301. The *Convention on Biological Diversity* (CBD), generally, contains a version of the precautionary principle in the preambular text, which provides some guidance on how the "serious or irreversible" harm mentioned in the *Rio Declaration* should be interpreted in the biodiversity context.

302. The *CBD* states that

> "where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat."

The *Cartagena Protocol on Biosafety* reaffirms the precautionary approach, by ensuring that development, handling, transport, use, transfer and release of living modified organisms are undertaken in a manner that prevents or reduces the risks to biological diversity or human health.

303. The *Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress* to the *Cartagena Protocol on Biosafety* also re-affirms the precautionary principle.

304. The *Biosafety Act*, 2009, is the lead piece of legislation governing biosafety in Kenya. There are four regulations under the Act, to wit: The *Biosafety (Contained Use) Regulations, 2011*, The *Biosafety (Environmental Release) Regulations, 2011*, The *Biosafety (Import, Export and Transit) Regulations, 2011* and the *Biosafety (Labelling) Regulations, 2012*.

305. These regulations are concerned with ensuring that potential adverse effects of genetically modified organisms are addressed to protect human health and the environment when conducting contained use; and to ensure that potential adverse effects of genetically modified organisms are addressed to protect human health and the environment when conducting environmental release.

306. The regulations also ensure safe movement of genetically modified organisms into and out of Kenya while protecting human health and the environment and to ensure that consumers are made aware that food, feed or a product is genetically modified so that they can make informed choices, and facilitate the traceability of genetically modified organism products to assist in the implementation of appropriate risk management respectively.

307. Guidelines have also been put in place to supplement the regulations. They include the *Guidelines for the Environmental Risk Assessment of Genetically Modified Crops, 2022*, *Guidelines for the Safety Assessment of Foods Derived from Genetically Modified Crops in Kenya, 2022*; *Sampling Guidelines for the Testing of Genetically Modified Organisms and Derived Products in Kenya, 2023*; and *Guidelines for Testing of Genetically Modified Organisms in Kenya, 2013*

308. The lead agency in matters biosafety is the National Biosafety Authority (NBA). The NBA is state corporation whose main objective under the Act, among others, is to regulate all activities involving genetically modified organisms (GMOs) in food, feed, research, industry, trade and environmental release.

309. With respect to preventive action, it is noted that the biosafety regime comprehensively provides for risk assessment. The *Biosafety Act* sets out as one of its objectives as "facilitation of responsible research into, and minimize the risks that may be posed by, genetically modified organisms.

310. The Act is further meant to ensure an adequate level of protection for the safe transfer, handling and use of genetically modified organisms that may have an adverse effect on the health of the people and the environment; and to establish a transparent, science-based and predictable process for reviewing and making decisions on the transfer, handling and use of genetically modified organisms and related activities".

311. Under Part III of the *Act*, applications on contained use activity, introduction into the environment, importation and placing into the market all GMOs require risk assessments and are supposed to be accompanied by information to aid in the assessment of the potential risks and benefits.

312. Section 27 of the Acts provides for risk assessment and management procedures. These are magnified under the 5th Schedule. Risk assessment under this section is carried out by the 2nd respondent (the Authority) taking into account available information concerning any known risk posed by potential exposure to a genetically modified organism.

313. Upon completion of the risk assessment, the National Biosafety Authority is required to make a report of its findings, and indicate any measures to be taken to ensure the safe use of a genetically modified organism.

314. The Authority is required to liaise with the appropriate regulatory agencies to ensure that appropriate measures are in place to manage and control risks identified during the assessment. In carrying out its mandate, Part V of the *Biosafety Act* provides that the Authority must consult with a multiple regulatory bodies which include the Department of Health; Department of Veterinary Services; Kenya Bureau of Standards; Kenya Plant Health Inspectorate Services; Kenya Industrial Property Institute; Kenya Wildlife Services; Pest Control Board and National Environment Management Authority.

315. The *Biosafety (Contained Use) Regulations* provides for a Biosafety Clearing House which is a mechanism for exchange of scientific, technical, environmental, socio-economic and legal information and experience with genetically modified organism. The regulations also provides for an Institutional Biosafety Committee whose functions include inter-alia, to assist the institution in the establishment of the appropriate monitoring mechanisms for risk assessments and risk management.

316. The Act also has provisions relating to monitoring, contingency measures and circumstances calling for recall and revocation of applications. Further, National Performance Trials (NPT) are undertaken to evaluate the performance of novel plant types to those that are already available on the market.

317. As regards public participation, this too is extensively provided for. One of the functions of the Authority as stated in section 7 of the Act is to promote awareness and education among the general public in matters relating to biosafety. The Biosafety (Environmental Release) Regulations, 2011 under regulation 12 mandates the authority to promote public awareness and participation on the proposed environmental release.

318. On the aspect of exploring alternatives to possible harmful actions, the Act provides for Biosafety Inspectors responsible for ensuring compliance with the Act. It also under part VI provide for restoration and cessation as well as for suspension or revocation of an approval under section 31.

319. As regards provisions on co-existence, which is one of the petitioner's concern regarding transgene transfer, the respondents state that each new GM product is evaluated and assessed on a case by case basis and is subjected to rigorous scientific scrutiny in line with the existing frameworks; and that in any event, technologies researched and deployed by various innovators coexists and do not harm the existing farming systems. This position is supported by the "*Guidelines and Checklists for the Risk Assessment and Certification of Facilities Dealing with Genetically Modified Organisms, June 2013*.

320. Further, Schedule V of the *Biosafety Act* provides that to fulfil its objective, a risk assessment shall entail the following steps: an identification of any genotype and phenotypic characteristics associated with the genetically modified organisms that may have adverse effects on the environment and on human health; an evaluation of the likelihood of these adverse effects being realized, taking into account the level and the kind of exposure of the likely potential receiving environment of the genetically modified organisms; and an evaluation of the consequences should these effects be realized.

321. Schedule V further provides that the risk assessment shall entail an estimation of the overall risk posed by the genetically modified organisms based on the evaluation of the likelihood and consequences of the identified adverse effects being realized and a recommendation as to whether or not the risks are acceptable or manageable, including identification of strategies to manage these risks.

322. The schedule further provides that where there is uncertainty regarding the level of risk, the Authority may request for further information on the specific issues of concern or may recommend implementing appropriate risk management strategies and monitoring the genetically modified organisms in the receiving environment.

323. The other factors to be considered during the risk assessment are the biological characteristics of the recipient organism or parental organism including taxonomic status, common name, origin, centres of origin and centres of genetic diversity and a description of the habitat where the organism persists; donor organism, taxonomic status and common name, source and the relevant biological characteristics of the donor organisms, vector characteristics of the vector including its identity and the sources of origin and host range, amongst other many factors listed in the schedule.

324. The *Guidelines and Checklists for the Risk Assessment and Certification of Facilities Dealing with Genetically Modified Organisms, June 2013* provide that the following shall be considered as harmful effects to human health during the risk assessment stage: disease to humans taking into account toxicity and allergenicity; disease to plants or animals; any deleterious effects as a result of failure to treat a disease or provide effective prophylaxis; any deleterious effects as a result of release of the microorganism into the environment; and any deleterious effects as a result of transfer of genetic material to other naturally occurring organisms.

325. On the issue of liability and redress mechanisms, the Authority may issue and serve on any person a restoration order in respect of any matter relating to release of a genetically modified organism into the environment and levy a charge on the person on whom it is served, which, in the opinion of the Authority, represents a reasonable estimate of the costs of any action taken by an authorized person or organization to restore the environment to the state in which it was before the release of a genetically modified organism.

326. Section 41 of the *Biosafety Act* provides that a penalty may be imposed by the Authority if the action specified is not undertaken. The Act further provide that the Authority, in consultation with the relevant regulatory agency, may issue an order for the immediate cessation of an approved activity, or for the immediate imposition of additional risk management measures with respect to such activity.

327. I have considered the literature on this subject, and especially the *paper* by Professor Mbote (*supra*). The literature shows that since its establishment, the National Biosafety Authority has granted numerous approvals for National Performance Trials (NPTs) and Confined Field Trials (CFTs). CFTs are undertaken for genetically modified organisms in a controlled space where specific measures are in place to ensure safety for humans and the environment

328. The paper shows that on September 2, 2016, the National Biosafety Authority approved environmental release of MON 15985 event (commonly known as Bt Cotton). The approval was granted following the application by Monsanto Kenya Limited in October 2015 seeking approval for 'environmental release, cultivation and placing on market.'

329. The research by Professor Mbote further shows that the National Biosafety Authority has also approved quite a number of food and feeds, which include water-efficient/drought tolerant transgenic maize at KARI Kiboko; virus resistant transgenic Cassava at KARI Alupe; Vitamin-A-enhanced cassava at KARI Alupe; Biofortified sorghum at KARI Kiboko and virus-resistant cassava at KARI Mtwapa, amongst other crops.

330. It is not clear to this court why all these approvals have not been challenged by the Petitioner if indeed there is a concern that GM foods pose a serious risk to the environment and human health.

331. In conclusion, it is the finding of this court that the Petitioner has not challenged the constitutionality of the laws governing GMOs, both international and domestic. The regulatory barriers that govern importation and cultivation of GMOs remain in force, and the same are presumed to be constitutional until the contrary is proved.

332. The evidence before me shows that the country has put in place robust frameworks with inbuilt strictures which must be met before the various Agencies can consider and determine applications for approval of the transfer, handling and use of genetically modified organisms.

333. In addition to the *Biosafety Act* and regulations thereunder, the 2nd Respondent has adopted guidelines that govern the procedures for environmental release and/or placing on the market of GMOs, procedure for receiving, administrative screening and acknowledging GMO all of which are intended to guarantee protection of the right to clean and healthy environment, and labelling of GMOs.

334. On GM food safety assessment, National Biosafety Authorities follows the relevant guidelines adopted from the International Food Code Codex Alimentarius to protect consumer health and promote fair practices in food trade. Kenya has domesticated Codex Alimentarius in NBA's guidelines for safety assessment of foods derived from genetically modified organisms.

335. The National Biosafety Authority implements the *Cartagena Protocol on Biosafety* in order to address safety for human health and the environment in relation to modern biotechnology. Safety of GM foods is assessed relative to the conventional counterpart having a history of safe use, taking into account both intended and unintended effects, including how gene transfer will affect the indigenous crop, on a case-by-case approach.

336. Indeed, schedule V of the *Biosafety Act* comprehensively adopts best practices with regards to prevention of unintended transgene transfer between BT Maize and conventional landraces. This is in addition to The *Guidelines and Checklists for the Risk Assessment and Certification of Facilities Dealing with Genetically Modified Organisms, June 2013*, which provides that harmful effects to human health and any deleterious effects as a result of transfer of genetic material to other naturally occurring organisms, must be considered during the risk assessment.

337. The existing legal and institutional framework has been set up for the rigorous evaluation of GM organisms and GM foods relative to both human health and the environment. The evidence before the court shows that the National Biosafety Authority and other Agencies have the capacity in the identification of foods that should be subject to risk assessment and recommend appropriate approaches to safety assessment.

338. Indeed, the environmental assessments alluded to above operate as precautionary measures aimed at protection of natural environment from any side effects that may be witnessed as a result of the release of GMOs to the market. The said safeguards by the 2nd respondent fall within the confines of precautionary principle as interpreted by our courts.

339. Let me end by stating that as a country, we need to trust the institutions that we have in place, and call them to order in the event they breach the law. The *Biosafety Act* stipulates that the National Biosafety Authority should work in close collaboration with the Department of Public Health, which safeguards the health of consumers through food safety and quality control, surveillance, prevention and control of food borne diseases.

340. The Authority is also obligated to work in tandem with the Department of Veterinary Services (DVS), which is charged with protection and control of animal diseases and pests to safeguard human health, improve animal welfare, and increase livestock productivity through production of high quality livestock and their products; the Kenya Bureau of Standards (KEBS), which is responsible for standardization in industry, trade and consumer protection; and the Pest Control Products Board (PCPB), which regulates importation and exportation, manufacture, registration and use of pest control products.

341. The other institutions that the National Biosafety Authority is supposed to collaborate with are Kenya Plant Health Inspectorate Service (KEPHIS), which offers inspectorate and vigilance services on all matters related to plant health, quality control of agricultural inputs and produce; the National Environmental Management Authority (NEMA), which conducts environmental impact assessment of GMOs intended for release into the environment; and the Kenya Industrial Property Institute (KIPI), which is responsible for addressing intellectual property issues arising from modern biotechnology.

342. With all these institutions, we should be confident that our health and environment is in good hands. It cannot be true that they have all conspired to expose the rest of the population to the calamities alluded to in the Petition.

343. This court has not been shown any evidence to show that the Respondents, and the institutions named in the preceding paragraphs have breached the laws, regulations and guidelines pertaining to GM food, and in particular the approval of the release in the environment, cultivation, importation and exportation of Bt maize.

344. For those reasons, the petition dated January 16, 2023 is dismissed but with no order as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 12TH DAY OF OCTOBER, 2023

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Muchangi for Petitioner

Mr. Gumbo and Mr. Motari and Odhiambo for 1st and 2nd Respondents.

Court Assistant - Tracy