Mwangi & 6 others v Attorney General & 6 others; Kenya University Biodiversity Consortium & 6 others (Interested Parties) (Petition E475 of 2022) [2024] KEHC 13678 (KLR) (Constitutional and Human Rights) (7 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13678 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E475 OF 2022

LN MUGAMBI, J

NOVEMBER 7, 2024

BETWEEN

PAUL MWANGI ..... 1ST PETITIONER

KENYAN PEASANTS LEAGUE ..... 2ND PETITIONER

KENYA SMALL SCALE FARMERS FORUM ..... 3RD PETITIONER

ALI SARIF ..... 4TH PETITIONER

DOREEN NAMAEMBA ..... 5TH PETITIONER

EZEKIEL JUMA ..... 6TH PETITIONER

HARRY AMATSIMBA ..... 7TH PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

CABINET SECRETARY, AGRICULTURE, LIVESTOCK & FISHERIES .... 2ND RESPONDENT

CABINET SECRETAR FOR EDUCATION, SCIENCE & TECHNOLOGY ..... 3RD RESPONDENT

NATIONAL BIOSAFETY AUTHORITY ..... 4TH RESPONDENT

CABINET SECRETARY, TRADE, INVESTMENT & INDUSTRY .... 5TH RESPONDENT

THE CABINET OF KENYA ..... 6TH RESPONDENT

SECRETARY TO THE CABINET ..... 7TH RESPONDENT

AND

KENYA UNIVERSITY BIODIVERSITY CONSORTIUM .. INTERESTED PARTY

BIODIVERSITY AND BIOSAFETY ASSOCIATION OF KENYA ... INTERESTED PARTY

ASSOCIATION OF KENYA FEEDS MANUFACTURERS . INTERESTED PARTY

KITUO CHA SHERIA ..... INTERESTED PARTY

CABINET SECRETARY FOR HEALTH ..... INTERESTED PARTY

COUNCIL OF GOVERNORS ..... INTERESTED PARTY

CEREAL GROWERS ASSOCIATION ..... INTERESTED PARTY

(As Consolidated With Petition No. E519 of 2022, 399 of 2015 & Petition 8 of 2022 (Formerly Kitale High Court)

RULING

Introduction

1. This Court in its direction of 1st November 2023 required the parties to address it on the implication of the ELC Court Judgment that adjudicated on the matter of lifting of the ban on open cultivation and importation of GMO food.

2. This Court observed that in the case of Law Society of Kenya v Attorney General & 3 others [2023] KEELC 20682 (KLR), the Environment and Land Court (ELC) had adjudicated on the issue which appeared to manifest in the present consolidated Petition. Consequently, the Court asked to be addressed on whether or not the matter was/is res judicata. In particular the Cour requested the Counsels to submit on the following issues:

    a. Whether in view of the ELC Judgment on GMO food, there is any issue that remains for determination in the instant constitutional petition.

    b. If so, the identification of the specific issues to be addressed by this Court.

The Consolidated Petitions- Case synopsis

Petition No. E475 of 2022

3. This Petition was filed on 13th October 2022. The Petitioner asserts that the effect of the 6th Respondent's lifting of the ban was to remove all regulatory barriers that had been established for the protection of the public against GMO food. According to the Petitioner, the 6th Respondent's decision is a threat to the fundamental freedoms in the Bill of Rights of the people of Kenya. Consequently, the Petitioner seeks the following reliefs:

    i. A declaration that the decision of the Cabinet of the Republic of Kenya made on 3rd October 2022, purportedly lifting a ban on the cultivation within and importation into the Republic of Kenya of foods and animal feeds that are produced from genetically modified seeds and other organisms is unconstitutional for derogating and threatening to derogate the following rights and freedoms of the Petitioner and of the people of Kenya:

a. Freedom of conscience, religion, thought, belief and opinion as guaranteed by Article 32 of *the Constitution*.

b. Right of access to information as guaranteed by Article 35 of *the Constitution*.

c. Right to food of acceptable quality as guaranteed by Article 43 of *the Constitution*.

d. Consumer rights guaranteed by Article 46 of *the Constitution*.

e. The right to fair administrative action as guaranteed by Article 47 of *the Constitution*.

ii. A declaration that the decision of the Cabinet of the Republic of Kenya made on 3rd October 2022, purportedly lifting a ban on the cultivation within and importation into the Republic of Kenya of foods and animal feeds that are produced from genetically modified seeds and other organisms is unconstitutional for derogating and threatening to derogate the following rights and freedoms of peasants and other people working in rural areas as guaranteed by Articles 2(5), and 2(6) and/or Articles 19(3)(b) and 21(3) of *the Constitution*.

a. The right to adequate food that is produced through ecologically sound and sustainable methods that respect culture and preserves access to food for future generations as guaranteed by Article 15 of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas.

b. The right to protection of traditional knowledge relevant to plant genetic resources for food and agriculture and the right to maintain, control, protect and develop own seeds and other propagating material and to obtain the support of the State to do so guaranteed by Article 19 of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas.

iii. An order awarding costs of the Petition to the Petitioner.

iv. Any other or further orders writs and directions this Court may consider appropriate in the circumstances the purpose of the Petitioner's rights.

Petition No. E519 of 2022

4. The Petitioner herein, filed this Petition on 22nd November 2022. The Petition is anchored on the 6th Respondent impugned decision. According to the Petitioner, the government did not undertake any public participation before the decision was made. The Petitioner is concerned in addition to health reasons, that this decision will gravely affect their farming and crop production as peasants thereby affecting their productivity and sustainability. Consequently, the Petitioner seeks the following orders:

i. A Declaration be made that by declining to respond to the Petitioner's letter dated 12th October 2022, the 2nd Respondent breached the Petitioner's right to access information under Article 35 of *the Constitution*.

ii. A Declaration be made that the Respondents breached the Petitioner's right to public participation and transparency contrary to the provisions of Article 10 of *the Constitution*.

iii. A Declaration be made that the Respondents breached the Petitioner's right to *fair administrative action act* as envisaged under Article 47 of *the Constitution*.

iv. A Declaration be made that the Respondents breached the Petitioner's right to consumer protection as provided for under Article 46(a)(b) & (c) of *the Constitution*.

v. A Declaration be issued that the decision of the Government of Kenya vide the Cabinet's Despatch dated 3rd October 2022 in relation to GMO acted ultra vires in usurping the powers of the 2nd Respondent and subsequent thereto, be pleased to issue an Order of certiorari quashing the decision dated 3rd October 2022.

vi. An Order of Prohibition and permanent conservatory order be issued restraining the Respondents either by themselves or through agents or such other person acting on their behalf from lifting the ban and/or importing and cultivating of GMOs save as prescribed under the laws of Kenya, the international conventions and protocols; and the observations of this Court.

vii. Costs of the petition herein.

viii. Any other order as this Court may deem fit.

Petition No. 399 of 2015

5. This Petition was filed on 18th September 2015 and was founded on the Petitioner's apprehension that the ban placed on GMO foods would be lifted by the government. Essentially, the Petitioner feared that this would cause irreversible harm to the health and social economic rights of the public and their right to quality food. On this basis, the Petitioner sought the following relief:

    i. This Court do issue conservatory orders to the Respondents to maintain the status quo with regards to lifting the ban on Genetically Modified Organisms until the Petition is heard and determined. (Spent)

    ii. The Respondent be ordered not to lift the ban on Genetically Modified Organisms before there is sufficient notification and wide consultation with the public, especially farmers at the county and sub-county levels throughout the country.

    iii. The Respondents engage the county assemblies and county governments for their views on the question of the introduction of genetically modified organisms.

    iv. That the respondents are condemned to pay costs of these proceedings.

    v. Any other order that the Court deems fit to grant.

The Environment and Land Court Case - Law Society of Kenya v Attorney General & 3 others [2023] KEELC 20682 (KLR)

6. The Petitioner in a Petition dated 16th January 2023 premised on the 6th Respondent's impugned decision stated that lifting of the ban was followed by the 2nd Respondent's approval of 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. In the Petitioner's view the use of biotechnology in agriculture has a number of social, economic, health and environmental risks. As such, it was argued that with the increase of the GMO crops into the environment, there was a likelihood of unintended ecological effects on both the agricultural and natural systems. Consequently, the Petitioner sought 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.

ii. 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*.

iii. 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.

iv. 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.

v. 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*.

vi. 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.

vii. 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.

viii. Any other relief the court deems fit.

7. The Court in its holding dated 12th October 2023 observed as follows:

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 officers 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."

Parties Submissions

1st Petitioner's Submissions

8. The 1st Petitioner on 10th January 2024 filed submissions through Paul Mwangi and Company Advocates. Counsel stated that the ELC Judgment is not binding on this Court.

9. Discussing the issues at hand, Counsel submitted that the ELC court in determining the matter filed by the Law Society of Kenya considered issues that were not part of the pleadings before it. These issues are:

> " whether public participation was conducted before the removal of the regulatory barriers governing introduction and use of GM seeds and crops as is the right of the people under Article 10 and Article 47 of *the Constitution*; whether the Cabinet Dispatch dated 3rd October, 2022 is a Statutory Instrument and subject to the procedure under the *Statutory Instruments Act* and the rights of Kenyan citizens under Article 35 of *the Constitution* to receive information regarding each and every genetically modified seed and food that will be introduced in Kenya that is necessary for the people to exercise their rights.

10. Counsel argued that this was contrary to the legal principle that parties are bound by their pleadings. Reliance was placed in Independent Electoral and Boundaries Commission & another v Mule & 3 others [2014] KECA 890 (KLR) where it was held that:

> " The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties."

11. Moreover, Counsel submitted that the ELC Court does not have supervisory jurisdiction over the Cabinet's decisions like the High Court as empowered under Article 165(6) of *the Constitution*. To buttress this point reliance was placed in Li Wen Tie & 2 others v Cabinet Secretary, Interior and Coordination of the National Government & 3 others [2017] eKLR where it was held that:

> " *The Constitution* has expressly granted the High Court jurisdiction over any person, body or authority exercising a quasi-judicial function. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised."

12. Like dependence was placed in Republic v Karisa Chengo & 2 others [2017]eKLR.

13. Furthermore, Counsel stressed that the jurisdiction to interpret *the Constitution* is solely vested in the High Court under Article 165(3) of *the Constitution*. For instance, in the ELC matter it was noted that the Court had made a determination on the principle of public participation which is in error. Equally that the Court had pronounced itself on violation of constitutional rights such Article 35 of

the Constitution, which also falls within the jurisdiction of the High Court. Reliance was placed in Republic v Karisa Chengo (supra) where it was held that:

> "We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court."

14. Correspondingly, Counsel pointed out that the ELC jurisdiction is only limited to disputes relating to environment planning and protection and land use as envisaged under Article 162(2)(b) of *the Constitution* as read with Section 13 of the *Environment and Land Court Act*. Accordingly, the Court's determination on the issues raised before this Court was argued to have been done without jurisdiction.

2nd Petitioner's Submissions

15. A. Omondi and Company Advocates on behalf of the 2nd Petitioner filed submissions dated 4th February 2024.

16. In like manner, Counsel argued that the issues raised herein are not related to those in the ELC matter. Counsel noted that although the issues stemmed from the decision of the 6th Respondent, the issues in the consolidated petitions revolve around constitutional and human rights issues while the ELC matter was an environmental claim specifically focused on Bt. maize. Likewise, it was noted that the relief sought in the instant Petitions and the ELC matter are distinct.

17. Interestingly, Counsel pointed out that merger of the issues in the two matters was untenable as the two superior courts hold different jurisdictions in determining matters. Similarly, Counsel stated that the question raised herein had already been determined in this Court's Ruling dated 30th June 2023.This is because the key questions that were raised there, were whether the facts in issue in the two matters are the same and whether this Court has the jurisdiction to determine the issues raised in the consolidated petitions. For this reason, Counsel argued that this inquiry is in fact res judicata in view of this Court's Ruling dated 30th June 2023 which settled the questions raised finally.

18. Counsel in view of the foregoing went on to argue that this Court by virtue of its Ruling, was functus officio. Otherwise, the said decision could only be revised by way of an appeal or review proceedings. It was noted that none had been preferred by the parties. This is the position that was held in a similar matter as upheld by the Court of Appeal in Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR cited in support.

19. On ELC's jurisdiction in determining the matter in Law Society of Kenya v Attorney General & 3 others(supra), Counsel stressed that the Court's jurisdiction was only limited to the relief sought by the Petitioner therein. Any determination outside that confine was considered to be without jurisdiction. Counsel stated that this was also appreciated by this Court in its Ruling dated 30th June 2023 as follows:

> "...The consolidated Petitions on the one hand raise purely constitutional and human rights issues, while the ELC Petition on the other hand is an environmental claim with a focus on Bt. maize as the main issue. The redress sought for violation of constitutional rights is incidental to this main issue."

20. To further buttress this claim Counsel relied in Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR where the Court of Appeal held that:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse..."

21. Like dependence was placed in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989) eKLR, and Peter Gichuki King'ara v. Independent Electoral and Boundaries Commission & 2 others (2013) eKLR.

22. Accordingly, Counsel submitted that it was evident that this Court has jurisdiction to determine the issues before it. It was submitted that the ELC guided by this Court's Ruling primarily considered the questions within its jurisdiction under Article 162 (2)(b) of *the Constitution* not the issues raised herein. Being the constitutionality of the 6th Respondent's dispatch and the violations of the Bill of Rights arising out that decision. Reliance was placed in Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another (2013) eKLR where it was held that:

> "We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing."

23. Counsel in conclusion stressed that the two cases were dissimilar in that none of the questions raised in the consolidated petitions have been answered by a competent Court of law.

1st, 2nd and 4th Respondents' Submissions

24. G and A Advocates LLP filed submissions for 1st 2nd and 3rd Respondents dated 2nd February 2024. Their submissions dealt on whether the ELC judgment is a decision in rem thereby rendering this matter res judicata.

25. Counsel observed that it was not in dispute that the two matters arose from the 6th Respondent's Dispatch which withdrew the ban on cultivation and importation of GMO's which was initially imposed on 8th November 2012.

26. The Petitioners herein challenged the decision on the premise that it was unconstitutional and in breach of the rights under Articles 10, 32,35,43 ,46,47 of *the Constitution*. The 1st, 2nd and 3rd Respondents submitted that the ELC decision conclusively dealt with all the constitutional issues that were in dispute.

27. That in particular, ELC addressed Article 43 of *the Constitution* under paragraph 337 to 340 of the Judgment. Further, Article 10 and 47 of *the Constitution* were dealt with under paragraph 248. Similarly, the contention on the right to information under Article 35 of *the Constitution* was determined under paragraphs 222 and 223. Equally that paragraphs 334 to 339 in the Judgment considered Article 46 of *the Constitution*.

28. In view of the foregoing, Counsel submitted that the ELC pronouncement was made in rem and was thus binding on this Court. Reliance was placed in the Court of Appeal decision in Kamunyu and Others vs. Attorney General & Others [2007] 1 EA 116 where it was held that:

> "In a suit seeking judgement in rem, that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world."

29. Similar dependence was held in Dina Management v County Government of Mombasa & 5 others (2021) eKLR.

30. Consequently, it was the contention of the 1st. 2nd and 4th Respondent that having made its pronouncement on the constitutional issues raised; this matter is now res judicata. As such the only way the matter can be considered under exemption is if the Petitioners proved compelling circumstances or a situation where a substantial miscarriage of justice would be occasioned as held in John Florence Maritime Services Limited & another vs Cabinet Secretary, Transport, Infrastructure & 3 others [2021] KESC 39 (KLR). It was argued that the Petitioners have failed to do so hence the consolidated petitions ought to be dismissed.

3rd Respondent's Submissions

31. On 23rd January 2024, Muthomi and Karanja Advocates on behalf of the 3rd Respondent filed submissions. Counsel sought to examine two issues. First, whether the ELC Judgment was made in rem and second, whether the ELC has jurisdiction to enforce the Bill of Rights.

32. Counsel in the first issue answered in the affirmative, stating that the Court had conclusively dealt with the substratum of the consolidated petitions as seen in its holding.

33. It was further posited that in its pronouncement, the ELC found that the 6th Respondent's decision was lawful in view of the protection of traditional knowledge, the right to food, consumer right, and the right to a clean and healthy environment. Consequently, it was argued that there was nothing left for this Court to adjudicate as the premise of the instant matter is the 6th Respondent's impugned decision. Considering this, it was asserted that the instant matter was res judicata in light of the ELC Judgment in rem.

34. Counsel further stressed that unless the ELC decision is set aside on appeal, the decision is binding on all parties with regard to the legality of the 6th Respondent's decision. Reliance was placed in Section 44(1) (c) of the *Evidence Act*. Consequently, Counsel urged the Court to decline the invitation to entertain the consolidated petitions.

35. Furthermore, Counsel submitted that by virtue of Section 13 of the *Environment and Land Court Act*, the Court has original jurisdiction to hear and determine all disputes relating to land and environment. As such, it was argued that the Court had jurisdiction to enforce the Bill of Rights. Counsel further anchored this argument in Article 20 (4) of *the Constitution* that a court, tribunal or other authority can enforce the Bill of Rights. Correspondingly, the Court of Appeal decision in Chimweli Jangaa Mangale & 3 Others v Hamisi Mohamed Mwawasaa & 15 Other (2016) eKLR where it was held that:

> "The High Court did not have exclusive jurisdiction to enforce the Bill of Rights and that *the Constitution* contemplates enforcement and protection of fundamental rights and

freedoms by other courts, other than the High Court. Accordingly, where issues involving the environment or land raise constitutional issues or issues of protection and enforcement of the right to land as property, the ELC will have jurisdiction to hear and determine the dispute. We are satisfied that the appellant's claim that the ELC lacks jurisdiction to enforce constitutional rights is totally bereft of merit."

36. Comparable dependence was also placed in Council of Governors v Senate [2017] eKLR, Kenya Urban Roads Authority v Ministry for Roads & Another [2017] eKLR and Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR.

1st and 7th Interested Parties Submissions

37. The 1st and 7th Interested Parties filed submissions dated 23rd January 2023 through Ochieng Ochieng Advocates.

38. Counsel submitted that the ELC matter had substantially dealt with the issues in the Consolidated Petitions. In particular that both were filed under Article 22 of *the Constitution* against the government, both are a claims on violation of fundamental rights and various international laws. As such the question that was determined by the ELC court was whether the Petitioners had established the alleged violations and breach of law. It is stated that in the end it was determined that the Petitioner had failed to demonstrate its claim in both issues.

39. The 1st and 7th interested Party pointed out that the issues set out in Petition 399 of 2015 herein had been overtaken by events. This is because the Petition was premised on the apprehension that the ban on GMO foods would be lifted. According to Counsel, determination of that issue as presented would be in vain as the government has since lifted the ban.

40. Furthermore, Counsel submitted that the ELC decision was per curiam hence its effect persuasive to this Court. Considering this, Counsel warned against this Court seating on appeal over the issues determined by the ELC which as it is have the full force of the law. Reliance was placed in Republic v Karisa Chengo (supra) where it was affirmed that *the Constitution* confers equal status on the high Court and the special courts.

41 Comparable dependence was placed in Constantine Joseph Advocates LLP v. Attorney General (2022) eKLR, United States International University -v-Attorney General & 2 Others (2012) eKLR and Jane Frances Angalia v. Masinde Muliro University of Science and Technology & Others (2010) eKLR.

2nd Interested Party's Submissions

42. Counsel, Emily Kinama for the 2nd Interested Party on 1st February 2024 filed submissions identifying the issue for discussion as whether the instant matter is res judicata.

43. Counsel submitted that this doctrine is not applicable in this case. Also relying in John Florence Maritime Services Limited [supra], Counsel stated that the attendant elements that should be established are:

> " We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
>
> a. There is a former Judgment or order which was final;
>
> b. The Judgment or order was on merit;

c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d. There must be between the first and the second action identical parties, subject matter because of action."

44. Further, Counsel stressed that the Supreme Court was clear that the doctrine of res judicata is used to promote the administration of justice and hence should not be used at the cost of justice. This position was also echoed in Okiya Omtatah Okoiti & Another v. Attorney General & 6 Others [2014] eKLR which was cited in support.

45. Like dependence was placed in Matindi & 3 others v The National Assembly of Kenya & 4 others; Controller of Budget & 50 others (Interested Parties) [2023] KEHC 19534 (KLR).

46. Analyzing these elements, Counsel submitted that it was evident that the parties in both suits are different save for the 1st and 2nd Respondent. Counsel submitted on the second element, that a perusal of the pleadings of the parties in the two suits revealed that the prayers sought in the ELC suit are different from those sought in the consolidated Petitions.

47. In particular, it is said that the ELC court in view of the consolidated petitions did not determine whether the lifting of the ban on GMOs violates the Petitioners and public's right under Article 32, 35, 43, 46, 47 of *the Constitution* and Article 15 and 19 of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas.Further, in relation to Petition E519 of 2022, whether the 2nd Respondent violated the right of access to information of the Kenyan Peasants League. Moreover, whether the 6th Respondent acted ultra vires in light of the 2nd Respondent's mandate. Equally, the question of the safety of GMOs in general to human health. Likewise, in view of Petition 399 of 2015, the question on the devolved functions about GMOs.

48. Counsel stressed that the ELC court would not have jurisdiction to determine matters under the High Court's jurisdiction and the same is true for this Court. Counsel added that this Court had also determined that the ELC could only determine questions in relation to the environment and that there were issues that can only be dealt with the High Court. It is noted that the Respondents never appealed this Ruling.

49. In conclusion, Counsel submitted that indeed this Court has jurisdiction to determine the consolidated Petitions as the matters are not res judicata.

3rd Interested Party's Submissions

50. Kurauka and Company Advocates filed submissions dated 28th May 2024 for this party.

51. Counsel on the substantive issue, submitted that the consolidated Petitions are res judicata in view of the ELC Judgment. According to this party, the Petitioners have not tendered any valid, reasonable and cogent evidence to support the allegations otherwise.

52. To support its case, reliance was placed in William Koross v Hezekiah Kipfoo Komen & 4 others [2015]eKLR where it was held that:

> " The philosophy behind the principle of re judicafa is that there has to be finality; litigation must come to an end. If is a rule to counter the all-too human propensity to keep trying until something gives. If is meant to provide rest and closure, for endless litigation and agitation

does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go."

53. Like dependence was placed in Mburu Kinyua v Gachini Tuti [1978]1 KLR 69; Churanji Lal & Co v Bhaijee [1932] 14 KLR 28; Ngugi v Kinyaniui & 3 others I1989] KLR 146; William Koross v Hezekiah Kipfoo Komen & 4 others [20151 eKLR and John Florence Maritime Services Ltd [Supra].

4th Interested Party's Submissions

54. The 4th Interested Party filed submissions dated 12th January 2024 through Khaminwa and Khaninwa Advocates.

55. To determine whether the issues raised in the consolidated petitions are res judicata, Counsel argued that this Court ought to interrogate the settled issues and those before this Court. In this regard, Counsel was certain that the issues herein are not res judicata.

56. Reliance was placed in Kenya Commercial Bank Ltd v Nenjoh Amalgamated Ltd (2017) eKLR where the ingredients of res judicata were outlined as:

> " (a) that the suit or issue was directly and substantially in issue in the former suit;
>
> (b) that the former suit was between the same parties or parties under whom they or any of them claim;
>
> (c) that those parties were litigating under the same title;
>
> (d) that the issue was heard and finally determined in the former suit;
>
> (e) that the court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

57. Comparable dependence was placed in Kennedy Mokua Ongiri v John Nvasende Mosioma & Florence Nvamoita Nyasende [2022] eKLR where it was held that:

> " it would be intolerable if it were the case, that a party who has been unsuccesful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say. I will show that this is a fact which entirely changes. the aspect of the case, and I will show you further that it was not. And could not by reasonable diligence have ascertained by me before."

58. Counsel submitted that the ELC petition sought declaratory orders that GMOs, be considered unsafe in view of the regulatory framework while the consolidated Petition challenge the 6th Respondent's decision which is argued to have usurped the 2nd Respondent's mandate. Secondly, Counsel submitted that the parties in the two suits differ save for the 1st and 2nd Respondents' herein.

59. On the next issue, Counsel submitted that the jurisdiction of the two courts differ and hence the issues for determination are also different. Accordingly, a competent Court would thus be one that had the

jurisdiction to settle the issues presented, to be sustainable under this doctrine. Therefore, Counsel submitted that the ELC Court did not have the jurisdiction to determine the issues raised herein.

60. Reliance was placed in Republic vs. Karisa Chengo (supra) where it was held that:

> "We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC. it should, by the same token. be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court."

Analysis and Determination

61. It is my considered view that the issue that arises for determination is:

Whether or not in light of Law Society of Kenya v Attorney General & 3 others [2023] KEELC 20682 (KLR) the instant consolidated Petitions are res judicata.

62. The principle of res judicata is encapsulated in Section 7 of the *Civil Procedure Act* as follows:

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

63. The Supreme Court in Kenya Commercial Bank Limited vs. Muiri Coffee Estate Limited & another (2016) eKLR explained the doctrine of res judicata as follows:

> "(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights..."

64. Similarly, the Supreme Court in John Florence Maritime Services (supra) opined as follows:

> "
>
> "54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.
>
> 55. It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article

159 of *the Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.

56. The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):

The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."

65. The Court went on to observe that:

"59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

a. There is a former Judgment or order which was final;

b. The Judgment or order was on merit;

c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d. There must be between the first and the second action identical parties, subject matter and cause of action."

66. The Court of Appeal in Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR on the same observed as follows:

"...for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

a. The suit or issue was directly and substantially in issue in the former suit.

b. That former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

67. The Court proceeded to note that:

"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection

against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

56. In effect the Court concluded that:

"The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."

68. It is noteworthy that res judicata bars not only identical suits from being re-litigated between the same parties or their representatives but also incorporates issue-based estoppel whose effect is to prevent any issue in a former suit that had been decided in that former suit from being reintroduced by a party or the representative of such party in a later claim/suit even if the suit is different. The party or his representative is barred from reopening the issue. Justice Lenaola used issue based estoppel in in Okiya Omutatah Vs Communication Authority of Kenya (2015) eKLR when he held thus:

"In my view, he sued the officials of the 1st Respondent so as to disguise the proper parties who were in the first Petition and that attempt cannot affect my conclusions above and help him evade the doctrine of res judicata on the main issue of digital migration which is the common thread running through all the Petitions as can be seen above. I shall repeat for emphasis that the said issue cannot be re-opened merely by re-introducing the rights of viewers to migrate and re-packaging it differently as a violation of the provisions of *the Constitution* and that of the Bill of Rights so as to prevaricate the principle of res judicata."

34. Further to the above, explanation (6) of the *Civil Procedure Act* makes it clear that Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating...."

35. In the previous suit Petition No. 447 of 2016 an order of declaration was issued in relation to the subject matter which was a declaration against seizure and destruction of gaming slot machines. A declaration by its nature is an order in rem. Even persons who were not parties in that suit could avail themselves the benefit of a declaratory relief. The instant petition is brought in public interest and relates to the same subject matter as the former petition. This is therefore a perfect res-judicata barred case."

69. Correspondingly, this doctrine was also discoursed in Anne Delorie v Aga Khan Health Service Limited [2009] eKLR as follows:

"...case in point cited by the Plaintiff is Trade Bank Limited –vs- L-Z Engineering Construction Limited [2000] IEA 266 where the Court of Appeal said the following at page 270:-

"Issue of estoppel and the doctrine of res judicata arise in these appeals. Issue estoppel and res judicata bar the appellant from re-litigating matters already ruled on by the court, since

the point at issue in both appeals is the same and based on the same facts between the same parties and arose out of the action which point had been decided with certainty and it matters not whether the first decision was right or wrong."

In its further remarks on the issue of estoppel, the Court of Appeal said the following at page 271 concerning the Trade Bank case:-

"We may observe that the doctrine of res judicata is a general application in this court and it behooves us therefore to refer to Halsbury's Laws of England (4 ed.), in volume 16 paragraphs 974 and 975 whereof, it has been stated that the doctrine is a fundamental doctrine of all courts that there must be an end to litigation. That doctrine is, for convenience treated as a branch of the law of estoppel. Halsbury's at 859 explains;

At page 859 of Halsbury's Laws of England, an explanation is given as to what amounts to an estoppel, namely that:-

"Even though the judgment was pleadable by way of estoppel, it is perhaps not strictly correct to regard its determination of legal rights as a question of estoppel. The parties are estopped by the findings of fact involved in the judgment; as respects the determination of the question of law, the true view seems to be that the parties legal rights are such that they have been determined to be by the judgment of a competent court. The conclusiveness of the determination, however, rests upon the same principle in each case."

At page 861 of Halsbury's Laws of England there is some further comment on the issue of estoppel as follows:-

"An estoppel which has come to be known as 'issue Estoppel' may arise where a plea of res judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, of one mixed fact and law."

8. In the local celebrated case of Mburu Kinyua –vs- Gachini Tuti [1978] KLR 69, Madan J (as he then was) said the following on the plea of res judicata:-

"The plea of res judicata applies --- not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject and which the parties, exercising reasonable diligence, might have brought forward at the time".

70. Equally in Mumira v Attorney General [2022] KEHC 271 (KLR) the Court observed as follows:

> " 18. In the United Kingdom, res judicata is known as cause of action estoppel or issue estoppel... (A distinction is made between "cause of action estoppel" and "issue estoppel". In the first case— "the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter." (Arnold v National Westminster Bank [1991] 2 AC 93 (HL) at 104.) In the second case— "a particular issue forming a necessary ingredient in a

cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue." (Arnold at 105.)

71. The Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) observed as follows:

"

"(317) The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on "issue estoppel", to bar the 1st, 2nd and 3rd respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice all in the cause of fairness in the settlement of disputes.

(318) This concept is incorporated in Section 7 of the *Civil Procedure Act* (Cap. 21, Laws of Kenya) which prohibits a Court from trying any issue which has been substantially in issue in an earlier suit. It thus provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

(319) There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title Karia and Another v. The Attorney General and Others, [2005] 1 EA 83, 89.

[320] So, in the instant case, the argument concerning res judicata can only succeed when it is established that the issue brought before a Court is essentially the same as another one already satisfactorily decided, before a competent court."

72. It is manifest that the Environment and Land Court judgment largely focused on the validity of the 6th Respondent's decision to lift the ban of GMO foods in Kenya. That was the substratum of the case before the Environment and Land Court which considered the implication of lifting the ban on GMO foods in relation to the importation and exportation of Bt maize.

73. In arriving at its decision ELC made findings on a host of issues that were raised in that case. A significant determination that was made was on the safety of GMOs. The Court made a finding that the laws and regulations in place both nationally and internationally are proper and were made in a

manner that guards against violation of fundamental rights such as ensuring protection of the right to a clean and healthy environment. The Court also noted that the laws were in harmony with the precautionary principle as interpreted by the Courts.

74. Additionally, it was observed that the Petitioner had failed to challenge the constitutionality of the laws that govern GMOs and hence those laws enjoy the presumption of constitutionality until proven otherwise. Further, findings were made on public participation and access to information where the Court found no fault on the part of the Respondents. Considering these factors, the Court found that the Respondents had not violated *the Constitution*, statutes, regulations and guidelines pertaining to GMO food.

75. It is apparent that the overriding grievance behind the filing of the consolidated Petitions was the 6th Respondent's alleged unconstitutional decision to lift the ban on GMO food. That was the underlaying reason which the Petitioners complained had impacted on them in different ways which they particularised. In Petition no. E475 of 2022 the Petitioner asserted that lifting of the ban violated Articles 32, 35, 43, 46 and 47 of *the Constitution* and the international laws.

76. The Petitioner in Petition No. E519 of the 2022 challenged the Respondents' failure to respond to his request for information on the GMOs issue which was said to be in violation of Article 35 of *the Constitution*. Further, it was contended that Lifting of the ban was breach of Articles 10, 46, 47 of *the Constitution*. Moreover, that the 1st Respondent had usurped the 2nd Respondent's mandate in making the said decision. For this reason, the Petitioner urged the Court to issue an order to stop the lifting of the ban.

77. Lastly, Petition No. 399 of 2015 sought to have the Court maintain the status quo and that before lifting of the ban, the Respondents' ought to engage the County governments on the question of introduction of GMOs.

78. Essentially, it is manifest that the substratum of the consolidated petition as well as the case before the ELC was constant, it was premised on alleged unconstitutional decision by the 6th Respondent to lift the ban on GMO.

79. The ELC judgement went to great length to determine various aspects of the concerns that had been raised on lifting of the ban on GMO including matters to do with public participation, access to information, whether the laws that are in place provide sufficient protection on GMOs, and whether the ban was unconstitutional to mention but a few.

80. The nature of the judgment delivered by ELC Court was a judgment in rem considering that the Petition had been filed in public interest. The submission that ELC Court made findings for which it had no jurisdiction to make is untenable. That is not a matter that this Court can be invited to decide since ELC Court is a Court of equal status and this Court cannot therefore purport to sit on appeal of the findings of the ELC Court. As was held by the Supreme Court in Karisa Chengo case [supra]:

> "[50] ... "By being of equal status, the High Court... does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. *The Constitution* though does not define the word 'status'. The intentions of the framers of *the Constitution* in that regard are obvious given the choice of... words they used; that the three Courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and

ELC exercise the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court...”

81. In view of the foregoing reasons, it is the finding of this Court that the current consolidated Petition is res judicata. This Court would be regurgitating the same issues that were exhaustively dealt with by the ELC Court if it were to insist on hearing this consolidated Petition. I hereby strike out the same with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2024.

L N MUGAMBI

JUDGE