



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**CONSTITUTIONAL PETITION NO. 5 OF 2020**

**IN THE MATTER OF ARTICLES 2(4), 3(1), 10, 22(1) & 165(3) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 2(4), 10(1) & (2) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF PART 2 SECTION 1(a) OF THE 4<sup>TH</sup> SCHEDULE TO THE CONSTITUTION.**

**AND**

**IN THE MATTER OF CONTRAVENTION OF SECTION 6 & 40 OF THE CROPS ACT NO. 16 OF 2013**

**AND**

**IN THE MATTER OF SECTION 38 OF THE CROPS ACT, 2013**

**AND**

**IN THE MATTER OF CONTRAVENTION OF PART IV OF THE STAUTORY INSTRUMENTS ACT NO. 23 OF 2013**

**AND**

**IN THE MATTER OF ILLEGAL AND UNPROCEDURAL ENACTMENT AND INTENDED ENFORCENMT OF THE CROPS (SUGAR) (GENERAL) REGULATIONS, 2020.**

**BETWEEN**

**KENYA NATIONAL FEDERATION OF SUGAR CANE FARMERS .....PETITIONER**

**AND**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF AGRICULTURE, LIVESTOCK, FISHERIES &**

**COOPERATIVES .....2<sup>ND</sup> RESPONDENT**

**THE AGRICULTURE AND FOOD AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**AND**

**THE COUNCIL OF GOVERNORS .....1<sup>ST</sup> INTERESTED PARTY**

LAKE REGION ECONOMIC BLOC.....	2 <sup>ND</sup> INTERSTED PARTY
KENYA ASSOCIATION OF SUGAR & ALIIED.....	3 <sup>RD</sup> INETERESTED PARTY
MOSES KHAEMBA & 151 OTHERS.....	4 <sup>TH</sup> INTERESTED PARTY
STEPHEN OLE NARUPA & 13 OTHERS.....	5 <sup>TH</sup> INETERESTED PARTY
KENYA SUGAR CANE GROWES ASSOCIATION.....	6 <sup>TH</sup> INETERESTED PARTY

## JUDGEMENT

The petitioner, Kenya National Federation of Sugarcane Farmers is a duly registered union is an umbrella organization representing all sugar cane farmers in Kenya. The 1<sup>st</sup> respondent, the Attorney General is a Constitutional office established by Article 156 of the Constitution of Kenya as the principal legal advisor to the national government and has been sued as counsel for the 2<sup>nd</sup> respondent.

The 2<sup>nd</sup> respondent, Cabinet Secretary Ministry of Agriculture, Livestock, Fisheries & Cooperatives has been sued for violations in enactment of the Crops (Sugar) (General) Regulations, 2020 under Section 40 of the Crops Act, 2013 while the 3<sup>rd</sup> respondent is a State Corporation established under the provisions of the Agriculture and Food Authority Act, 2013.

The 1<sup>st</sup> interested party, the Council of Governors has been sued as an agency of the government established under Section 19 of the Intergovernmental Relations Act, 2012 and the 2<sup>nd</sup> interested party is a legal person representing Kakamega, Bomet, Bungoma, Busia, Homa Bay, Kericho, Kisii, Kisumu, Migori, Nandi, Nyamira Siaya, Trans Nzoia and Vihiga Counties.

Vide a petition dated 13<sup>th</sup> August, 2020, the petitioner seeks;

**a. A declaration that the enactment of the Crops (Sugar)(General) Regulations, 2020 published by the Cabinet Secretary Ministry of Agriculture, Livestock, Fisheries and Cooperatives in the special issue of the Kenya Gazette Supplement No. 84 (Legislative Supplement No. 58) of 27<sup>th</sup> May 2020 by the 2<sup>nd</sup> respondent was undertaken in violation of the constitution, violating Article 10(1) and (2) of the Constitution and part 2 Section 1(a) of the Fourth Schedule of the Constitution.**

**b. A declaration that the enactment of the Crops (Sugar)(General) Regulations, 2020 published by the Cabinet Secretary Ministry of Agriculture Livestock, Fisheries and Cooperatives in the Special issue of the Kenya Gazette Supplement No. 84 (Legislative Supplement No. 58) of 27<sup>th</sup> May, 2020 by the 2<sup>nd</sup> respondent violated the obligation of prior Consultation under Section 40(1) of the Crops Act, 2013.**

**c. A declaration that the enactment of the Crops (Sugar)(General) Regulations, 2020 published by the Cabinet Secretary Ministry of Agriculture Livestock, Fisheries and Cooperatives in the special issue of the Kenya Gazette Supplement No. 84 (Legislative Supplement No. 58) of 27<sup>th</sup> May, 2020 by the 2<sup>nd</sup> respondent was done *ultra vires* the powers of the 2<sup>nd</sup> respondent.**

**d. A declaration that the enactment of the Crops (Sugar)(General) Regulations, 2020 published by the Cabinet Secretary Ministry of Agriculture Livestock, Fisheries and Cooperatives in the special issue of the Kenya Gazette Supplement No. 84 (Legislative Supplement No. 58) of 27<sup>th</sup> May, 2020 by the 2<sup>nd</sup> respondent is accordingly unconstitutional, illegal, null and void.**

**e. A declaration that the failure to lay before the National Assembly the copy of the Crops (Sugar)(General) Regulations, 2020 published by the Cabinet Secretary Ministry Of Agriculture Livestock, Fisheries and Cooperatives in the special issue of the Kenya Gazette Supplement No. 84 (Legislative Supplement No. 58) of 27<sup>th</sup> May, 2020 by the 2<sup>nd</sup> respondent under Section 11(4) of the Statutory Instruments Act, 2013 within 7 days of publication rendered the said Regulations null and void.**

**f. An order of *certiorari* to bring the Crops (Sugar)(General) Regulations, 2020 published by the Cabinet Secretary Ministry Of Agriculture, Livestock, Fisheries and Cooperatives in the special issue of the Kenya Gazette Supplement No. 84(Legislative Supplement No. 58) of 27<sup>th</sup> May, 2020 into the High Court and to quash the Crops (Sugar)(General) Regulations, 2020.**

**g. An order of permanent injunction restraining the 3<sup>rd</sup> respondent from holding the meeting invited for and slated for 14<sup>th</sup> August, 2020 at the Sugar Research Institute Kisumu or at any place whatsoever on sensitization over the Crops (Sugar) (General) Regulations, 2020 to the petitioner or from any manner whatsoever implementing the Crops (Sugar)(General) Regulations, 2020.**

**h. Any other appropriate relief that the honourable court shall in the circumstances of the case deem fit to grant.**

**i. An order of costs on indemnity basis.**

The facts relied upon are that the President of the Republic of Kenya directed the 2<sup>nd</sup> respondent to form a Taskforce from stakeholders in the sugar sector to undertake an inquiry and render reports on how to save the collapsing sector and aid it from policy and legislative framework.

That pursuant to the directive, the 2<sup>nd</sup> respondent gazetted a taskforce known as Taskforce of Sugar Industry Stakeholders to make recommendations for development of the sugar industry in Kenya vide special issue of the Kenya Gazette Notice Number 11711 of 9/11/2018 (**hereinafter the taskforce**).

That the taskforce was drawn from the council of governors since the agriculture function had been devolved under Part 2, Section 1(a) of the Constitution. The taskforce comprised of the following;

- a. Hon Wycliffe Oparanya representing the Council of Governors.**
- b. Hon Prof Peter Anyang Nyong'o representing the Council of Governors.**
- c. Hon. Zachary Okoth Obado representing the Council of Governors.**
- d. Hon. Cleophas Wakhungu Malala representing the Senate.**
- e. Hon. Emmanuel Wangwe representing the National Assembly.**
- f. Mrs. Janerose Omondi representing the Privatization Commission.**
- g. Mr. Benard Otieno representing the Public Sugar Millers.**
- h. Mr. Jayantilal Gopal Patel representing the Private Sugar Millers.**
- i. Dr. Kennedy Ngumbau Mulwa representing the Public/Private Sugar Millers.**
- j. Mrs. Caroline Lentupuru representing the Intergovernmental Relations Technical Committee.**
- k. Mr. Patrick Omutia representing the Intergovernmental Budget and Economic Council.**
- l. Mr. Zakayo Magara representing the Ministry of Agriculture, Livestock, Fisheries and Irrigation and a special representative of the 2<sup>nd</sup> respondent.**
- m. Mr. Solomon Odera representing the 3<sup>rd</sup> respondent.**
- n. Mr. Francis Waswa representing the petitioner.**
- o. Mr. Solomon Kitungu representing the National Treasury and Planning.**
- p. Ms. Beverly Lamanya representing the 1<sup>st</sup> respondent.**

It is the petitioner's case that the task force undertook the mandate and received the views of all public stakeholders and wrote a report which was presented to the 2<sup>nd</sup> respondent and the President of the Republic of Kenya. The taskforce also formulated the Crops (Sugar)(General) Regulations, 2020 which were sent to the 2<sup>nd</sup> respondent.

The petitioner avers that since the 2<sup>nd</sup> respondent was represented in the taskforce, the draft Regulations were binding on him and ought to enact the Regulations under Section 40 of the Crops Act, 2013.

It is averred that in violation of the Constitution and the law, the 2<sup>nd</sup> respondent drew his own set of Regulations without consulting the Council of Governors and that the regulations were to be tabled in the National Assembly within 7 days pursuant to the Provisions of Sections 2, 10 and 11 of the Statutory Instruments Act, 2013.

The petitioner avers that when the Regulations were published on 8/6/2020, the 1<sup>st</sup> interested party and the 2<sup>nd</sup> respondent's Chairperson wrote letters to the 2<sup>nd</sup> respondent informing him that; he had gazetted the wrong set of regulations and; sought a meeting with the 2<sup>nd</sup> respondent on 11/6/2020 to discuss the matter and have the correct set of Regulations gazetted.

That the meeting was duly held attended by 5 Governors representing the 1<sup>st</sup> interested party, representatives of the sugar millers and the petitioner where the 2<sup>nd</sup> respondent undertook to make a formal publication withdrawing the gazetted regulations as well as request the 1<sup>st</sup> respondent to fast track the debate and conclusion of enactment of the Sugar Bill by the National Assembly.

It is the petitioner's further case that despite the above, the 3<sup>rd</sup> respondent has issued a notice dated 10<sup>th</sup> August, 2020 inviting interested

party to a meeting on 14/8/2020 to implement parts of the unconstitutional and illegal Regulations. The petitioners aver that as such, the Regulations violates their rights under Article 10(1) and (2), Part 2 of Section 1(a) of the Constitution, the Crops Act, 2013, their right to legitimate expectation and the Statutory Instruments Act, 2013.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the petition on the grounds inter alia that; part 2 Section 1(a) of the Constitution limits the agriculture function of the County Government to crop and animal husbandry and not crop regulation where the 2<sup>nd</sup> respondent is mandated by Part 1 Section 29 with the responsibility of formulation of agricultural policy including the formulation of regulations.

They state that the development of the Regulations is the preserve of the 2<sup>nd</sup> respondent under Section 40(1) of the Crops Act and the task force was merely tasked with the responsibility of making recommendations which were taken into account by the 2<sup>nd</sup> respondents before publishing the Regulations.

That in compliance with the Statutory Instruments Act, the Regulations were forwarded to Parliament on 2/6/2020 and the Regulations ought not to be quashed only on the basis that the Regulations drafted by the task force were not published. .

The 3<sup>rd</sup> respondent also opposed the petition by filing a replying affidavit through Anthony Muriithi, the Interim Director General sworn on 31/8/2020. He depones that public participation was conducted pursuant to Article 10(1) of the Constitution and the views of all stakeholders taken into consideration, that under Part 1 of the 4<sup>th</sup> Schedule of the Constitution, the National Government is responsible for agricultural policy including the formulation of regulations.

He depones that the regulations were published on 27/5/2020 and submitted to the Clerk of the National Assembly on 2/6/2020.

The 1<sup>st</sup> and 2<sup>nd</sup> interested parties supported the petitioner's case and filed their respective affidavits in that regard.

The 5<sup>th</sup> interested party opposed the petition by way of replying affidavit sworn by Stephen Ole Narupa, Jeckonia Samwel Oyoo and Michael Otieno Arum. The salient features of the affidavit are; they are officials in the petitioner and that by virtue of their offices, the petitioner is a registered society which lacks capacity to bring the suit in its own name. That there were no resolutions by the governing board to institute the petition and therefore ought to be struck out.

That the 2<sup>nd</sup> respondent did not breach any Constitutional or Legal provision by taking the action it did since public participation was conducted and the promulgation of the Regulations is a function of the executive. They depone that the regulations are good for development of the sugar industry in the country.

The petition was canvassed by way of written submissions. Parties filed their respective submissions which have been duly considered.

During the pendency of the petition, the court was informed on 8/2/2021 by Mr. Bwire learned counsel for petitioner that the National Assembly had passed a resolution suspending the Regulations. The issue that ought to be determined by the court then is whether by suspension of the Regulations by the National Assembly, the petition is overtaken by time.

The petitioner on this issue submits that pursuant to Articles 10, 117(2) and 259(1) of the Constitution, Sections 13, 15, 17, 18 and 23(1) of the Statutory Instruments Act, the House Committee on Delegated Legislation was right when it recommended the nullification of the regulations on account of being unconstitutional. That the recommendation was adopted by the National Assembly and the Regulations are therefore inoperative until the resolution is set aside.

The 1<sup>st</sup> and 2<sup>nd</sup> respondent on their part dwelled on the issue of whether the respondents violated the Constitution by publishing the Regulations.

The third respondent on their part contend that that the decision to suspend the Regulations is a preserve of Parliament and the court ought not to usurp that role. Reliance has been placed on the provisions of Sections 17 and 18 of the Statutory Instruments Act and the case of **Pevans East Africa Limited & Another Vs Chairman, Betting Control And Licensing Board & 7 Others (2018)eKLR**.

It is not in dispute that the President of the Republic of Kenya appointed a task force to look into the problems ailing the sugar sector with a view of making recommendations to improve the sector. Pursuant thereto, the task force received views from the public and presented the report with the recommendations to the President for implementation.

The Regulations were published on 27<sup>th</sup> May, 2020 and transmitted to the Clerk of the National Assembly on 2/6/2020 for consideration by the House in accordance with Section 11(4) of the Statutory Instruments Act.

The Hansard of the National Assembly on 17/11/2020 has been annexed to the petitioner's supplementary affidavit sworn on 5/2/2021. The Hansard reads;

#### **ANNULMENT OF THE CROPS (SUGAR) (GENERAL) REGULATIONS, 2020.**

**THAT, this house adopts the report of the Committee on Delegated Legislation on its consideration of the Crops (Sugar) (General) Regulations, 2020 laid on the table of the house on Tuesday November 03, 2020, and pursuant to Section 18 of the Statutory Instruments Act, 2013 and Standing Order 210(4)(b), annuls in entirety the Crops (Sugar)(General) Regulations, 2020 (Legal Notice No. 99 of 2020)**

The Regulations were nullified pursuant to Section 18 of the Statutory Instruments Act, 2013 which provides;

**When a report on a statutory instrument has been tabled in Parliament, the statutory instrument shall be deemed to be annulled if Parliament passes a resolution to that effect.**

The court recognizes the role played by Parliament in its legislative work under Article 94 of the Constitution which provides;

**. (1) The legislative authority of the Republic is derived from Role of Parliament. the people and, at the national level, is vested in and exercised by Parliament.**

**(2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.**

**(3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.**

**(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.**

**(5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.**

**(6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.**

Clause (4) of Article 94 therefore confers the authority of making legislation on parliament. The power to make Regulations under a legislation is specifically provided for by the statute. It is pursuant to this Constitutional provisions that Section 40(1) of the Crops Act, 2013 was enacted and provides;

***The Cabinet Secretary may, in consultation with the Authority and the county governments, make regulations for the better carrying into effect of the provisions of this Act, or for prescribing anything which is to be prescribed under this Act.***

Under Article 165(3)(d)(i) and (ii) of the Constitution, the High Court is clothed with the jurisdiction to hear questions in respect of the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution.

Therefore, whereas the legislative authority vests in Parliament, where a question arises as to whether an enactment is inconsistent with the Constitution or is passed in contravention of the Constitution, the High Court is the institution constitutionally empowered to determine such an issue.

However, in doing so, the court is equally mandated to respect the principle of separation of power and the role of each of the state organs. The court is mindful not to interfere with the internal processes as that is side-stepping its constitutional duty. In ***Jayne Mati & Another Vs. Attorney General and Another (2011) eKLR*** it was held;

**...separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of the Constitution.**

The National Assembly proceedings are governed by the Standing Orders which guide the internal operations while exercising its duty. The Standing Orders are self-governing. The petitioner in this case is not challenging the grounds upon which the Committee on Delegated Legislation arrived at its conclusion to annul the regulations.

It is therefore the finding of this court that the manner in which the regulations were nullified is a province for the National Assembly and the court is not seized of the power to inquire into the internal processes.

The Regulations therefore having been nullified by the National Assembly, the Regulations are no longer operative. The annulment of the Regulations on 17/11/2020 violates none of the petitioner's Constitutional rights.

In the end therefore, the court finds and holds that the petition has been overtaken and the prayers sought by the petitioner granted by parliament which annulled the impugned regulations on 17/11/2020. That being so, this petition is hereby marked as overtaken by events. Each party to bear its own costs.

**DATED AT BUNGOMA THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2021**

**S. N. RIECHI**

**JUDGE**