



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL AND HUMAN RIGHTS COURT

PETITION NO. 23 OF 2018

ROSEMARY KARIMI & 59 OTHERSPETITIONERS

VERSUS

THE CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK

AND FISHERIES.....1ST RESPONDENT

AGRICULTURE AND FOOD AUTHORITY.....2ND RESPONDENT

JOSEPH NGETICH..... 3RD RESPONDENT

AND

KENYA REVENUE AUTHORITY.....1ST INTERESTED PARTY

COUNCIL OF GOVERNORS2ND INTERESTED PARTY

JOSEPH KAMAU KURIA & 6 OTHERS.....3RD INTERESTED PARTY

KENYA NUT..... 4TH INTERESTED PARTY

NUT PROCESSORS ASSOCIATION.....5TH INTERESTED PARTY

R U L I N G

1. This Ruling relates to the petitioners' Notice of Motion dated 29th April 2019. In the Motion, the petitioners sought that this suit be transferred to the High Court of Kenya at Chuka for hearing and determination.

2. The grounds for the application were set out in the body of the Motion and the Supporting Affidavit of **John Paul Murithi**. These were that; there is a similar petition (**Constitutional Petition No. 4 of 2018**) pending before the High Court of Kenya at Chuka and whose substance is materially similar to the substance of the instant petition; that the High Court at Chuka, (Limo) had rendered itself and given directions on the petition and had framed up issues for determination following a ruling on an interlocutory application; that the two matters raise a common issue with regard to **section 43 of the Food and Agriculture Authority Act** and that the matters are proceeding concurrently and there is a danger that the two superior courts may render different and contradicting judgments.

3. The application was opposed by the 4th respondent, the 1st and 2nd Interested Party. The **4th Respondent** opposed the application through the replying affidavit dated 27th May 2019 sworn by **Janet Kungu**. She averred that; the issue of **section 43 of the Agriculture Food and Fisheries Act** has been settled and there can't be any judicial embarrassment; that the petitioners and their proxies were engaged in forum shopping; that the current petition and the Chuka Petition were filed during the subsistence of the Embu Petition and that directions had been made in this petition as opposed to the Chuka Petition.

4. The **1ST Interested party** opposed the application vide the replying affidavit sworn on 3rd June, 2019 by **Dennis Makobu**. He averred that in both matters the petitioners had applied for conservatory orders which had been denied. That in this matter and specifically on 12th September 2018, the court directed that the petition be heard through viva voce evidence. That it is in the interest of expediency and fair

administration of justice that this petition be heard and determined first since the court has already set the matter down for hearing.

5. On its part, the **2nd Interested Party** replied to the application vide a replying affidavit dated 7th June 2019 sworn by **Charles Muigai**. He averred that the application was frivolous since it has been filed by applicants who are not licensed processors of Macadamia or registered dealers and that the ruling of Limo. J. in Petition No. 4 of 2018 declined to grant the injunctive orders sought.

6. The parties filed their respective submissions which the court has considered. The petitioner relied on the provisions of **Rule 8 (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. The rule empowers the Court to transfer a petition to another court of competent jurisdiction either on its own motion or on the application of a party. It was submitted that there was a risk of rendering conflicting decisions over the same issue which will in effect embarrass the court. The petitioners relied on **Hangzhou Agrochemicals Industries Ltd v Panda Flowers Ltd [2012]** and **Kimani Waweru & 28 Others vs Law Society of Kenya** in support of their submissions.

7. In opposing the application, the 2nd respondent submitted that the petitioners had not attached the Chuka petition. That for this court to make a determination on the transfer, it has to take into account the factors and character of the proceedings and the nature of the reliefs and remedies sought in the Chuka petition. The case of **Julius Munyinyi Mcharia v. Dakianga Distributors Ltd [2014] eKLR** was relied on in support of that contention.

8. The 1st interested party submitted that the transfer of the petition to another jurisdiction will defeat the overriding objective of expeditious disposal of matters. Reliance was placed on **Said Burham & Hussein Mohammed v. Abdi Adan Abubakar & Others [2019] eKLR**.

9. The **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice And Procedure Rules, 2013** provides: -

“8. (1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.

(2) Despite sub rule (1), the High Court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party.

10. The overriding objective of the rules of procedure is to facilitate the just, expeditious, proportionate and/or affordable resolution of disputes governed by such rules. In the furtherance of this overriding objective, courts are enjoined mandated to ensure the just determination of proceedings, efficient disposal of court business, the efficient use of available judicial and administrative resources and the timely disposal of proceedings at a cost affordable to the respective parties.

11. In the present case, it is not in dispute that the petition herein and the one filed in Chuka High Court raise similar set of issues. At least none of the parties disputed that fact. Whereas the petitioners are not the same, there is an allegation that the petitioners in the present petition are forum shopping and have previously instituted suits of a similar nature.

12. In **Fortis Tower Management Ltd & another v Trendmark Computers Limited [2018] Eklr**, the court held: -

“A court may have technical or substantive jurisdiction but still refuse to take up a matter out of legitimate prudential or administrative concerns. This is one reason Courts have judicially created the doctrine of forum non conveniens. A Court may have the substantive jurisdiction to take up a matter but refuse to do so because the matter would be most conveniently and fairly be adjudicated elsewhere ... where there is evidence that a party has filed suit in a Court in bad faith or in a manner that signals forum shopping, the prudential doctrine counsels that the Court should decline to take jurisdiction and should, instead request the High Court to transfer the case to the most appropriate Court where the case should be heard. In cases where the court in which the case was filed is a seriously inappropriate forum, and the filing smirks of bad faith, the Court should even dismiss the suit outright.....”

13. In **Hangzhou Agrochemical Industries Ltd v Panda Flowers Limited [2012] eKLR**, the court held:-

“In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and maintaining the witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case.....”

14. In the present case, the only evidence that was produced on the similarity of the two cases was the Ruling of the court in Chuka where the petitioners therein sought an injunction. It is clear from the ruling that the petition therein revolve around the provisions of **section 43 of the Agriculture and Food Authority Act No. 13 of 2013 (AFA)** and specifically the ban on raw macadamia.

15. I have noted the sentiments made by the respondents that there has been a multiplicity of suits filed by the same petitioners, or their proxies and concerning the same matter. Since the common issue for consideration in both petitions is said to be the provisions of **section 43 of the AFA** and the processing of raw macadamia nuts, and since the main objective of the court is to facilitate the effective, fair and expeditious administration of justice, such an objective cannot be achieved when cases are filed in various courts which touch on a similar matter.

16. On that ground, it will not be furthering the objective of justice to have the two petitions continue in two separate courts. Judicial time is precious and expensive. I would rather one court dealt with all issues that relate to the aforesaid section of the law with finality. That would reduce time and expense on all involved, including the court.

17. In this regard, I allow the application and direct that the petition herein be and is hereby transferred to Chuka High Court for hearing and determination.

It is so ordered.

DATED and **DELIVERED** at Meru this 19th day of September, 2019.

A. MABEYA

JUDGE