REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION. NO. 399 OF 2015

KENYA SMALL SCALE FARMERS FORUM…..……PETITIONER

VERSUS

CABINET SECRETARY MINISTRY OF EDUCATION

SCIENCE AND TECHNOLOGY …..…..……..……..1ST RESPONDENT

ATTORNEY GENERAL…….....……..2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF AGRICULTURE ...1ST INTERESTED PARTY

CABINET SECRETARY MINISTRY OF HEALTH.....2ND INTERESTED PARTY

COUNCIL OF GOVERNORS……...….....……...3RD INTERESTED PARTY

NATIONAL BIOSAFETY AUTHORITY….....……4TH INTERESTED PARTY

RULING

Introduction

1. This Petition involves a general challenge to an alleged intended total deregulation of Genetically Modified Organisms and foods (together "GMOs") by the Government of the Republic of Kenya. The Petitioner alleges that the Government of Kenya is about to allow for the importation of Genetically Modified Organisms (GMOs).
2. The Petitioner's apprehension was prompted by a statement made by the second highest ranking official in the Government, the Deputy President on or about 13 August 2015.
3. For the fear and apprehension, the Petitioner filed the Petition. The Petitioner also simultaneously filed an application for conservatory orders under Article 23(3) and Rules 23(1) & 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

4. The question for the court is whether the court may, on the basis of the documents now before the court and minus the benefit of a full interrogation of the protagonists' cases, grant a conservatory order to the Petitioner.

The Application

5. The Petitioner seeks, through its Notice of Motion dated 18th September 2015, the following orders:

1. **THAT ….**
2. **THAT ….**
3. **THAT** pending the hearing and determination of this Petition, a conservatory order be and is hereby issued prohibiting the Respondents whether by themselves or through their agents, officers, servants, employees and/or whosoever from lifting the ban on Genetically Modified Organisms (GMOs) until the Petition herein is heard and determined. The Respondent be ordered not to lift the ban on Genetically Modified Organisms (GMOs) before there is sufficient notifications and wide consultation with persons especially farmers at the county and sub-county levels throughout the country.
4. Any other order and/or directions as this Honorable Court deems fit and just to grant.

6. The Application is supported by the Affidavit of Justus Levi Mwololo together with the grounds stated on the face thereof.

Background facts and Petitioner's Case

7. The brief background to the Petition can be gathered from (but not entirely) the Supporting Affidavit.
8. The deponent states that the Genetically Modified Organisms (GMOs) have since November 2012 been officially banned in Kenya. The ban was however never gazetted. It ranked only as an executive order issued by a Cabinet Secretary.
9. Then in 2013 a task force was appointed and duly gazetted to assess and make recommendations on the general administration and management of genetically modified food imports into Kenya. The task force presumably, finalized its work. Its report though has never been released to the public, not even to the Petitioner who has openly requested for the same. Then in August 2015, the Deputy President of the Republic of Kenya announced that the Government was going to veto the earlier ban on GMOs. Genetically modified foods and organisms were now to be allowed in Kenya once the Cabinet so decided.
10. The Petitioner states that the failure to release the report by the task force to review matters relating to genetically modified foods and food safety was unconstitutional as such failure violated Article 35 of the Constitution.
11. The Petitioner also states that the decision to allow genetically modified foods and organisms without first involving the public also violates the Constitution. The Petitioner pegs its arguments on the fact that various international reports, have all scientifically pointed to the fact that genetically modified foods and organisms are harmful and dangerous to both man and nature. Human health will be affected. The environment too. The conventional seeds and crops are not spared either. Both will be contaminated through pollination.
12. The Petitioner asserts that the ban on genetically modified foods and organisms should not be lifted without first adequately educating the public on its effects. The Petitioner adds that conventional breeding, conventional crops and existing crop varieties developed by farmers world wide as well as agro-ecological farming methods are effective enough to alleviate Kenya's food security concerns.
13. The Petitioner's fears are allegedly further heightened by the belief that small scale farmers will be affected both socially and economically.

Respondents' Case

14. A Replying Affidavit was sworn on behalf of 1st Respondent by John Ayisi.
15. All the Respondents alluded to the said Replying Affidavit in the course of the oral arguments.
16. According to the Respondents, the concerns of the Petitioner have been adequately addressed. As to safety of genetically modified organisms (GMOs) the 1st Respondent is clear that there exists a

satisfactory statutory framework to ensure safety of both the environment as well as of each individual. Reference was consequently made to the Biosafety Act, 2009 together with the various regulations thereunder.

17. As regards public participation and involvement in decisions prior to the introduction of genetically modified organisms and food into the country, the Respondents were all unanimous that the task force has done its bit. The public was fully involved and did participate.
18. Regarding the pronouncement by the Deputy President of the intention to lift the embargo on genetically modified foods, the Respondents held the view that the Deputy President was merely expressing a personal view though the media which view is not binding at all on any of the Respondents or even the government.

Arguments

19. Oral submissions were made before me on 5th October 2015.
20. Mr. Paul Ngarua for the Petitioner submitted that introducing genetically modified organisms and food in Kenya was an important matter which required public participation. He added that in the instant case the same was unlikely as the ban on genetically modified organisms (GMOs) was set to be lifted once the Cabinet discussed the matter. He asserted that the Petitioners fear was well founded as none of the Respondents or the Interested parties had denied the statement by the Deputy President.
21. Mr. Ngarua further asserted that the public had to be involved in any decision on genetically modified organisms (GMOs) and that such involvement had to be both qualitative and quantitative. For this proposition, Mr. Ngania relied on the case of **Samuel Thinguri Waruathe & 2 Others –v- Kiambu County Government & 2 Others [2015] eKLR** as well as the provisions of Section 54 of the Biosafety, Act No. 2 of 2009 and Article 10 of the Constitution.
22. For completeness, counsel for the Petitioner stated that the Respondents would not be prejudiced in any way if the orders sought were granted. On the other hand, the Petitioner as well as the public in general would suffer extreme prejudice if there were no orders to restrain the introduction of the genetically modified organisms (GMOs) into Kenya, it being common knowledge that the safety of genetically modified organisms (GMOs) is questionable.
23. Mr. Evans Gaturu for the 3rd Interested Party while associating himself with the submissions made on behalf of the Petitioner added that public participation was a mandatory requirement under the Constitution and in the current instance it was applicable. In his view, it would be premature to hurriedly lift the ban on genetically modified organisms (GMOs) without proper public participation.
24. Ms. Mwangi, who appeared for the two Respondents as well as the 1st, 2nd & 4th Interested Parties, in opposition to the application submitted that the application was pre-mature and brought out of sheer fear and apprehension as the Government had not issued any gazette notice expressly lifting the ban on Genetically Modified Organisms (GMOs). According to Ms. Mwangi, the Petitioner's fear could be addressed through the already well laid out channels and especially, through the 4th Interested Party, the National Biosafety Authority.
25. Ms. Mwangi also submitted that no decision to introduce genetically modified organisms (GMOs) into Kenya had been made. Consequently, the application as well as the Petition were simply precipitate. Ms. Mwangi then looped in that if a decision is made that genetically modified organisms (GMOs) ought to be introduced then the Government will follow the due process and involve all stakeholders, including the public. Finally, Ms Mwangi stated that the Petition was premised on newspaper reports as evidence and this was not admissible evidence.
26. Mr. Oluoch submitted on behalf of the amici curiae. He was of the view that the application was not merited. Appearing to take sides contrary to the known principles of the role of an amicus curiae, Mr. Oluoch submitted that the Petitioner's fears were not real. He further asserted that the Petition was one-sided as all exhibits vilified and condemned genetically modified organisms (GMOs). Mr. Oluoch also submitted that consumer rights under Article 46 of the Constitution were well protected.

Discussion

27. I have looked at the Petition as well as the application and all the documents filed in support thereof. I have also read the Replying Affidavit and considered carefully the submissions of the parties.
28. At this stage of the proceedings, the Petitioner seeks only conservatory orders intended to maintain the current state of affairs. The status quo currently is that there is a ban on genetically modified organisms and food in Kenya The Respondents are to be effectively barred from introducing genetically modified organisms and food into the country.
29. I am aware that I should not in determining the application venture into a minute analysis of facts and evidence. Neither am I expected to make any definitive findings of law or fact. That will be for the trial court.

Some guiding principles

30. For the grant of conservatory orders under Article 23(3) of the Constitution as read together with Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 the court ought to consider certain pertinent factors. A series of cases may be stated to have laid down the proper guidelines applicable. I would state the principles which govern a court considering an application for interim or conservatory relief to be the following:

- The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see **Centre for Rights Education and Awareness & 7 Others –v- The Attorney General HCCP No. 16 of 2011.** It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see **Godfrey Mutahi Ngunyi – v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015** and also **Muslims for Human Rights and Others –v- Attorney General & Others HCCP No. 7 of 2011.**
- The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see **Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR** and also **Peter Musimba –v- The National Land Commission & 4 Others (No. 1) [2015] eKLR.**
- If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see **Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.**
- The Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya's decision in **Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR.**
- The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters: see **Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012** as well as **Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.**

Analysis and Determination

31. With the above principles in mind, the question is whether the Petitioner has met the criterion.
32. The quintessence of the Petitioner's case is that the Respondents are about to authorize the introduction into the market and into Kenya of genetically modified food and organism. Genetically modified food and organisms, according to the Petitioner, are harmful to the human health and to the environment. The Petitioner says that the Respondents are about to so act without involving the public. That the Constitution as well as the Biosafety Act both dictate that the public be involved in any such action. The Petitioner's contentions are predicated upon a newspaper report. The newspaper report appeared on 13th August 2015. The excerpt of the report has been annexed to the Supporting Affidavit and the relevant portion of the excerpt attributed to the Deputy President reads as follows:

"***Addressing researchers yesterday during the 4th National Biosafety Conference***

at the Kenya School of Monetary Studies, Mr. Ruto said discussions to lift the ban had been concluded and that the Government would support scientist in research"

33. The report then proceeded to quote particularly the Deputy President as having specifically said that:

"The Government appreciates the great contribution of technology. We are going to lift the ban on Genetically Modified Organisms (GMOs) shortly after the cabinet makes a decision. In a month or two after the cabinet makes a decision.

34. The Respondents, on the other hand, contend that there is no evidence that the Government has lifted the ban on genetically modified organisms (GMOs) or that the Government is about to. In particular, Ms. Mwangi submitted that newspaper reports and cuttings should ordinarily not constitute evidence which the court should rely upon to make a determination. For being speculative, the application and indeed the Petition are frivolous and that the court should not grant the orders sought.
35. I have little doubt in my mind that newspaper reports should not constitute evidence upon which a court of law should solely rely to make a determination. They ordinarily do not satisfy and are not covered under the provisions of Section 35 of the Evidence Act (Cap 80) Laws of Kenya. Print media articles have no evidential value and the court should not rely on the same as a basis for determining any matter: see **Wamwere –v- Attorney General [2004] 1 KLR 166, Tesco Corporation Ltd –v- Bank of Baroda (K) Ltd HCCC 182 of 2007 [2009]eKLR** and **Randu Nzau & 2 Others –v- Internal Security Minister and Another [2012]eKLR.**
36. It is the newspaper reports which the Petitioner is using to demonstrate a threat of violation of Constitutional rights. It is the newspaper report that is being relied upon to show that the government is on the verge of introducing genetically modified organisms into Kenya. As media reports, especially print media reports, have no probative value, I should ideally prefer not to express an opinion on this matter and summarily dispose of the Application without further deliberations.
37. However for one of three reasons I am constrained to consider spaciously the merits of the Application.
38. First, the court is currently dealing with an intermediary application and not the substantive Petition. At this stage of the proceedings the court must ensure that the ends of justice is not rendered nugatory. Proportionate justice would consequently demand that the entire merit if any of such applications are considered. Secondly, the Respondents did not strenuously contest the utterances in question. They say the utterances could have been made by the Deputy President but that they were personal and did not reflect the true picture. It would therefore not be mete to dismiss the utterances as non-existent. Thirdly, the issue of genetically modified organisms (GMOs) is one of great public interest. It has generated debate the world over. There are arguments for and against genetically modified organisms.
39. The Respondents have submitted that the Petitioner has not demonstrated a prima facie case with a likelihood of success. The Petitioner argues otherwise and states that on the premise of the newspaper report there is good ground to conclude that the government will shortly introduce Genetically Modified Organisms (GMOs). I have perused the newspaper cutting. Even if the benefit of doubt was to be given to the Petitioner that the report has some evidential value, I am not convinced that it helps to establish a ground for the Petitioner for purposes of the instant application.
40. True, the words attributed to the Deputy President could have been uttered by him but it is also evidently clear that the Deputy President acknowledged the fact that the decision is to be made by or through a Cabinet session. That in itself is consultative in the narrow sense of the word. It has not been suggested, nay submitted, by the Petitioner that the Cabinet has made a decision. It would be unreasonable and perhaps unjustified, to now conclude that the Cabinet will not disapprove the introduction of genetically modified organisms (GMOs). The Cabinet may. The Cabinet may not. Until a determination by the Cabinet is made, it would certainly not be appropriate to pre-empt the

decision.

41. The Petitioner claims that no public participation has been undertaken. In my view and having found that it would be pre- emptive to reach a conclusion that the Government is going to introduce Genetically Modified Organisms (GMOs), I would hold that we must be cognizant of the fact that Section 54 of the Biosafety Act, 2009 is in force. The public will have to be involved in the process and absent such consultation or participation the decision may be rendered void.
42. As stated by the Respondents, the Biosafety Act 2009 provides for adequate safeguards but it must be read and interpreted in such a manner as to conform with the Constitution. Certainly, to introduce genetically modified organisms (GMOs) would require very clear regulations and guidelines. The existing ones may have to be reviewed. New regulations may have to be formulated and the public must participate. For now, I am not prepared to hold that the stage for public participation has been reached and or by-passed.
43. Whilst it is true that public interest may be served if genetically modified organisms (GMOs) were introduced it is also equally true that public interest may be affected negatively. I state so because 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.
44. For, now and based on the safeguards in place through the Biosafety Act 2009 and the regulations thereunder, I am satisfied that threats alluded to by the Petitioner may be addressed through such a framework rather than a court order.
45. In my judgment too , public interest would be better served if the Cabinet was allowed to have a session on this issue and deliver a decision pursuant to Article 153 of the Constitution without any pre-emptory orders, which is exactly what the conservatory order sought would do.
46. Finally, I am also satisfied that the substratum of the Petition as well as the reliefs sought will not be rendered nugatory if an intermediary conservatory order is not granted. The speculative evidence availed by the Petitioner may ultimately crystallize once a cabinet decision is made. The Court would still be in a position to hear the Petition and craft such remedy as may be necessary and viable to protect the Constitution and the public at large.

Disposal

47. The upshot is that based on the affidavit evidence before me, I am not satisfied that the Petitioner has made out and established a prima facie case with a likelihood of success. Neither are the circumstances so exceptional as to demand the court's intervention through a conservatory order, given that there is in place various regulations touching on genetically modified organisms and food.
48. The application has to be dismissed. It is dismissed.
49. The costs will abide the outcome of the Petition.

Dated at Nairobi this 19th day of October 2015 and duly signed and delivered in open court.

J.L. ONGUTO

JUDGE