



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA AT NAIROBI**

**PETITION NO 32 OF 2017**

**(FORMALLY HC PETITION NO. 375 OF 2017**

**CONSOLIDATED WITH JR NO. 412 OF 2017)**

**IN THE MATTER OF ARTICLES 22 AND 165(3) (d) (i) & (ii) OF**

**THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS**

**AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 24, 40**

**47 AND 69(1) (d) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 129 (1) (2) AND 153 (a) OF THE CONSTITUTION OF**

**KENYA 2010**

**AND**

**IN THE MATTER OF SECTION 86(2) OF THE ENVIRONMENTAL**

**MANAGEMENT AND CO-ORDINATION ACT**

**AND**

**IN THE MATTR OF SECTION 5, 6, 7, 8(1), 11(1) AND (2) OF THE**

**STATUTORY INSTRUMENTS ACT 2013**

**AND**

**IN THE MATTER OF SECTION 4, 5, AND 6 OF THE FAIR**

**ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**BETWEEN**

**KENYA ASSOCIATION OF MANUFACTURERS.....1ST PETITIONER**

**FREDRICK GICHUHI NJENGA &STEPHEN MWANGI.....2ND PETITIONER**

**=VERSUS=**

**THE CABINET SECRETARY, MINISTRY OF ENVIRONMENT**

**AND NATURAL RESOURCES.....1ST RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3RD RESPONDENT**

**MULTYTOUCH INTERNATIONAL.....4TH RESPONDENT**

## **R U L I N G**

### **Introduction**

1. The single issue to be determined in this consolidated cause at this point is whether, pending the hearing and determination of the cause, this court should grant the 1st Petitioner a conservatory order staying the implementation of Gazette Notice Nos. 2334 and 2356, both dated 28th February 2017 and published in the Kenya Gazette on 14th March 2017 by the Cabinet Secretary for Environment & Natural Resources. The text and substance of the two Gazette Notices is the same in every respect. The Gazette Notice reads as follows:-

“In exercise of the powers conferred under Sections 3 and 86 of the Environmental Management and Co-ordination Act, it is notified to the public that the Cabinet Secretary for Environment and Natural Resources has with effect from 6 months from the date of this notice banned the use, manufacture and importation of all plastic bags used for commercial and household packaging defined as follows:-

(a) Carrier bag- bag constructed with handles, and with or without gussets;

(b) Flat bag- bag constructed without handles, and with or without gussets

Dated the 28<sup>th</sup> February, 2017

JUDI W. WAKHUNGU,

Cabinet Secretary for Environment and Natural Resources.”

2. Through a Petition dated 28th July 2017 and filed in court on the same day, the 1st Petitioner has challenged the said Gazette Notice and seeks an order quashing it. Similarly, through a Judicial Review Motion dated 17th July 2017, the 2nd Petitioner seeks to quash the said Gazette Notice.

3. Together with the Petition, the 1st Petitioner filed a Notice of Motion dated 28th July 2017, seeking a conservatory order staying the implementation of the Gazette Notice, pending the hearing and determination of the Petition. That Notice of Motion is the subject of this Ruling.

### **1st Petitioners’ Case**

4. The first ground upon which the 1st Petitioner has challenged the Gazette Notice is that the 1st Respondent published the Notice in contravention of Section 5 of the Statutory Instruments Act, No. 23 of 2013. The 1st Petitioner contends that this legal framework enjoins every authority making regulations

to make consultations with persons who are likely to be affected by the proposed regulatory instrument before making the statutory instrument. The 1st Petitioner further contends that the Notice contravenes Articles 10 and 69(1) (d) of the Constitution of Kenya 2010. It is the 1st Petitioner's case that the Notice contravenes the above laws because there was no consultation with the stakeholders and there was no public participation prior to the issuance of the Notice.

5. Second, the 1st Petitioner contends that the 1st Respondent's decision was not preceded by a regulatory impact statement prepared by the 1st Respondent. To this extent, the 1st Petitioner argues that the Notice offends the provisions of Section 6 of the Statutory Instruments Act, No. 23 of 2013 which obligates every regulatory authority to prepare a regulatory impact statement in instances where the statutory instrument imposes significant costs on the community.

6. The third ground argued by the 1st Petitioner is that Section 86 (2) of the Environmental Management and Co-ordination Act which the 1st Respondent invoked in issuing the Notice does not grant her statutory powers to ban the manufacture and importation of plastic carrier and flat bags.

7. Fourth, the 1st Petitioner contends that the 1st and 3rd Respondents were privy to preceding discussions and memorandum of understanding aimed at creating a plastic waste management mechanism, including the imposition of a levy which the 1st Petitioner's members were willing to pay to actualize the plastic waste management mechanism. The 1st Respondent contends that the 1st Petitioner's new policy entailing ban of plastic bags is drastic, disproportionate and ignores other viable and reasonable alternatives that would not adversely impact on the economy and the livelihood of many people.

8. The fifth ground raised by the 1st Petitioner is that, by failing to grant the 1st Petitioner an opportunity to present its case on the impact of the Gazette Notice, the 1st and 3rd Respondents are in violation of the 1st Petitioner's right to fair administrative action under Article 47 of the Constitution of Kenya and Sections 5 and 6 of the Fair Administrative Action Act.

9. The 1st Petitioner's affidavit and submissions (both written and oral) on the Application under consideration canvass and advance the above five grounds. In addition, the 1st Petitioner argues that plastic is an extremely cost-effective, versatile and durable synthetic product made from oil by-products which is used across diverse sectors, including packaging, construction, transportation, healthcare and electronics.

10. In urging the court to grant a conservatory order, the 1st Petitioner argues that the impugned regulation will cause a virtual collapse of the sectors affected by the ban and will occasion a devastating, unquantifiable and irreparable loss to the affected sectors.

11. The 2nd Petitioner supports the 1st Petitioner's case for a conservatory order and advances largely similar grounds. The 2nd Petitioner further contends that the wording of the notice is ambiguous and constitutes a total ban on all plastic bags.

### **1st, 2nd & 3rd Respondents' Case**

12. The 1st, 2nd and 3rd Respondents strongly oppose the plea for a conservatory order suspending the implementation of the Legal Notice. Their case is that the Notice was properly issued under Sections 3 and 86 of the Environmental Management and Co-ordination Act, Cap 387 (**hereinafter referred to as "the EMCA"**), a legislative instrument enacted to provide regulatory legal framework on all issues relating to the environment. They further contend that the notice was issued pursuant to the administrative powers vested in the 1st Respondent. They contend that under Article 42 of the Constitution, every person has the right to a clean and healthy environment, and that this right includes the right to have the environment protected by the state, for the benefit of present and future generations.

13. They further contend that Article 69 of the Constitution obligates the state to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources. They

also contend that Article 69 enjoins the state to eliminate processes and activities that are likely to endanger the environment. The 1st, 2nd and 3rd Respondents further argue that Article 69 of the Constitution requires every person, including the Petitioners herein, to co-operate with the state in protecting and conserving the environment and ensuring ecologically sustainable development and use of natural resources.

14. The 1st, 2nd and 3rd Respondents further contend that Article 70 of the Constitution enshrines in the Constitution the precautionary principle as part of Kenya's environmental governance legal framework and that this court's decision on the present application should be guided by Article 70 of the Constitution. They contend that Section 86 of the EMCA gives the 1st Respondent powers to identify materials and processes that are dangerous to human health and the environment and to issue guidelines and prescribe measures for the management of the materials and processes so identified.

15. The 1st, 2nd and 3rd Respondents argue that plastic is a non-biodegradable material that is hazardous to the environment. They contend that prior to issuing the notice, there had been previous unsuccessful attempts to control the negative impact of plastics to the environment. They further contend that prior to the notice, the state, through the 3rd Respondent engaged stakeholders on the issue of plastics in numerous meetings and a total of 27 Meetings were held with the plastics sector players between 2006 and 2017. They further argue that between 2014 and 2017, the Ministry and NEMA held a total of 10 Meetings with the plastic sector players on the theme of a new approach entailing stoppage of certain categories of plastics. They contend that the impugned gazette notice complied with all relevant provisions of the Statutory Instruments Act.

16. They further argue that the constitutional mandate to formulate policy framework and take administrative measures to protect the environment is vested in the executive arm of the state. They contend that the six months notice issued by the 1st Respondent is reasonable period for the plastic industry and for the users of the affected plastic products to adjust themselves to the new packaging requirements.

17. On whether or not a conservatory order should be granted as sought by the 1<sup>st</sup> Petitioner, the 1st, 2nd and 3rd Respondents urged the court to be guided by the Supreme Court of Kenya's decision in **Gatirau Peter Munya -Vs- Dickson Mwenda Githinji & 2 Others (2015) eKLR** and the decision in **Michael Osundwa Sakwa -Vs- Chief Justice & President of the Supreme Court of Kenya & Another (2016) eKLR**. Both decisions emphasize the need for the court to consider the public interest whenever faced with a plea for a conservatory order in a public interest litigation.

#### **4<sup>th</sup> Respondent's Case**

18. The 4th Respondent's position is that the intended ban is part of the Government's commitment to address pollution in tandem with the United Nations Environment Programme's (UNEP) Clean Seas Initiative. The 4<sup>th</sup> Respondent contends that plastic bags are to blame for continued proliferation of used plastic bags in waterways, grazing fields, dwelling estates, urban centres and virtually all empty spaces. The 4th Respondent urges the court to determine the application for conservatory orders in away that favours the protection and conservation of the environment.

#### **Analysis & Determination**

19. I have carefully considered the substance of the Petition, the grounds upon which the Application for a conservatory order is based, the parties' rival affidavits and submissions, the applicable constitutional and legal framework on the environment, existing local and international jurisprudence on the issue under consideration, and the relevant international legal instruments with bearings to the present dispute.

20. This court is urged to grant a conservatory order within the framework of Article 23 of the Constitution, suspending the implementation of the legal notice subject matter of this Petition. The guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution are settled. In an application

for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a *prima facie* case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.

21. The tenor, import and scope of a conservatory order was defined by the Supreme Court of Kenya in **Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others eKLR** as follows:

“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the applicants case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes”

22. Besides the above general guiding principles, a court seized of an environmental dispute, whether at the interlocutory stage or at the substantive hearing, is to bear in mind that, through their judgments and rulings, courts play a crucial role in promoting environmental governance, upholding the rule of law, and in ensuring a fair balance between competing environmental, social, developmental and commercial interests.

23. Thirdly, in determining environmental disputes at any stage, Kenyan courts are obliged to be guided by and promote the constitutional framework on the environment as spelt out in Articles 42, 69 and 70 of the Constitution and the legislative framework set out in the EMCA. In this regard, Articles 42, 69 and 70 of the Constitution and the broad environmental principles set out in Section 3 of the EMCA are important tools in the interpretation of the law and adjudication of environmental disputes. Invariably, the environmental governance legal framework and any other relevant legislative instrument [substantive or subsidiary], ought to be construed in a manner that promotes the letter and spirit of the above constitutional underpinnings and general principles in Section 3 of the EMCA.

24. The impugned legal notice was issued within the framework of Sections 3 and 86 of the Environmental Management and Coordination Act. Section 3 of the Act provides as follows:

“3. Entitlement to a clean and healthy environment

(1) Every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws and has the duty to safeguard and enhance the environment.

(2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.

(2A) Every person shall cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.

(3) If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public

interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to

—

- (a) prevent, stop or discontinue any act or omission deleterious to the environment;
- (b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
- (c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;
- (d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and
- (e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.

(4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action—

- (a) is not frivolous or vexatious; or
- (b) is not an abuse of the court process.

(5) In exercising the jurisdiction conferred upon it under subsection (3), the Environment and Land Court shall be guided by the following principles of sustainable development

- (a) the principle of public participation in the development of policies, plans and processes for the management of the environment;
- (b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;
- (c) the principle of international co-operation in the management of environmental resources shared by two or more states;
- (d) the principles of intergenerational and intragenerational equity;
- (e) the polluter-pays principle; and
- (f) the pre-cautionary principle.”

25. Section 86 provides as follows:

“The Cabinet Secretary shall, on the recommendation of the Authority—

- (1) identify materials and processes that are dangerous to human health and the environment;
- (2) issue guidelines and prescribe measures for the management of the materials and processes identified under subsection (1);

(3) prescribe standards for waste, their classification and analysis, and formulate and advise on standards of disposal methods and means for such wastes; or

(4) issue regulations for the handling, storage, transportation, segregation and destruction of any waste.”

26. At this stage of determining whether the applicant has established a *prima facie* case or not, the court’s role will entail an examination of the relevant legal framework to establish if the 1st Respondent had the requisite powers to issue the legal notice. Section 3 of the Act echoes the constitutional framework on the right to a clean environment. It also provides a broad framework on environmental governance principles and access to justice in environmental disputes. One of the environmental governance principles emphasized by this legal framework is the principle of public participation in the development of policies, plans and processes for the management of the environment and natural resources. The other key principle set out in this section is the precautionary principle. This principle requires that where there are threats of damage to the environment, whether serious or irreversible, immediate, urgent and effective measures be taken to prevent environmental degradation notwithstanding the absence of full scientific certainty on the threat to the environment.

27. Section 86 empowers the Cabinet Secretary responsible for the environment to, inter alia, identify materials and processes that are dangerous to human health and the environment and to issue guidelines and prescribe measures for the management of the materials and processes so identified. The 1st Petitioner contends that the powers donated to the 1st Respondent under Section 86 do not include banning of any category of plastic bags. The Respondents contend that plastic bags fall within the ‘materials’ contemplated under the Act. They also contend that the notice falls within the ‘guidelines and measures’ contemplated under the Act. It does appear [and I say so with caution because I am precluded from making any conclusive finding on this issue] that the 1st Respondent has broad powers to identify hazardous materials and prescribe measures for the management of the materials. Whether the 1st Respondent exceeded the scope of those powers is a question to be conclusively answered at the substantive hearing of this dispute. At this point, I would say it does appear the 1st Respondent has the power to issue the notice that she issued. I say so bearing in mind that Section 86 is to be interpreted in a manner that promotes the constitutional framework on the environment and the environmental principles in Section 3 of the EMCA.

28. The 1st Petitioner contends that there was no consultation and public participation prior to the issuance of the notice. A cursory perusal of the annexures to the Affidavit of William Kiprono reveals that there were a number of meetings involving key players in the plastic sector. The earlier meetings dwelt on plastic waste management and standard gauge for certain categories of plastics. The running theme in the post 2013 meetings was the stoppage of plastic carrier bags. These meetings were attended by representatives from key stakeholders in the plastic sector industry such as KAM, RETRACK, KEPISA, NAKUMATT, Cleanshelf Supermarket, Naivas Supermarket, KWTA, MEWNR, AND MOFED, among others. Whether these meetings satisfy the criteria on consultation and public participation is a question to be answered at the substantive hearing of the Petition herein.

29. The third key ground canvassed by the 1st Petitioner is that the legal notice was not preceded by a regulatory impact statement within the framework of Sections 6 and 7 of the Statutory Instruments Act. The requirement on regulatory impact statement applies when the statutory instrument imposes significant costs on the community or a part of the community. At this point, the 1st Petitioner has not placed before court evidence of any cost imposed on it or on its members by the impugned legal notice.

30. In seeking a conservatory order, the Applicant has invoked Articles 22, 23 and 47 of the Constitution. The Applicant contends that the 1st Respondent denied it the right to present its case on the impact of the Gazette Notice and thereby contravened Article 47 of the Constitution. There is no doubt that the impugned Gazette Notice affects the entire population of the Republic of Kenya. In my view, it is doubtful that Article 47 of the Constitution contemplates that a legal notice affecting the entire population of Kenya be treated as an administrative action and each member of the population (both natural and corporate) be given an opportunity to be heard individually on the intended legal notice before the notice

(which is in the nature of an environmental precautionary measure) is issued or implemented. I would not say more on this issue at this point.

31. Both Petitioners have argued that the legal notice imposes a total ban on all categories of plastic bags. In addition, the 1st Petitioner argues that unless the notice is suspended, its members will suffer a devastating and unquantifiable loss. I have carefully analyzed the legal notice. The ban is limited to two categories of plastic: (1) carrier bags constructed with handles and with or without gussets; and (2) flat bags constructed without handles, and with or without gussets. It is clear from the notice that plastic bags used for industrial and medical packaging are not covered in the ban. Suffice to add that all other forms of plastic bags are exempted from the ban.

32. I have also reflected on the 1st Petitioner's contention that its members will suffer loss. In my view, this apprehended loss is to be carefully weighed against the public interest of the over 40 Million Kenyans whose right to a clean environment the legal notice seeks to secure. Grant of a conservatory order in the circumstances of this dispute would mean that, the offensive plastic bags continue to suffocate the environment to the detriment of the Kenyan population, while serving the commercial interests of a section of the plastic bags dealers. In my view, that would offend Kenya's constitutional and legal framework on protection and management of the environment. That would also subordinate the public interest of the Kenyan people to the commercial interests of plastic bag dealers.

33. In summary, the 1st Petitioner's Notice of Motion dated 28th July 2017 seeking to stay the implementation of Gazette Notice Nos. 2334 and 2356 both dated 28<sup>th</sup> February 2017 is rejected for the following reasons:-

(a) The application does not satisfy the criteria for grant of a conservatory order within the framework of Article 23 (3) (c) of the Constitution.

(b) Grant of a conservatory order in the unique circumstances of this dispute would gravely undermine and derogate the precautionary principle which is a key pillar and legal tool in the country's environmental management framework.

(c) Grant of a conservatory order in the circumstances of the present dispute would severely injure the public interest. Public interest in this regard is the general environmental welfare of the Kenyan people, which requires recognition and protection; the totality of their natural environment in which they collectively and individually have a stake which requires state protection.

34. In light of the foregoing, the 1st Petitioner's Notice of Motion dated 28th July 2017 seeking a conservatory order staying the implementation of the Gazette Notice contained in Legal Notice Nos 2334 and 2356 is rejected. Costs of the Application shall be in the cause.

**Dated and Signed at Nairobi on this 25th day of August 2017**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

.....Advocate for 1st Petitioner

.....Advocate for 2nd Petitioner

..... Advocate for the 1st Respondent

..... Advocate for the 2nd Respondent

.....Advocate for the 3rd Respondent

.....Advocate for the 4th Respondent

.....Court Clerk