



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

PETITION NO. 32 OF 2017

(FORMERLY NAIROBI HIGH COURT PETITION NO. 375 OF 2017

CONSOLIDATED WITH

NAIROBI HIGH COURT JR MISC NO. 412 OF 2017

AND FURTHER CONSOLIDATED WITH

NAIROBI ELC PETITION NO. 35 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 MATTER OF *SECTIONS 5, 6, 7, 8 (1), 11 (1) AND (2)*

OF THE STATUTORY INSTRUMENTS ACT 2013

AND

IN THE MATTER OF SECTIONS 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 PETITIONERS
OKIYA OMTATA OKOITI.....3RD 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

RULING

1. This consolidated Petition encompasses three suits: **i]** Nairobi ELC Petition No. 32 of 2017 [*formerly Nairobi High Court Petition No. 375 of 2017*]; **ii]** Nairobi High Court Judicial Review Misc Civil Application No. 412 of 2017 - which was consolidated with Nairobi High Court Petition No. 375 of 2017 prior to the transfer of the consolidated Cause to the Environment and Land Court and designated as ELC Petition No. 32 of 2017; and **iii]** Nairobi ELC Petition No. 35 of 2017.

2. In the consolidated Petition, the parties are designated as follows:

Kenya Association of

Manufacturers 1st Petitioner

Fredrick Gichuhi Njenga &

Stephen Mwangi 2nd Petitioner Okiya Omtata Okoiti 3rd 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

3. The 1st Petitioner is the representative organization for manufacturing industries in Kenya. The 2nd Petitioner are two private citizens. The 3rd Petitioner is similarly a private citizen involved in public interest litigation in Kenya. The 1st Respondent is the Cabinet Secretary responsible for matters relating to the environment and natural resources. The 2nd Respondent is the statutory body mandated to exercise general supervision and co-ordination over all matters relating to the environment and is the principal organ of the government in the implementation of all policies relating to the environment. The 3rd Respondent is the principal legal advisor to the government of Kenya. The 4th Respondent is a non-governmental organization registered under the Non-Governmental Organizations Act No. 19 of 1990 and is involved in the conservation and management of the environment.

4. The key issues in this consolidated cause revolve around the validity of a legal notice dated 28/2/2017 and published twice in the Kenya Gazette under Notice Nos. 2334 and 2356 by the Cabinet Secretary for Environment and Natural Resources. The effect of that Legal Notice is that it outlaws the use, manufacture and importation of certain categories of plastic bags used for commercial and domestic packaging. 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 28th February, 2017

JUDI W. WAKHUNGU,

Cabinet Secretary for Environment and Natural Resources.”

5. The Petitioners have challenged the above Legal Notice on various grounds, *inter alia*:

a) Lack of public participation in the promulgation of the legal notice.

b) Violation of the right to equal protection and benefit of the law under Article 27 of the Constitution.

c) Violation of Article 24 (2) of the Constitution.

d) Violation of the right to fair administrative action under Article 47 of the Constitution.

e) Violation of Articles 1 (1), 2 (1) & (2), 4 (2) 10) (2), 19, 20, 21, 22, 24, 40, 41, 43, 47, 69, 70, 73 (1) (b), 129 (1) & (2), 153 (4), 232 (1) (d), (e) & (f) and 259 (1) & (3).

f) Violation of Section 11 of the Statutory Instruments Act in that it is alleged the said legal notice has not been submitted to Parliament for scrutiny and approval.

g) Abuse of mandate under the Environmental Management and Co-ordination Act.

h) Vagueness rendering the legal notice void.

6. Among other reliefs, the Petitioners seek the following:

a) *A declaration that the said Legal Notice banning the use, manufacture and importation of certain categories of plastic bags is unconstitutional, null and void.*

b) *An order quashing the said Legal Notice.*

c) *A declaration that the 1st and 2nd Respondents have violated the Constitution of Kenya.*

7. The 3rd Petitioner's Petition was accompanied with a Notice of Motion dated 5/9/2017 in which he sought, among other orders, an order certifying that his Petition raises a substantial question of law and that the Petition should be referred to His Lordship the Chief Justice to appoint an uneven bench of three or five judges to hear the Petition. On 21/9/17, the 3rd Petitioner intimated to the court that he was abandoning that quest. He indicated that the decision to abandon the quest for a bench of three or five judges was informed by the need to fast-track the substantive hearing and disposal of the Petition.

8. On 10/10/2017, Mr Kamau, Mr Wabwoto and Mr Anyoka, counsel representing the four Respondents herein, moved the court through oral applications and submissions urging the court to certify the consolidated Petition as one raising substantial questions of law and refer it to the Chief Justice to constitute a bench of at least three judges to hear and dispose the Petition. The Respondents contended that the present dispute is the first of its kind in Kenya and that the pronouncement of the court on the key issues in the dispute will have a key bearing on the conservation of the environment in Kenya. They further submitted that the present dispute raises issues for which we do not have settled principles.

9. The 1st Petitioner submitted that a priority hearing before one judge would suffice. The 3rd Petitioner opposed the request for certification. He submitted that he had abandoned his quest for a bench of at least three judges because he was keen on a quick disposal of the dispute herein. He further submitted that when he applied for a bench of three judges, he believed this dispute revolved around the interpretation of the precautionary principle in the context of the legal notice. He contended that he subsequently realized that the material legal notice was void and is dead because it was never tabled in Parliament as required by the law. He argued that for this reason, he is now satisfied that the dispute herein can be competently disposed by one judge.

Determination

10. The single issue to be determined in this Ruling is whether the key issues in the consolidated Petition disclose a substantial question of law to merit a certification to the effect that this Petition qualifies to be heard by an uneven number of judges as may be determined by His Lordship the Chief Justice. The legal framework on certification by a judge of this court for this purpose is spelt out in **Section 21 of the Environment and Land Court Act** as follows:

“21. (1) The Court shall be properly constituted for the purposes of its proceedings under this Act by a single judge.

(2) Notwithstanding subsection (1), any matter certified by the Court as raising a substantial question of law:

(a) under Article 165(3)(b) or (d) of the Constitution; or

(b) concerning impact on the environment and land,

shall be heard by an uneven number of judges, as determined by the Chief Justice.”

11. From the plain wording of the above legal framework, it is clear that the test to be applied in determining whether a dispute satisfies the threshold for certification is that of “*substantial question of law*”. The court's discretion to grant or decline certification under the above legal framework is to be

guided by the test of “substantial question of law”. In **CHUNLAL V MEHTA V CENTURY SPINNING AND MANUFACTURING CO, AIR 1962 SC 1314**, what constitutes a substantial question of law was defined as follows:

“A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the questions are settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial ...”

12. In **MAINA KIAI & 2 OTHERS V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOR, 2016 eKLR**, Lenaola J [as he then was] outlined the following as some of the factors to be considered in determining what constitutes a substantial question of law:

- i. Whether, directly or indirectly, it affects the substantial rights of the parties or*
- ii. Whether the question is of general public importance; or*
- iii. Whether it is an open question in the sense that the issue has not been settled by pronouncement of the supreme court or any other superior court; or*
- iv. The issue is not free from difficulty; or*
- v. It calls for a discussion of an alternative view.*

13. The consolidated Petition herein seeks to annul a legal notice issued by the 1st Respondent under **Section 86 of the Environmental Management and Co-ordination Act**, banning the use, manufacture and importation of certain categories of plastic bags. Among the questions to be answered in this Petition is whether, in issuing the legal notice in the manner she did, the 1st Respondent violated any of the cited Articles of the Constitution and provisions of the Statutes cited by the Petitioners. Secondly, this Petition raises the question as to the proper legal approach to be applied when a subsidiary legislative instrument is invoked as a precautionary measure under the precautionary principle doctrine in environmental governance. The third question raised in the Petition is what remedy is appropriate for a party aggrieved by an impugned measure taken to protect the environment under the precautionary principle doctrine. Fourth, this Petition raises the question as to the role of courts of law in environmental governance. These are but only some of the many substantial questions raised by this Petition.

14. The material Legal Notice has generated a lot of public interest because plastic bags had become a common feature in many households. In the same vein, plastic bags have become a major pollutant of the environment. A judicial pronouncement on the present dispute will, either way, bear a significant impact on the Kenyan population and their environment.

15. More importantly, none of Kenya’s superior courts has made a clear judicial pronouncement on the key issues raised in this Petition. For instance, the petitioners contend that the Cabinet Secretary’s decision to invoke **Section 86 of the Environmental Management and Co-ordination Act** to ban certain categories of plastic bags is unconstitutional because certain procedures were not adhered to and to that extent, that decision should be nullified. On their part, the respondents contend that the measure taken by the Cabinet Secretary falls within the doctrine of precautionary principle and are legitimate. Consequently, this court is invited to determine whether the Cabinet Secretary’s invocation of the precautionary principle in the manner she did and in the context of our existing legal and constitutional framework, is lawful.

16. Having considered some of the key issues in this Petition, I am satisfied that the questions raised in the Petition are substantial questions of law in the sense that they are unsettled. They call for an uneven

bench of at least three judges to interrogate them and make a guiding pronouncement on them. Consequently, I hereby exercise discretion and refer the consolidated Petition herein to His Lordship the Chief Justice to constitute a bench of judges in terms of **Section 21 (2) of the Environment and Land Court Act**. The Registrar shall cause the proceedings herein to be typed forthwith and the consolidated File shall be forwarded to His Lord The Chief Justice forthwith. Parties shall be kept apprised.

Dated, signed and delivered at Nairobi on this 13th day of October, 2017.

B M EBOSO

JUDGE

In the presence of:

Mr Amoko & Mr Dar	Advocate for the 1 st Petitioner
Mr Amoko h/b for Mr Ogesa	Advocate for the 2 nd Petitioner
Mr Okiya Omtata Okoiti	3 rd Petitioner present in person
Mr Kamau	Advocate for 1 st & 2 nd Respondents
Mr Wabwoto	Advocate for 3 rd Respondent
Mr Wabwoto h/b for Mr Anyoka	Advocate for 4 th Respondent
Ms Halima Abdi:	Court Assistant