Kenya Peasants League v Attorney General & 19 others (Civil Application E004 of 2025) [2025] KECA 448 (KLR) (7 March 2025) (Ruling)

Neutral citation: [2025] KECA 448 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E004 OF 2025

PO KIAGE, WK KORIR & JM NGUGI, JJA

MARCH 7, 2025

BETWEEN

KENYA PEASANTS LEAGUE ..... APPLICANT

AND

HON ATTORNEY GENERAL ..... 1ST RESPONDENT

CS, AGRICULTURE, LIVESTOCK ..... 2ND RESPONDENT

EZEKIEL JUMA ..... 3RD RESPONDENT

HARRY AMATSIMBA ..... 4TH RESPONDENT

CS, MINISTRY OF EDUCATION, SCIENCE & TECHNOLOGY .... 5TH RESPONDENT

NATIONAL BIOSAFETY AUTHORITY ..... 6TH RESPONDENT

CS, TRADE, INVESTMENT & INDUSTRY ..... 7TH RESPONDENT

THE CABINET OF KENYA ..... 8TH RESPONDENT

SECRETARY TO THE CABINET ..... 9TH RESPONDENT

THE KENYA UNIVERSITY BIODIVERSITY CONSORTIUM .... 10TH RESPONDENT

BIODIVERSITY AND BIOSAFETY ASSOCIATION OF KENYA .... 11TH RESPONDENT

ASSOCIATION OF KENYA FEEDS MANUFACTURERS ..... 12TH RESPONDENT

KITUO CHA SHERIA ..... 13TH RESPONDENT

CS, MINISTRY OF HEALTH ..... 14TH RESPONDENT

COUNCIL OF GOVERNORS ..... 15TH RESPONDENT

CEREAL GROWERS ASSOCIATION ..... 16TH RESPONDENT

PAUL MWANGI ..... 17TH RESPONDENT

KENYA SMALL SCALE FARMERS FORUM ..... 18TH RESPONDENT

ALI SARIF ..... 19TH RESPONDENT

DOREEN NAMAEMBA ..... 20TH RESPONDENT

(Being an Application for injunction pending appeal arising from the Ruling of the High Court at Nairobi (Mugambi, J.) dated 7th November, 2024 in Const. Petition No. E475 of 2022 as Consolidated With Const. Petition Nos. E519 of 2022, 399 of 2015 & 31 of 2022)

RULING

1. On 08th November, 2012, the Cabinet of the Republic of Kenya reached a resolution directing the Minister of Public Health and Sanitation to use the existing legal framework for public health to prohibit the open cultivation of genetically modified crops and the importation of food crops and animal feeds produced through biotechnology innovations and genetically modified foods (GMOs). This decision was made notwithstanding the existence of the *Biosafety Act*, No. 2 of 2009 which received Presidential assent on 12th February, 2009. Indeed, by the time of the Cabinet decision, the National Biosafety Authority, established under the *Biosafety Act*, had already developed four sets of biosafety regulations to guide various activities in GMOs research: contained use regulations (2011); environmental release regulations (2011); export, import and transit (2011); and labelling (2012).

2. The prohibition on GMOs placed pursuant to the cabinet decision was to remain in force until a review and evaluation of scientific knowledge on the safety of GMO foods on human health was undertaken to determine potential adverse long-term human health effects and ways to mitigate them.

3. Following this cabinet decision, the then Minister for Health and Sanitation, Hon. Beth Mugo appointed a Taskforce chaired by Professor Kihumbu Thairu. Among other things, the taskforce was charged with: Assessing Kenya's infrastructure and capacity to monitor and regulate GMOs; evaluating the potential health effects of GMOs on humans and the environment; and reviewing global practices and policies regarding GMO usage and regulation.

4. The Thairu Taskforce completed its task and handed in its report to the government in 2014. However, the report of the Taskforce has never been released to the public. The recommendations of the Taskforce were expected to govern the government's next steps in ensuring that potential adverse effects of genetically modified mechanisms are addressed to protect human health and biodiversity through a transparent, science-based process for reviewing and making decisions on the development, transfer, handling, trade and use of GMOs in Kenya.

5. On 03rd October, 2022, the Cabinet of the Republic of Kenya, through the Executive Office of the President of Kenya, issued a Cabinet Despatch of even date (hereinafter, "Cabinet's Despatch on GMO") in which it communicated that the lifting of the 2012 ban on the open cultivation and importation of genetically modified organisms (GMOs). In relevant part, the Cabinet Despatch on GMO read:

> "In accordance with the recommendation of the Task Force to Review Matters Relating to Genetically Modified Foods and Food Safety, and in fidelity with (sic) the guidelines

of the National Biosafety Authority on all applicable international treaties including the Cartagena Protocol on Biosafety (CPB), Cabinet vacated its earlier decision of 8th November, 2012 prohibiting the open cultivation of genetically modified crops and the importation of food crops and animal feeds produced through biotechnology innovations; effectively lifting the ban on Genetically Modified Crops. By dint of the executive action open cultivation and importation of White (GMO) Maize is now authorized."

6. This Cabinet decision provoked at least four petitions challenging it:

   a. Milimani Constitutional and Human Rights Division Petition No. E475 of 2022 was dated and filed on 13th October, 2022 by Paul Mwangi (the 15th respondent herein);

   b. Milimani Constitutional and Human Rights Division Petition No. E519 of 2022 was dated 24th November, 2022 by Kenya Peasants League (the applicant herein);

   c. Kitale High Court Constitutional Petition No. E008 of 2022 filed on 18th October, 2022 by Ali Saif, Doreen Namaemba, Ezekiel Juma & Harry Amatsimbi.

   d. Environment and Land Court Petition No. 11 of 2023 filed on 16th January, 2023 by the Law Society of Kenya at the Nyahururu ELC Court. It was transferred to Nairobi ELC vide an order dated 28th March, 2023.

7. The first three of these petitions were consolidated at the High Court. They were later consolidated with another petition, to wit, Milimani High Court Constitutional Petition No. 599 of 2015 filed by Kenya Small Scale Farmers Forum which raised similar issues (constitutional issues related to an apprehended lifting of the ban on GMOs) or hearing and determination.

8. In addition to the order of consolidation, the High Court also granted conservatory orders dated 15th December, 2022 in the following terms:

> "That the court notes that this is a matter of great public interest more so to the global uncertainties surrounding GMOs. In light of this, it is in the public interest that the court adopts the precautionary principle pending the hearing of evidence of expert witnesses on the effect of consumption and growing of GMO products on health and on the environment. Accordingly, the court hereby extends the interim orders herein pending the hearing and determination of the consolidated petitions."

9. On 11th May, 2023, Environment and Land Court Petition No. 11 of 2023 (hereinafter, "the ELC Petition") was mentioned before the Presiding Judge of the ELC for directions. The learned Presiding Judge of the ELC, Angote, J. gave the following directions:

> "In view of the pending two petitions in the High Court on the question of the ban in the importation and open cultivation of GMO, which is also an issue in this petition, the decision has to be made on which Court as between the ELC and the High Court should determine the three petitions. For those reasons, I transfer this petition to *the Constitution* and Human Rights Division of the High Court on condition that in the event it is found that the three petitions should be heard by the ELC, the same will be re-transferred to this court. The petition to be mentioned before the Presiding Judge, Constitutional and Human Rights Division on 17/05/2023 for directions."

10. This is how the ELC Petition, Milimani Constitutional and Human Rights Division Petition No. E475 of 2022 (the "Paul Mwangi Petition") and Milimani Constitutional and Human Rights Division

Petition No. E519 of 2022 (the "Kenya Peasants League Petition") were placed before the learned Thande, J. Before her, counsel for the petitioner in the ELC Petition made an oral application for the transfer of the ELC Petition to the High Court, and then, for its consolidation with the Paul Mwangi and Kenya Peasants League Petitions. The learned Judge heard arguments for and against the application made and reserved the ruling

11. In a ruling dated 30th June, 2023, the learned Judge declined to consolidate the petitions as sought, finding that:

> "...It is quite evident as stated herein, that the reliefs sought in the consolidated petitions [the Paul Mwangi Petition and the Kenya Peasants League Petition] on the one hand are different from those sought in the ELC Petition. Further, this Court lacks jurisdiction to deal with the ELC Petition just as the ELC lacks jurisdiction to deal with the consolidated petitions. A matter within the exclusive jurisdiction of one court cannot be consolidated with a matter within the exclusive jurisdiction of another court. The jurisdiction of the ELC to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedoms, is limited to the right relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*. In light of this, it is quite clear that the ELC has no jurisdiction to hear and determine the consolidated petitions which seek enforcement of rights beyond those relating to the environment. In light of this, consolidation of the petitions for hearing by the ELC as sought, would occasion a miscarriage of justice to the parties in the consolidated petitions. Accordingly, consolidation is not tenable. Similarly, the 3 petitions even if not consolidated, cannot be heard in the same court."

12. Having made these findings, the learned Judge ordered the ELC Petition to be sent back to the ELC for hearing and determination; while the Paul Mwangi Petition and the Kenya Peasants League Petition, as consolidated, were to proceed for hearing and determination before the High Court.

13. There was no appeal against the ruling by the learned Judge dated 30th June, 2023 declining consolidation of the ELC Petition with the High Court petitions.

14. As stated above, subsequently, the Paul Mwangi Petition and the Kenya Peasants League Petition were further consolidated with Kitale High Court Constitutional Petition No. E008 of 2022 and Milimani High Court Constitutional Petition No. 599 of 2015.

15. Thereafter, the learned Thande, J. was transferred out of the Constitutional and Human Rights Division. The matter, thereafter ended up before the learned Mugambi, J. for hearing and determination. Meanwhile, the ELC Petition proceeded for hearing and a judgment reserved before the learned Angote, PJ. The judgment in the ELC Petition was delivered on 12th October, 2023.

16. On 01st November, 2023, the learned Judge, Mugambi, J. invited the parties to the consolidated petition at the High Court to address the court "on the implication of the ELC court judgment that adjudicated on the matter of lifting the ban on open cultivation and importation of GMO food" since the learned Judge observed that the ELC "had adjudicated on the issue which appeared to manifest in the present consolidated petition....on whether or not the matter was/is res judicata."

17. The parties filed written submissions and addressed the High Court at length on the question whether the consolidated petitions were res judicata the ELC Petition. In a judgment dated and delivered on 07th November, 2024, the learned Judge found that the consolidated petition was res judicata the ELC Petition and proceeded to strike it out with no order as to costs.

18. It is that consequential ruling dated 07th November, 2024 that both Paul Mwangi (the 1st Petitioner at the High Court) and Kenya Peasants League (the 2nd Petitioner at the High Court and the applicant herein) have appealed against. Both are aggrieved by the finding that the consolidated petition was res judicata, and hope to have it restored for substantive hearing on the merits before the High Court.

19. Additionally, the applicant herein has brought the present application under Rule 5(2)(b) of the Court of Appeal Rules seeking for certain conservatory orders aimed at preserving the substratum of the appeal. The application is dated 05th January, 2025. It seeks, in the main, orders:

> "That pending the hearing and determination of the intended appeal herein, an order of injunction be and is hereby issued restraining the 1st, 2nd, 3rd, 4th, 6th, 8th, 10th, 12th, 13th and 14th respondents herein either themselves, or through such other persons acting under their instructions from gazetting or acting upon the contents of the Despatch from the Cabinet authored by the Executive Office of the President of Kenya, dated 03 October, 2022 (Cabinet's Despatch on GMO), regarding the lifting of the ban on the genetically modified organisms (GMO crops) or gazetting other directive or decision similar to the said decision dated 03 October 2022."

And:

"That pending the hearing and determination of the intended appeal herein, an order of injunction be and is hereby issued restraining the 1st, 2nd, 3rd, 4th, 6th, 8th, 10th, 12th, 13th and 14th respondents herein either themselves, or through such other persons acting under their instructions from allowing/ permitting the importation of GMO crops and food into the country."

20. The application is supported by the grounds on its face as well as the supporting affidavit of David Caleb Otieno sworn on 05th January, 2025.

21. The application is also supported by the 9th respondent vide a replying affidavit of Anne Maina deposed on 07th February, 2025.

22. The application was opposed by the 1st, 3rd, 5th, 6th, 7th and 12th respondents, all of whom were represented by the Honourable Attorney General. On their behalf, a replying affidavit sworn by Dr. Kiprono Paul Rono, the Permanent Secretary in the Ministry of Agriculture and Livestock, on 28th November, 2024 was filed. The 2nd respondent also opposed the application vide Grounds of Opposition dated and filed on 06th February, 2025. The 4th respondent opposed the application and filed a replying affidavit sworn by Nehemia K. Ngetich, the Acting Chief Executive Officer, sworn on 03rd February, 2025. Additionally, the 8th respondent opposed the application through the replying affidavit of Dr. Joel Ochieng sworn on 03rd February, 2025.

23. Although he did not file any formal response to the application, the 15th respondent appeared in person during the plenary hearing of the application on 10th February, 2025 and we allowed him to make oral arguments in support of the application. During the plenary hearing, Dr. Khaminwa also appeared for the 11th respondent and orally made representations in support of the application. The 13th and 16th respondents, also represented by Mr. Paul Mwangi, holding brief for Mr. Gaturu during the plenary hearing of the application, also supported the application.

24. On the other hand, counsel for the 10th respondent, Mr. Kurauka, also appeared during the plenary hearing and indicated that he opposed the application.

25. The other parties not explicitly mentioned, did not appear or file any documents in court in relation to the application.

26. Following directions by the Honourable Deputy Registrar, some of the parties filed written submissions as follows:

    a. The applicant's submissions are dated 06th February, 2025.

    b. The 9th respondent's submissions in support of the application are dated 07th February, 2025.

    c. The 2nd respondent's submissions in opposition to the application are dated 06th February, 2025.

    d. The 4th respondent's submissions in opposition to the application are dated 06th February, 2025.

27. As aforesaid, we conducted the plenary hearing for the application on 10th February, 2025. Mr. Oriri, learned counsel, appeared for the applicant. Mr. Motari, learned state counsel, representing the Honourable Attorney General, appeared for the 1st, 3rd, 5th, 6th, 7th and 12th respondents while Dr. Muthomi Thiankolu and Mr. Dennis Njoroge appeared for the 2nd respondent. The other appearances during the plenary hearing were as follows: Mr. Gumbo with Mr. Elias Ouma and Mr. Alex Mbaya appeared for the 4th respondent; Mr. Wauna Oluoch appeared for the 8th and 14th respondents; Ms. Emily Kinama together with Ms. Sitawa appeared for the 9th respondent; Mr. Henry Kurauka appeared for the 10th respondent; Dr. John Khaminwa appeared for the 11th respondent; and Mr. Paul Mwangi appeared in person as the 15th respondent and held the brief of Mr. Gaturu for the 13th and 16th respondents.

28. We have keenly read the application, the grounds in support of the application as well as the affidavits in its support. We have also read the grounds of opposition as well as the replying affidavits filed in opposition to the application. Finally, we have read the written submissions filed by the parties, and considered the oral highlights and representations made in Court during the plenary hearing. We propose not to reiterate in any great detail all the parties presented in their filed documents and oral submissions. Suffice it to say that we have considered all of them most carefully; and we are grateful to the parties for their industry and assiduity.

29. All the parties agree on the principles governing the grant of the orders sought under Rule 5(2)(b) of the Court of Appeal Rules. The parties agree that in order to succeed, the applicant has to satisfy the twin requirements of Rule 5(2)(b) of the Court of Appeal Rules as restated in Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR. The requirements are that the intended appeal must be arguable and secondly, that the intended appeal would be rendered nugatory if the preservatory orders sought are not granted. All the parties also agree that for cases such as the one at bar, the Court must consider a third aspect: the public interest. This third requirement, the parties agree, was added courtesy of the Supreme Court's decision in Gatirau Peter Munya v Dickson Mwenda Kithinji (Civil Application No. 31 of 2012) [2014] eKLR where the Supreme Court declared public interest as a "third condition ... dictated by the expanded scope of the Bill of Rights, and the public- spiritedness that run through *the Constitution*." This case was cited with approval by this Court recently in National Assembly & 47 Others v Okoiti Omtatah & 169 Others [2024] KECA 39 (KLR) (26 January 2024).

30. In favor of the application, the applicant argues that it has demonstrated, through both the supporting affidavit of David Caleb Otieno and a copy of the Draft Memorandum of Appeal which is annexed to the supporting affidavit, that it has a serious appeal which meets the test established in our decisional law. The serious question on appeal, the applicant argues, is whether the learned Judge was correct in

his finding that the consolidated petition before him was res judicata the ELC Petition on the law and the facts.

31. On the question whether the appeal would be rendered nugatory if the orders sought are not granted, the applicant points out that the most consequential order it will be seeking on appeal is for the consolidated petition to be remitted back to the High Court to be heard on its merits by a different Judge. The applicant argues that the petition at the High Court challenged the constitutionality of the Kenyan Cabinet's decision on 3rd October 2022 to lift the ban on genetically engineered (GE) foods.

    The applicant contends that the ban was lifted without due consideration of scientific evidence highlighting health and environmental risks. They say that scientific and court rulings from other jurisdictions support these concerns.

32. The applicant argues that the State plans to proceed with importing and distributing Genetically Modified Foods, with GM maize set for release into the Kenyan market almost immediately if preservatory orders are not granted. The applicant argues that if an injunction is not granted, the appeal will be rendered pointless, and the public and environment will be exposed to irreversible risks. The applicant references the decision in Kiru Tea Factor Company Ltd v Kenya Tea Development Agency Holdings & Another [2017] eKLR for the proposition that an injunction under Rule 5(2)(b) does not need to be related to the substance of the appeal; it is intended to balance the interest of the appellant who has an undoubted right of appeal with the interest of the successful party in the lower court who is entitled to the fruits of his decree or order. Finally, the applicant argues that the respondents have not demonstrated any urgency in rolling out GMO products, whereas the potential harm to the public outweighs any inconvenience to the State.

33. The 9th respondent's counsel supported the application on roughly the same grounds as did Mr. Paul Mwangi for himself and on behalf of the 13th and 16th respondents. Mr. Mwangi, in addition, pointed out that in considering whether the appeal is arguable, we should consider that the doctrine of res judicata does not operate in constitutional cases in the same way as it does in run-of-the-mill civil cases; in constitutional litigation, the doctrine paves way for new constitutional interpretations.

34. On his part, the 2nd respondent faults the application for asking for a conservatory order instead of an injunction because, in his view, conservatory orders can only be granted by trial courts; not by this Court sitting in its appellate capacity. He also argues that the present application is, in essence, an appeal against the ELC Petition but disguised as an application for stay against the consolidated petition. He argues that the *Biosafety Act* and the laws passed thereunder have not been challenged; and their comprehensiveness and robustness have been confirmed by the ELC Petition. This means, the 2nd respondent argues, that the appeal will not be rendered nugatory because Kenya has a comprehensive legal and institutional framework to regulate cultivation and importation of genetically modified organisms; and that any cultivation or importation of GMOs will be subjected to the most rigorous assessment by various institutions set up within Kenya's legal framework.

35. In his Grounds of Opposition and written submissions, the 2nd respondent argues that the application is inarguable because the ELC Petition is a judgment in rem filed in the public interest to "challenge the validity of the same thing challenged in the consolidated petitions (i.e. the Cabinet Decision of 03rd October, 2022)". Additionally, the 2nd respondent finds the appeal inarguable due to its inability to "plead with specificity" the "alleged contradistinction between the constitutional issues addressed in the ELC judgment and those raised in the consolidated Petition", he argued that the glaring omission to include the specifics is because the issues are precisely the same.

36. On the question of nugatory effects element, the 2nd respondent argues that the Cabinet Decision of 03rd October, 2022 merely paved way for the institutional and legal framework in place for the regulation of GMOs in Kenya. The appeal, therefore, cannot be rendered nugatory unless the applicant can demonstrate that this framework is unconstitutional or that it has failed or is being disregarded. Since the applicant has not succeeded to do either, the 2nd respondent argues that it has not met the threshold for judicial intervention.

37. Finally, the 2nd respondent argues that the public interest element only arises in specific circumstances after the arguability and nugatory elements have been conjunctively met. Since there is an existing legal and regulatory framework whose constitutionality is not impugned, the 2nd respondent argues that public interest in the present case lies in favour of allowing the relevant statutory and regulatory institutions to perform their constitutional and statutory functions; and that, consequently, public interest militates against the grant of the reliefs sought in the application. In this regard, the 2nd respondent cites Kenya Tea Growers Association & 2 Others v National Social Security Fund Board of Trustees & 13 Others [2023] KESC 42 (KLR).

38. All the other respondents who are in opposition to the application have rehashed this position by the 2nd respondent with admirable stridency.

39. As we set out above, in an application under Rule 5(2)(b), the applicant's first task is to demonstrate that the appeal they have proffered is an arguable one. The parties who are in opposition to this appeal have ponderously argued that the intended appeal is not arguable. In doing so, they have pointed out to the doctrinal precepts of the res judicata doctrine and its statutory underpinnings in Kenya. Counsel for the 2nd respondent, in particular, has stridently argued that it is definitionally impossible to make a finding that the intended appeal herein is arguable in the face of sections 6 and 7 of the *Civil Procedure Act* which statutorily bar a court from hearing a matter that has been heard and determined by another competent court, between the same parties.

40. On the other hand, counsel for the 4th respondent's lead argument is that the appeal is inarguable because, at its core, the appeal seeks to challenge the validity of the Cabinet Despatch of 3rd October, 2022 yet the ELC Petition has already conclusively determined its validity. Moreover, they point out that there has been no appeal against that judgment.

41. In context, we are in no doubt that the intended appeal raises at least one arguable point. As the procedural history of the case reproduced in the early part of this ruling demonstrates, in the present case, what is at issue is not a question of the application of the doctrine of res judicata simpliciter. Instead, the proper application of that doctrine is hoisted upon the question of the propriety of a High Court Judge inviting arguments about the applicability of the doctrine to a case in which another High Court Judge had already ruled, without a challenge of appeal, that the issues raised in the matter under consideration are distinct enough to deny an order for consolidation with the other case which the second High Court Judge ultimately decides was res judicata the one under consideration. The question whether the second High Court Judge (who decided that the consolidated petition was res judicata the ELC Petition) was bound by the decision of the earlier High Court Judge and hence whether the question whether the case was res judicata or not was foreclosed is an eminent issue that begs juristic attention and determination on appeal. In Stanley Kengethe Kinyanjui Case (supra), this Court held that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court. In other words, as the cases have emphasized, this is not to say that an arguable appeal is one which has a winning argument or even one that has a likelihood of success; it is merely to say that it presents serious legal issues warranting further judicial consideration on appeal.

42. We find, therefore, that the intended appeal is eminently arguable: the question whether it was open for the High Court Judge, in the circumstances of this case, to invite arguments and then rule that the ELC Petition was res judicata the Consolidated Petition is an arguable ground of appeal. As our case law has enunciated, on the question whether an appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. See, for example, Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.

43. We now turn to the question whether the appeal will be rendered nugatory. This Court decided in the Stanley Kengethe Kinyanjui Case (supra), that "nugatory" not only means worthless or futile but also "trifling".

44. The parties in opposition to the application's lead argument in this regard is that a superior court of competent jurisdiction, namely, the ELC in the ELC Petition, has adjudged that there is a robust legal, regulatory and institutional framework to regulate GMOs, ensuring their safe use in Kenya. This comprehensive framework, the respondents in opposition to the application argue, adequately anticipates and mitigates any potential adverse effects of GMOs; and, moreover, are in consonance with the Cartagena Protocols. As such, they point out, there will be no adverse effects if the preservatory orders are not granted since the public interest and public safety is adequately taken care of anyway and any cultivation of GM products in Kenya will be subject to the most rigorous assessment by the various institutions set up within Kenya's legal framework.

45. As all the parties agree, the "factors which can render an appeal nugatory are to be considered within the circumstances of each particular case, and in doing so, the Court is bound to consider the conflicting claims of both sides." See Reliance Bank Ltd v Norlake Investments Ltd [2002] 1EA 227. In the present case, the applicant's case is that should the orders sought not be granted, there will be an influx of GMO foods into the country and, to the extent that their essential case is that the open cultivation and importation of such foods in the present regulatory and institutional framework threatens to violate several fundamental rights and freedoms of Kenyans and to the extent that once so introduced it would be difficult to withdraw. The applicant seeks for an opportunity to urge their appeal which, if it succeeds, will lead to the remittance of the consolidated petition back to the High Court for determination of the questions of violations of fundamental rights and freedoms.

46. We are persuaded that in the circumstances of this case, and given what is at stake, the precautionary principle militates in favour of granting conservatory orders during the pendency of the appeal. We say so because, as the applicant points out, the consequence of not granting conservatory orders would lead to the open cultivation and importation of GMO foods – the very action that is at the heart of the consolidated petition when the technical skirmishes are stripped off. While we take cognisance of the respondents' arguments that a court of competent jurisdiction ruled that Kenya has a comprehensive legal and institutional framework that effectively addresses potential adverse effects of GM products, we note that the High Court had imposed conservatory orders which kept things in status quo notwithstanding the ELC Petition's judgment.

47. We further note that the respondents do not contest that GMOs, once introduced in the country, are extremely difficult, if not impossible to reverse due to their biological persistence made possible by their ability to self-replicate and crossbreed with non- GMO varieties. Further, once farmers adopt GMO crops, removing them from supply chains is challenging while controlling seed distribution would be impossible at scale. Finally, controlling GMOs after widespread adoption would disrupt food production and trade in addition to potential exposure to legal liabilities from claims by patent holders and importers.

48. While the respondents opposed to the application correctly point out that the application seeks, in effect, an injunction against that which is not, technically, the direct subject of appeal, we observe that this Court's jurisprudence on Rule 5(2)(b) is aimed at preserving the elemental subject matter of the appeal. In the Kiru Tea Factory Company Limited v. Kenya Tea Development Agency Holdings Limited & 16 Others [2017] eKLR, this Court addressed the application of Rule 5(2)(b) of the Court of Appeal Rules. The Court emphasized that its jurisdiction under Rule 5(2)(b) is original, independent, and discretionary, enabling it to issue orders to preserve the subject matter of an appeal. This jurisdiction "is not only original and discretionary but is also distinct from its appellate jurisdiction". This ruling underscores that this Court can entertain applications under Rule 5(2)(b) independently, focusing on preserving the appeal's subject matter to ensure the appeal's efficacy is not rendered nugatory.

49. This principle was further reinforced in Equity Bank Limited v. West Link Mbo Limited [2013] eKLR, where the Court stated that an injunction under Rule 5(2)(b) seeks to balance the interests of the parties by ensuring that the appeal is not rendered nugatory if successful, and that the respondent is not unduly prejudiced. Therefore, the Court of Appeal has consistently held that applications under Rule 5(2)(b) are procedural mechanisms designed to preserve the subject matter of the appeal, irrespective of whether the injunction directly relates to the substantive issues on appeal.

50. When all is considered, we are persuaded that the public interest is served by issuing limited conservatory order aimed at preserving the status quo while being sensitive to the policy issues raised by the respondents by directing the expeditious hearing of the appeal. This course of action will, we believe, carefully balance the interests of all the parties – including the public interest in both securing the benefits of biotechnology in potentially addressing food insecurity in the country while ensuring that there is a comprehensive legal and institutional framework for addressing the potential adverse health, biological,ecological, social and economic effects of the introduction of GMOs into the country. Given the substantial arguments on both sides of the discourse, we have no doubt that a couple of months of sedimentation as the expedited appeal is processed and determined is well worth the wait.

51. We note, however, that some of the respondents have already taken certain actions following the ruling of the High Court which automatically vacated the conservatory orders. Consequently, we allow the application dated 05th January, 2025 only to the limited extent of retaining the status quo as it exists today. The order shall be that pending the hearing and determination of the intended appeal herein, an order of injunction be and is hereby issued restraining the 1st, 2nd, 3rd, 4th, 6th, 8th, 10th, 12th, 13th and 14th respondents herein either themselves, or through such other persons acting under their instructions from taking any further action aimed at allowing or permitting the importation of GMO crops and food into the country or otherwise taking any further action to advance the contents of the Dispatch from the Cabinet authored by the Executive Office of the President of Kenya, dated 03rd October, 2022 (Cabinet's Dispatch on GMO), regarding the lifting of the ban on the genetically modified organisms (GMO crops) or gazetting other directive or decision similar to the said decision dated 03rd October, 2022.

52. We further make directions that the intended appeal is certified urgent. The intended appellants shall file and serve the record of appeal together with their written submissions and authorities within twenty-one (21) days of today. All the respondents shall file and serve their written submissions and authorities within fourteen (14) days of service. The appeal shall be listed for hearing in the second term of this year, 2025.

53. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR