REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 1174 OF 2007

BETWEEN

KENYA SMALL SCALE FARMERS FORUM..... 1ST PETITIONER

MOSES SHAHA.....2ND PETITIONER

OMAR KUTARA.....3RD PETITIONER

JUSTUS LAVI.....4TH PETITIONER

ESTHER JEPKOGEI BETT.....5TH PETITIONER

KENYA HUMAN RIGHTS COMMISSION….....6TH PETITIONER

PAUL KUNGANIA RUKARIA.....7TH PETITIONER

AND

REPUBLIC OF KENYA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....INTERESTED PARTY

JUDGMENT

Introduction

1. This matter has a long history and this is the second bench reconstituted to hear it following the transfer of one of the judges in the initial bench empanelled to determine it.

2. The Petition is brought under **Section 84(1)** of the Repealed Constitution and it relates generally to a State's obligation in facilitating public involvement in public governance, formulation of public policy, legislative processes and in the present context, the formulation and conclusion of international agreements and treaties.

The Parties

3. The 1st Petitioner, Kenya Small Scale Farmers Forum ("KSSFF") is a society registered under the **Societies Act, Chapter 108 of the Laws of Kenya** with the goal of empowering small-scale farmers with capacities at all levels to enhance equal partnerships for sustainable and dignified livelihoods. According to its Constitution, some of its specific objectives include to mobilize small scale farmers for self-organization and collective voice, create awareness on the issues affecting small scale farmers in Kenya, campaign, lobby and advocate for change of policy in favour of small-scale farmers in Kenya and to build the capacity of small-scale farmers to enable them participate effectively in policy formulation by seeking to be self-reliant and effective national networks that will empower them to increase their visibility.

4. The 2nd, 3rd and 4th Petitioners are officials in KSSFF in the capacities of Chairman, Secretary and Treasurer respectively. The 5th Petitioner is a small scale farmer in Uasin Gishu District and she depones that she has as such taken substantial interest in the Economic Partnership Agreements (EPAs). The 6th Petitioner is a Nairobi-based human rights

organization founded in 1992 committed to the promotion and protection of human rights by all Kenyans.

Background

5. Kenya has in the past taken a number of measures in a bid to reform the trade sector, key among them being the movement of the country towards a free market economy. Pursuant to its international relationships with the European Union(EU) , Kenya has been engaged in various trade arrangements and its relationship with EU countries had for a long time been governed mainly by the *Lome Conventions*-which preceded the signing of the *Cotonou Protocol* in 2000.

6. As one of the African, Caribbean and Pacific (ACP) group of countries, Kenya engaged in negotiations with the EU over reciprocal free trade agreements known as the Economic Partnership Agreement (EPA) along with other countries. The negotiations were part of a new trading arrangement that was set to bring about rapid and almost absolute liberalization of trade between the ACP countries and the EU.

7. The EPA negotiations were structured to be undertaken in groups based on geographical configuration being the East and Southern Africa (ESA), Southern African Development Community(SADC), Economic Community of West African States(ECOWAS), Central African Monetary Union(CEMAC), the Caribbean Community(CARICOM) and the Pacific Group of countries(Pacific EPA). Kenya is in the group of countries whose negotiations with the EU were being conducted through the Eastern and Southern Africa (ESA) geographical configuration comprising about 16 countries.

8. The negotiations were being carried out on the basis of the *Contonou Partnership Agreement (CPA)* between the EU and ACP countries. The Cotonou Partnership Agreement ("The Agreement") is a comprehensive aid and trade Agreement between the 77 ACP Members States of the one part, and the EU and its Member States, of the other part, signed in Cotonou, Benin on 23 June 2000. The CPA contains the terms of agreement between the parties and provides the framework for EPA negotiations. There have been subsequent amendments to the CPA, the last one being in the year 2010. Kenya is one of the ACP countries that ratified the CPA.

9. By the time of filing the present Petition, trade negotiations were ongoing and were structured along three main phases with the first phase taking place between the year 2002-2003 centering on general issues and principles of EPAs of common interest to all ACP countries, the second was between 2003-2007 involving substantive negotiations at regional levels while the third phase(July 2009) was projected for finalization of the negotiations.

10. According to the EPA draft text, the objective of EPA was to *"Promote and expedite the economic, cultural and social development of the ESA countries, and with a view to contributing to peace and security and to promoting a stable and democratic political environment as well as regional integration."*

Petitioners' Case

11. The Petitioners' case is contained in the Petition dated the 24th October 2007 and the three supporting affidavits, being that of Moses Shaha, KSSF's Chairman, Esther Jepkogei Bett the 5th Petitioner and Muthoni Wanyeki, then Executive Director of KHRC, the 6th Petitioner dated 24th October, 2007. They also rely on the written skeletal arguments dated 24th March 2009 and the list of authorities of the same date.

12. The Petitioners are basically opposed to the operationalization of the CPA and commencement of the EPA for the reason that the said agreement is not in the interests of small scale farmers and is likely to have detrimental effects to the economy of the Country at large.

13. The Petitioners complain that subsequent studies on the impact of the EPAS on the Kenyan economy have revealed that their coming into force will lead to massive losses in agricultural produce and could push a large number of farmers out of work and extirpate their means of livelihood owing to the heavy subsidization of agricultural produce by the EU.

14. In support of the negative impact of EPAs, the Petitioners point to studies carried out by the Kenya Institute for Public Policy Research and Analysis (KIPPRA) on behalf of the Ministry for Trade and Industry dated September 2005 entitled "*Assessment of the Potential*

Impact of Economic Partnership Agreements (EPAs) on the Kenyan Economy" and the "*Economic and Welfare Impacts of the EU-African Economic Partnership Agreement"* published by the Africa Trade Policy Centre, a division of the UN Economic Commission for Africa.

15. According to these reports, the Agreements would lead to various negative impacts including loss of revenue to the tune of 6 to 9 billion Kenya shillings, loss of competitive edge for Kenyan industries and manufactured goods, competition under the principle of reciprocity, and difficulties in the area of market access for agricultural and non-agricultural products, increased competition from EU-based industries in a number of products and that ACP countries will have to cope with and bear adjustment costs as a result of revenue shortfalls, challenges to Kenya's major food commodities such as wheat, rice, sugar, dairy, maize, meat and meat products and restriction of movement of natural persons amongst other demerits.

16. The Petitioners aver that the coming into force of the EPAs could lead to food insecurity, undermine Kenya's food sovereignty and impede their self determination. It is their case that as studies have revealed, operationalization of EPAs will affect many sectors of the economy as they will open the Kenyan market or economy to cheap and heavily subsidized products from the EU, leading to unfair competition and which may ultimately lead to closure of the Kenyan manufacturing industries.

17. The Petitioners plead that the Government had not carried out any proper and adequate studies on potential human rights impacts of the EPAs and complain about the various detrimental effect that EPAs will have on a number of sectors of the Kenyan economy including fundamental reduction in government revenue collectible from trade tariffs and customs charges and in short urged that the said agreement is a violation or risked violating the Petitioners' fundamental rights.

18. The Petitioners also fault the process in which the *Draft Economic Partnership Agreement Text* was arrived at. They claim that the Draft Text does not address socio economic welfare concerns of the Petitioners and Kenyan citizens generally. They further fault the process of negotiations on the ground that the State was in breach of its obligation under international law by failing to involve them in the negotiations. At paragraph 24 of the Petition, they complain that; *"Contrary to the declared principles and basis for negotiations*

the EPA process has been solely driven by the Government of Kenya with selective and discriminative admission of participants, thereby excluding the Petitioners or their representatives from participation in the negotiations."

19. The 5th Petitioner swore an Affidavit dated 24th October 2007 in which she states that the Kenya government has failed to take into account the primary conditions that must inform and guide the negotiations before the EPA is signed between Kenya and its counter parts in the ESA group (within the ACP group) and the European Union. She deponed on several issues that Kenya had not complied with in the conclusion of EPA. These include;

- *Equal and effective participation of women and the involvement of non-state actors*
- *Consideration of non-tariff barriers which may impact negatively on EPAs*
- *Proper scrutiny and monitoring of the EPA negotiations in national parliaments in ACP countries throughout the process*
- *Effective safeguard measures to protect ACP producers from the influx of EU imports*
- *Demand that EU addresses issues of trade liberalization and of sequencing financial support for agriculture and fisheries during EPA negotiations.*

20. The KHRC filed an affidavit in support of the Petition dated 24th October 2007 sworn by its then Executive Director, Muthoni Wanyeki. KHRC faulted the process in which the government undertook the negotiations on the basis that no consultation had been carried and in particular that;

i. *[The government] refused to institute a mechanism that would ensure that the people, not drawn only from the private sector, have access to information and the opportunity to express their opinion at all stages of the negotiations.*

ii. *There has been no formal or official public hearings involving stakeholders and the citizenry.*

iii. *There is no evidence that Parliament has been involved and its approval and mandate sought.*

iv. *No impact assessments have been conducted by independent and non-partisan researchers and on inter-disciplinary basis.*

21. There is also an Affidavit filed on 21st May 2013 sworn by Andrew Odete, a Programme Officer at the KHRC to which is annexed a report commissioned on its behalf entitled, *"Study on the EAC/EU Economic Partnership Agreement: Current Status of Negotiations and the Implications to Kenyan Producers and Consumers (Interim Report)(**"KHRC-1").***

22. In the Petition dated 24th October 2007 the Petitioners seek the following main prayers:

a. ***A declaration that the conduct of ongoing negotiations on EPAs, the EPAs as presently conceived and the actions of the first respondent in regard to the said negotiations contravene sections 70(a), 70(b), 70(c), 71(1), 73(1), 74(1), 75(1) and 82(2) of the Constitution of Kenya in relation to the Petitioners.***

b. ***A declaration that the nature of the negotiations as reflected in the Draft Text will contravene the Petitioners' rights and freedoms including the right to life, the right to work, the right to earn a living or livelihood which encompasses or includes the rights to basic services such as the provision of water, security, education, roads and infrastructure.***

c. ***A declaration that the Petitioners have a right to participate in the on-going EPA negotiations***

d. ***An order directing the Respondents to take into account the Petitioners fundamental rights and freedoms and the human rights impact of EPAs.***

e. ***An order directing the respondents to establish a mechanism for involving stakeholders including the Petitioners in the on-going EPA negotiations.***

f. ***An order directing the First Respondent to make available to the Petitioners and other stakeholders all the relevant information on the on-going negotiations on EPAs.***

g. ***An order directing the Respondents to involve and consult Parliament and obtain its authority and mandate in negotiating and signing EPAs..***

h. ***An injunctive or conservatory order staying the signing of EPAs by the First Respondent pending and until the hearing and determination of this Petition.***

23. In their oral submissions, Mr Norwojee, Senior counsel for the Petitioners was emphatic that the Petitioners were more concerned about the process in which the EPA negotiations took place. Mr Norwojee submitted that the government was in breach of the provisions of the *Cotonou Agreement* which requires the State party to consult before signing of the EPA. It is the Petitioners case that there was no real or effective consultation with the non-state actors.

24. The Petitioners also contended that the Respondents had not furnished them with the information that would enable them make representations. That the negotiations kept changing and have been changing over the past five years and the Petitioners and the majority of small scale farmers lacked the requisite information and were *'in the dark'* on the current state of the negotiations.

That for the above reasons, they seek the orders set out above.

The Interested Party

25. As indicated above, the Interested Party, KNCHR was in support of the Petitioners' case and it also relied on the Supporting Affidavit of Eucabeth Oduol while Mr. Nduhiu

learned counsel for the Interested Party adopted Mr. Norwojee's submission adding that there was inadequate consultation as there was no feedback and further that the one seminar facilitated by the Respondent was inadequate.

Respondent's Case

26. The 1st Respondent opposes the Petition on the basis of the Replying Affidavit of Amos Kimunya, then Minister for Trade, skeleton submissions dated 16th September 2012. It also filed a Supplementary affidavit sworn on 11th December 2012 by **Eric Ronge,** the Director of External Trade at the Ministry of Trade in which it dismissed the Petitioners' claims as premature, moot and based on misplaced presumptions and falsehoods.

27. Mr Ronge defended the impugned agreement deposing that under the EPA, agricultural products have been largely protected by excluding them from liberalization. That all agricultural products form part of EAC sensitive products and that this position was motivated by the need to address food security and rural livelihood. That therefore, imports of agricultural produce will be facing the same import duty as imports coming from all other countries.

28. It was his deposition that EPA provided a means for Kenya to address the negative impact of the agriculture subsidies that EAC countries suffered through the subsidies by EU and other developed countries, through countervailing duties.

29. Generally, Mr. Ronge countered the Petitioners' allegations that Kenya stood to lose or gain very little as a result of the EPA agreement, deposing that Kenya stood to gain in many ways from the trade negotiations.

30. The Attorney General also opposed the Petition. Through the Grounds of Opposition dated 13th November, 2012, it is contended that the Petition was odious, premature, and speculative and has been overtaken by events. Further that Kenya is a dualistic State thus does not participate in self-executing treaty provisions and that any Economic Partnership agreement must be ratified by Parliament. It was further contended that issues of Economic

Partnership Agreements are polycentric and thus the Court was limited in its adjudication and the Petition should therefore be dismissed.

Determination

31. Several issues were canvassed by the parties in the pleadings regarding the impact of the impugned negotiations and agreement. However, after evaluating the material before us and after listening to the parties, the only issue that falls for our determination concerns the extent of the State's obligation to allow public participation in public policy processes.

Preliminary issues

32. Before we embark on the substance of these issues, we find it crucial to address a few preliminary matters arising out of Submissions made by the Parties, Firstly, it has to be borne in mind that this court is not called upon to carry out an appraisal of the impugned agreement or negotiations to satisfy itself whether or not they are good for Kenya. Those are matters of policy of which this court is not best suited to handle. The dissenting decision of the Supreme Court in ***U.S v Butler,* 297 U.S. 1[1936],** is apposite in this regard that; ***"…courts are concerned only with the power to enact statutes, not with their wisdom….For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government."***

33. This brings to fore the doctrine of separation of powers and the extent of the Court's intervention in governmental functions that was raised on behalf of the Attorney General as one of the grounds of opposition. It was proffered in that regard that Economic Partnership Agreements are dealt with by the political arms of Government and as such this Court needed to exercise restraint in view of the doctrine of separation of powers.

34. This court has on several occasions dealt with the extent of its powers *vis a vis* other government organs. The common denominator running across these authorities being the holding that where there is a breach of the Constitution, or where certain actions are challenged on the basis of their unconstitutionality, the High Court will not hesitate to exercise its supervisory and enforcement jurisdiction bestowed upon it under **Article 165** to protect and promote fidelity to constitutional values. (See generally **Federation of Women Lawyers of Kenya (FIDA – K) and Others v Attorney General and Others Nairobi Petition No. 102 of 2011**, **Trusted Society of Human Right Alliance v Attorney General**

Nairobi Petition No. 299 of 2012, Jeanne W. Gacheche and 6 Others v Judges and Magistrate's Vetting Board and Others Nairobi Judicial Review No. 295 of 2011, 433, 434 and 438 of 2012, International Centre for Policy & Conflict & 5 Others **v** Attorney General *& 4 Others***,** Petition No 552 **of** 2012, **Diana Kethi Kilonzo and Another v The Independent Electoral & Boundaries & 2 Others, Petition No. 359 of 2013).**

35. The Court of Appeal in the recent case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others, Civil Appeal No. 290 of 2012 of 2012 [2013] eKLR**, had this to say on separation of powers:

> ***"(49) It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such***
>
> ***powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court's dicta in the petition the subject of this appeal that:***
>
> ***"[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role - including the last word in determining the constitutionality of all governmental actions..."***

36. The Supreme Court in ***Re the Matter of the Interim Independent Electoral Commission [2011] eKLR, SC Constitutional Application 2 of 2011*** elucidated the essence of separation of powers thus:

> ***"[53] Separation of powers is an integral principle in Kenya's Constitution: for instance, Chapter 8 is devoted to the Legislature; Chapter 9 to the Executive; and Chapter 10, on the Judiciary, provides (Article 160(1)) that:***
>
> ***"In the exercise of judicial authority the Judiciary as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority".***

[54] The effect of the Constitution's detailed provision for the rule of law in the processes of governance, is that the legality of executive or administrative actions is to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several governmental organs functions in splendid isolation.."

37. In the case of ***Minister of Health and Others v Treatment Action Campaign and Others*** **(2002) 5 LRC 216**, **248** at paragraph 99, the South African Constitutional Court defined the constitutional duty of the Court in the following terms:

"The primary duty of Courts is to the Constitution and the Law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfill the rights in the Bill of Rights. Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself."

38. Similarly, in the ***Doctors for Life Case Doctor's for Life International v The Speaker National Assembly and Others 9CCT12/05)[2006] ZACC II*** the Court noted as follows regarding the delicate balance; at para. 70;

"What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfill in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand."

We agree with and adopt these sentiments which now form the back bone of our determination.

39. The second preliminary matter regards the applicable law. It is notable that this matter was initiated in the year 2007 long after the initial phase of the negotiations had began and

when the negotiations were ongoing and before the promulgation of the Constitution of Kenya, 2010. We shall thus confine ourselves to the repealed Constitution save that the provisions of the current Constitution will be evoked where necessary especially in view of the fact that the negotiations continue to take place post the promulgation period. (For the proposition that the Constitution does not operate retrospectively, See generally the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application 2 of 2011, Joseph Ihuro Mwaura & 82 Others v The Attorney General & Others Nairobi Petition No. 498 of 2009.**

40. The other notable issue is that the Petition does not particularize the specific infringements or violation of fundamental rights and freedoms of the Petitioners. It is trite law that where a petitioner seeks relief from the court for breach of fundamental rights and freedoms, he must set out with precision the rights violated and the manner in which the rights have been violated in relation to him. (See **Anarita K Njeru v R (No. 1) (1979) KLR 154 , Cyprian Kubai v Stanley Kanyonga Mwenda Nairobi HC Misc. No. 612 of 2002 and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (supra)).**

41. The Petitioners in that regard couch their case primarily on the breach of a treaty agreement, to wit, the *Cotonou Protocol* and which provides for engagement and participation of non-state actors in the negotiation. The law as we understand it is that breach of international law attracts international sanctions. Unless the Petitioners can demonstrate that as a result of the breach of treaty provisions, their rights have been or are likely to be infringed, we find that the treaty provisions providing for public participation cannot be directly enforced in the Kenyan courts under the former constitutional regime absent domestication or direct infringement of rights known under the country's Constitution. Things however are different in the current constitutional dispensation as these treaties now form part of the laws of Kenya (See Article 2(6)).

We now turn on to examine the State's obligations as below;

Public participation

42. The Petitioners' case is anchored on the failure of government to involve them in the negotiations. In a nutshell, the Petitioners and the Interested Party are aggrieved by what they term as the lack of consultation by the Government on the current status of the negotiations or consultation on the consequential, adverse or beneficial effects therefrom. They claim that there has neither been an invite for the Petitioners to participate in the current negotiations nor the assessment of the consequential implications therein. Mr. Norwojee S.C. urged that the

one off consultation over a span of five years could not be said to be effective participation as the stakeholders had not met since then. It was further their case that failure by the State to provide the requisite information regarding the negotiations curtailed their ability to put forth their views.

43. All parties are agreed that the repealed Constitution did not contain express provisions requiring the State to ensure public participation in public policy decisions. We thus turn to the international framework. The Petitioners have urged that the State was and is under a duty to involve them by dint of the various international instruments to which Kenya is a party.

44. International instruments recognize the general right to political participation that extends beyond the right to vote. **Article 21** of the **Universal Declaration of Human Rights (UDHR)** provides as follows;

> ***"1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.***
>
> 2. ***Everyone has the right to equal access to public service in his country.***
>
> 3. ***The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."***

45. We also have the ***African Charter on Human and Peoples' Rights***, which provides as follows; At **Article 9;**

> *"**1. Every individual shall have the right to receive information.***
>
> 2. ***Every individual shall have the right to express and disseminate his opinions within the law."***

At **Article 13**:

> ***"1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.***
>
> 2. ***Every citizen shall have the right of equal access to the public service of his country.***
>
> ***3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law."***

46. The ***International Covenant on Civil and Political Rights (ICCPR)*** is even more telling. At ***Article 25***, it provides that;

> ***"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions;***
>
> ***(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;***
>
> ***(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;***
>
> ***(c) To have access, on general terms of equality, to public service in his country."***

47. **Article 25** has received further interpretation through the **UN Human Rights Committee's General Comment 25(1996)UN Doc CCPR/C/21/Rev.1/Add.7.)** whose pertinent parts read as follows;

> "*1. Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.*
>
> *5. The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of*

legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by Article 25 should be established by the constitution and other laws.

6. Citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office. This right of direct participation is supported by paragraph (b). Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b). Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government. Where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation on the grounds mentioned in article 2, paragraph 1, and no unreasonable restrictions should be imposed.

7. Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in Article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power. It is also implicit that the representatives exercise only those powers which are allocated to them in accordance with constitutional provisions. Participation through freely chosen representatives is exercised through voting processes which must be established by laws that are in accordance with paragraph (b).

8. Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves.This participation is supported by ensuring freedom of expression,assembly and association.

25. In order to ensure the full enjoyment of rights protected by Article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas."

48. The following pointers emerge from these comments;

i) Firstly, that the right to public participation is broad and open- textured and requires a State party to provide for the modalities of such participation in legislative or constitutional provisions.

ii) Secondly, that citizens may exercise their right to public participation either directly or through democratically elected representatives.

iii) Third, that for this right to be actualized, there ought to be free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.

49. Many Countries of the world have moved on to recognize public participation as a crucial aspect in the realization of human rights. Such jurisdictions have laid down constitutional and legislative platform to actualize this right. In South Africa for example, the Constitution imposes an obligation on the legislatures at all levels to facilitate public involvement in the legislative and other processes of its committees. The Court in the ***Doctor's Life Case*** (Supra at para. 105) observed that*;*

"The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation."

50. The essence of public participation has also been captured in the subsequent case of ***Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others*, CCT 86/08 [2010] ZACC 5**, where the same Court stated as follows:

"…engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.

[34] As this Court observed in Doctors for Life, both the duty to facilitate public involvement and the positive right to political participation "seek to ensure that citizens have the necessary information and the effective opportunity to exercise the right to political participation." This can be

achieved not only through elected representatives, but also by enabling citizens to participate directly in public affairs, "through public debate and dialogue with elected representatives, referendums and popular initiatives or through self-organisation".

51. The issue of direct public participation presents a cocktail of issues that all go to the heart of this matter. As observed earlier on in the judgment, the old Constitution did not provide for public participation. Further this Court as already stated, is not concerned about the merits or quality of the impugned negotiation agreements but is assessing breach of the fundamental rights and freedoms which in any case, have not been pleaded with the particularity that they deserve by the Petitioners. The Petitioners also rely primarily on international instruments including the UDHR, the ICCPR and the *Cotonou Agreement* to couch the State's responsibility to allow public participation but it is to be noted that there was no express provision assimilating these international agreements directly into national legislation under the old constitutional regime.

52. Prior to the promulgation of the Constitution 2010, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if Parliament domesticated the particular treaty or convention by passing the relevant legislation. **(**See **Beatrice Wanjiku & another v Attorney General & another, Petition No. 190 of 2011** para. 17)**.** An issue that would then arise is whether the State's obligation can be enforced purely on the basis of these international instruments. Our simple answer is no. (See para. 41 above).

53. However, that is not the end of the matter. It is common ground that the negotiations are still ongoing and so the question here is whether the court should fold its hands and do nothing even in the face of the new Constitutional dispensation? We think not. And for obvious reason already aforementioned. These negotiations continue to take place in the new constitutional dispensation in which public participation is underlined and international agreements espoused in the new Constitutional regime. But before we embark on the new provisions and their implications on the ongoing process, we find it necessary to mention something about the Cotonou *Agreement* that is the basis of the impugned negotiations.

54. Pertinent to the disposition of the matter is the requirements of the Agreement as far as involvement of non-State actors is concerned. **Articles 2, 4** and **7** of the Agreement are relevant. **Article 2** provides 'participation' as one of the fundamental principles . On this, it

states that, "*apart from central government as the main partner, the partnership shall be open to ACP parliaments, and local authorities in ACP States and different kinds of other actors in order to encourage the integration of all sections of society, including the private sector and civil society organisations, into the mainstream of political, economic and social life**;"*** **Article 4** goes on to acknowledge the sovereignty of all ACP States in determining the development principles, strategies and models of their economies and societies. The Article goes on to provide thus, *"However, the parties recognise the complementary role of and potential for contributions by non State actors, ACP national parliaments and local decentralised authorities to the development process, particularly at the national and regional levels. To this end, under the conditions laid down in this Agreement, non-State actors, ACP national parliaments and local decentralized authorities, shall, where appropriate:*

> *- be informed and involved in consultation on cooperation policies and strategies, on priorities for cooperation especially in areas that concern or directly affect them, and on the political dialogue; be provided with capacity-building support in critical areas in order to reinforce the capabilities of these actors, particularly as regards organisation and representation, and the establishment of consultation mechanisms including channels of communication and dialogue, and to promote strategic alliances."*

55. The Petitioners have invoked the provisions of the Agreement to buttress their case that the State was under an obligation to involve, indeed ensure the participation of the non-state actors including the Petitioners. This now brings us to the crux of the issue regarding public participation in the new Constitutional dispensation.

56. Under the new Constitution, various changes have permeated governance and indeed the conduct of public affairs. The Constitution and in particular **Article 2(5)** and **2(6)** gave new colour to the relationship between international law and international instruments and national law. **Article 2(5)** provides;

> ***"The general rules of international law shall form part of the law of Kenya"*** and **Article 2(6)** provides that ***"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."***

57. One of the golden threads running through the current constitutional regime is public participation in governance and the conduct of public affairs. The preamble to the Constitution recognizes, *"the aspirations of all Kenyans for a government based on the*

essential values of human rights, equality, freedom, democracy, social justice and the rule of law." It also acknowledges the people's *'sovereign and inalienable right to determine the form of governance of our country…"* ***Article 1*** bestows all the sovereign power on the people to be exercised only in accordance with the Constitution. One of the national values and principles of governance is that of 'inclusiveness' and 'participation of the people.' Other principles include rule of law, democracy, human rights, integrity, transparency and accountability. These principles bind all State organs, State officers, public officers and all persons generally. Under **Article 129**, executive authority derives from the people of Kenya to be exercised in accordance with the Constitution. **Article 129(2)** provides that *"Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and their well-being and benefit."* Treaties are executed by the executive on behalf of the State and at the national level, Parliament established under **Article 94** acts as the custodian of the legislative authority of the Republic. Under Article **94(2)** ***"Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty."*** There are also other pertinent provisions such as the right to access information protected under **Article 35** which states that;

"*35. (1) Every citizen has the right of access to*—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation."

58. In the ***Doctors of Life Case(supra),*** the Court explained that the duty to facilitate public involvement in the legislative process is an aspect of the right to political participation recognized in affairs of State and enabled and anchored by other rights and fundamental freedoms such as the freedom of expression, association and freedom of access to information. All these rights and fundamental freedoms are to be found in **Articles 33**, **35** and **36** respectively of our Constitution.

59. Until 14th December 2012, Kenya lacked a legislative framework governing the process of making and ratification of Treaties. Parliament then enacted the *Treaty Making and Ratification Act,* No. 45 of 2012 **("the Act')** which commenced operation on 14th December, 2012. According to its long title, it is ***"AN ACT of Parliament to give effect to the provisions***

***of Article 2(6) of the Constitution and to provide the procedure for the making and ratification of treaties and connected purposes*.”**

60. This marked a departure from the past whereby treaty making processes were camouflaged in a shroud of mystery with the public having little or no knowledge on their existence or operation. Gladly, all that will be in the past. Under the Act, the national executive is responsible for initiating the treaty making process, negotiating and ratifying treaties, though this responsibility may be delegated to the relevant State department.

61. In negotiating treaties, the national executive or the relevant State department is to be bound by the values and principles of the Constitution and is to take into account the regulatory impact of any proposed treaty (Section 6). The Act injects transparency in the treaty making process by providing for cabinet and parliamentary approvals. It also promotes public awareness by providing for approval and tabling of the treaties before the National Assembly annually and the publication of the same in the local dailies. **Section 12** makes it a criminal offence for any person to sign the treaty on behalf of the Government without Cabinet and Parliament approval in accordance with the Act.

62. However, it is notable that all these progressive provisions have not been alive in yester years and hence cannot operate to bind actions taking place prior to their enactment. The law is that an Act is presumed to be of prospective effect unless the contrary is expressed. (*See* Supreme Court decision in ***Samuel Kamau Macharia case (supra)).***

63. The Court in ***Commission for the Implementation of the Constitution v Parliament of Kenya and another*, Petition No. 454 of 2012**, had a chance to deal with the constitutionality of the ***Leadership and Integrity Act*, No. 19 of 2012** on the basis, *inter alia*, that there was no public participation, the Court observed as follows:

> ***“[74] The National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is affected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public. Indeed, as Sachs J observed in Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at para. 630, “The forms of facilitating an appropriate***

degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."

64. In the South African case of ***Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others [2008] ZACC 10*** it was observed at paras 50, 51; "*…But being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them. [51] To say that the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public."*

65. In the circumstances of this particular case, we are of the view that it is still not too late in the day for the State to involve the public, including the Petitioners, in the negotiations leading to the agreement. As already seen, the Act stipulates a mechanism of appraisal before the same is ratified and there is therefore still room for participation as participation from the initial process was curtailed for various reasons, key among them being that there has in the past been no domestic legislative or constitutional framework requiring the State to employ direct public participation in policy matters. As discussed earlier, even the **UN General Comment No. 5** recognises at **paragraph (5)** as follows;

"5. The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws. "

66. Therefore, in the absence of Constitutional or other legislative provisions governing the right to participate in the conduct of public affairs, then the State cannot be held at fault. We are also of the view that public participation need not be at the pre-legislative process. The Act as we have seen provides for various modes of approval even before the agreements can be ratified by the Parliament.

67. We also find solace in the sentiments expressed by Yacoob J. in his dissenting opinion in the ***Doctors for Life case (supra)*** where he remarked that,

> *"328]…**Any contention that the ICCPR, on any interpretation requires member countries to ensure that it is essential for the public to be consulted before legislation is adopted and the legislation to be invalid absent consultation would, in my view, be liable to rejection with the ridicule it deserves. Nor can it be said that the addition of the word "opportunity" in the introduction to the section improves the position. The kind of right contemplated would have to be facilitated by a government whether the word "opportunity" was in the text of the document or not. The hard fact is though that the provisions of the ICCPR are satisfied by indirect participation reasonably restricted; DFL wants unrestricted indirect participation as well as substantial direct participation. It is not necessary to go through any of the other international instruments. All of them are understandably satisfied with indirect participation without any direct component.***
>
> ***[329] I have examined many constitutions. None of them properly read provide that legislation will be invalid unless some generally stated unspecific requirement of public involvement is fulfilled. Many have manner and form provisions that are clear and specific and that facilitate a measure of public involvement. I have found no judgment of any court anywhere in which a legislative provision properly adopted in an open legislature and having been read through in the way required by the relevant instrument has been found to have been inconsistent with the constitution on the basis of non-compliance with some generalised public involvement provision even if the prescribed manner and form provisions have all been complied with."***

68. Similar views had earlier been expressed in ***Marshall v Canada*, Communication No. 205/1986, UN Doc CCPR/C/43/d/205/1986(1991)** where the United Nations Human Rights Committee expressed itself as follows*:*

> ***"5.4 It remains to be determined what is the scope of the right of every citizen, without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives. Surely, it***

cannot be the meaning of article 25(a) of the Covenant that every citizen may determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives. It is for the legal and constitutional system of the State party to provide for the modalities of such participation.

5.5 ...Although prior consultations, such as public hearings or consultations with the most interested groups may often be envisaged by law or have evolved as public policy in the conduct of public affairs, article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a).”

69. We are persuaded by these arguments and find that the fact that the State did not directly involve the Petitioners cannot be said to invalidate the whole process, which now, even as we speak is understandably in its final stages. We also cannot find the State to have been in breach of provisions which were not in existence at the infant stages of the negotiations.

70. This however does not exonerate the State of its duty post 27th August 2010 when it is bound by the various principles enunciated earlier on in this judgment as the EPA negotiations are an ongoing process.

Conclusion

71. The question then begs, ‘What is the appropriate relief to issue? The appropriate relief in our view is one that will allow for the executive to proceed with its task to conclude the agreements while at the same time allowing the Petitioners to have full access to the information relating to the negotiations so as to make appropriate contributions if they so wish in fulfillment of **Article 4** of the **Cotonou Protocol.**

72. Most of the reliefs sought in the Petition centered around the expected impact of the EPAs and the infringement to fundamental rights. These however are moot and cannot issue as the Court adopted a narrower issue to wit, the State’s obligation to facilitate public participation in governance. The only relief that commends itself is to direct the respondents to put in place mechanisms to facilitate participation of the stakeholders in the ensuing process.

73. These then are our final Orders;

> *i) We direct the Respondents in consultation with the Petitioners within **Thirty days** to establish a mechanism for involving stakeholders including the Petitioners in the on-going EPA negotiations.*
>
> *ii) That the Respondents publishes information within **Thirty days** regarding the negotiations in particular, but not limited to publishing in at least two dailies and other official communication the progress of the negotiations for public awareness and in order to stimulate public debate.*

74. Given the public interest nature of this Petition, we shall not award costs.

75. We thank the counsel who appeared before us for their erudite and helpful submissions. If we did not refer to each argument and every authority cited it is not because it was not helpful.

76. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 31ST OCTOBER, 2013

….....

ISAAC LENAOLA

JUDGE

….....

MUMBI NGUGI

JUDGE

….....

DAVID S. MAJANJA

JUDGE