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Association for Plant Breeding for the Benefit of Society

Judgement of the Machakos High Court in the case Kisilu Musya and Samuel Wathome Vs the Kenya Plant Health Inspectorate Service concerning the Kenyan plant breeders' rights legislation

Below, we describe the ruling of the Machakos High Court (Kenya) of November 27, 2025, in which parts of the Seeds and Plant Varieties Act were deemed unconstitutional (case number: HCCHRPET/E011/2022). Kenya's Seeds and Plant Varieties Act covers both seed legislation and plant breeders' rights. In their successful lawsuit, the plaintiffs challenged articles from both parts of the Act.

In this summary, we will only focus on the part of the lawsuit that was directed against the Kenyan plant breeders' rights legislation. Kenya is a member of UPOV 91, and its legislation is therefore considered in line with UPOV 91.

The whole judgement could be downloaded at

<https://de.scribd.com/document/959810259/Seed-Act-Judgment-1>.

The Petition

By a petition dated 25th July 2022, and submissions dated 29th February 2024, the petitioners challenge the constitutionality of the impugned sections/provisions for reasons that they provide for the criminalization of selling, sharing and exchange of unregistered, uncertified and protected seeds.

As a starting point, the petitioners emphasized that Kenya acceded to the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture, which under Article 9 defines farmers' rights. They also contended “*that said rights are recognized and guaranteed by the 2001 African Model Legislation, citing Articles 26(1)(d) and 32 which expressly permit farmers to ‘save, exchange and use part of the seed from the first crop of plants which they have grown for sowing in their own farms to produce a second and subsequent crop’.* In addition, they relied on Articles 2(1), 2(3), 19(1) to (3), (5) and (6) to (7) of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP), to support the assertion that farmers have the right to save, use, exchange and sell farm-saved seed/propagating material.”

The petitioners argued that “*Section 20 (1) of the Act is an unnecessary infringement on their own rights and the rights of other farmers to save, use, exchange and sell farm-*

saved seeds and other propagating material. They submit that Section 20(1E) of the Act requiring that within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, farmers may use the product of the harvest which they have obtained by planting, on their own holdings, the protected variety, removes the farmers freedom to deal with their own harvest, breaches the farmers right to food, contrary to Article 21(2) and 43(1) (c) of the Constitution. It is their case that the rights of farmers and plant breeders can be protected without necessarily violating the rights of farmers.”

The relevant Articles of [Kenya's Seeds and Plant Varieties Act](#)

20. Nature of rights

(1) Subject to this Part, and of any other written law, the holder of plant breeder's rights in a plant variety shall have the exclusive right to do, and to permit others to do, the following—

- (a) production or reproduction;
 - (b) conditioning for the purpose of Propagation;
 - (c) offering for sale;
 - (d) selling or other marketing;
 - (e) exporting;
 - (f) importing, or
 - (g) stocking for any of the purpose set out in the foregoing paragraphs.
 - (h) in the circumstances described in the Fifth Schedule to this Act, to this Act, to exercise the other rights therein specified,
- and, [...]

20. (1E) Notwithstanding the provisions of subsection (1), within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, farmers may use the product of the harvest which they have obtained by planting, on their own holdings, the protected variety

The petitioners' case states that the “*said provisions infringe their rights to be free from and to have adequate food of acceptable quality (right to food) guaranteed by Article 43(1) of the Constitution.*”

The third interested party impugned “*Section 20(1) and 20(E) of the Act for granting exclusive and extensive proprietary rights to plant breeders, that is, exclusive control over production, reproduction, marketing and stocking, which restricts farmers from engaging in traditional practices of saving, reusing and sharing seeds from harvested crops of protected varieties. It is further submitted that this provision creates economic dependency on commercial breeders, undermining the economic and food rights of farmers and the marginalized protected by Article 43. They rely on Centre for Rights Education and Awareness (CREAW) & 7 Others vs Attorney General [2011] eKLR to persuade the Court that laws which disproportionately affect marginalized groups are unconstitutional.*”

Based on the foregoing, the petitioners sought the following reliefs:

- *“A declaration that Section 20(1) and 20(1E) of the Seed and Plant Varieties Act, Cap 326, is wholly unconstitutional and therefore void and invalid in terms of Article 2(4) of the Constitution, and it accordingly stands to be struck from the statute.*

- *Whether Section 10(4)(c), (d), (e), (f), and (g) of the Act, as read with Regulation 6(1) of the Regulations and Sections 20(1) and 20(1E) of the Act, violates Article 43(1)(c) read 21(2) of the Constitution.”*

The relevant articles of the [Kenyan Constitution](#)

2. Supremacy of this Constitution

[...]

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

21. Implementation of rights and fundamental freedoms

(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

43. Economic and social rights

(1) Every person has the right— [...] c) to be free from hunger, and to have adequate food of acceptable quality;

The Ruling

The judge argued *“that a reading of the constitutional obligations, the State has the obligation to ensure the realization of the right to be free from hunger and to ensure adequate food for the people of Kenya.*

Small-scale farmers, including the petitioners and especially those in rural areas, greatly contribute to the food basket in Kenya whether through subsistence farming or for commercial purposes. The majority of Kenyan farmers are also greatly dependent on the savings of their harvest, exchange and sale of the seeds and propagating materials to ensure the continuity of their produce.

Therefore, to criminalize the sale of seeds unless by registered merchants, the sale of uncertified seeds, and to limit dealings in the farmers’ harvest from protected varieties, unless with authorization from the plant breeders, violates Articles 21(2) and 43(1) of the Constitution.

Furthermore, the provisions of section 20(1) and 20(1E), by granting exclusive reproduction, marketing and stocking control to the plant breeders, even of harvest by farmers from the use of protected varieties, create economic dependency on

commercial breeders, further undermining Articles 21(2) and 43(1)(c) of the Constitution. The small-scale farmers' freedom to deal in their harvest and products is unreasonably extinguished."

Consequently, the judge found *"the petition meritorious and allow it in the following terms;*

e) Section 20(1) of the Seed and Plant Varieties Act is hereby declared unconstitutional, for violating Articles 21(2) and 43(1)c of the Constitution.

f) Section 20(1E) of the Seed and Plant Varieties Act is hereby declared unconstitutional, for violating Articles 21(2) and 43(1)c of the Constitution"

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