REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS COUNTY

COURT NAME: MACHAKOS HIGH COURT

CASE NUMBER: HCCHRPET/E011/2022

KISILU MUSYA AND SAMUEL WATHOME AND 3 OTHERS VS THE KENYA PLANT HEALTH INSPECTORATE SERVICE AND GREENPEACE ENVIRONMENTAL KENYA NPC AND 1 OTHERS

JUDGMENT

A. Background to the petition

1. Parliament enacted the Seeds and Plant Varieties Act, Cap 326 (the Act), which was assented to on 16th May 1972. The Act was amended severally. On 30th October 1998 by the Seeds and Plant Varieties (Amendment to the Fourth Schedule) Rules, 1998 (Legal Notice 152 of 1998), on 7th June 2002 by the Statute Law (Miscellaneous Amendments) Act, 2002 (Act No. 2 of 2002), on 4th January 2013 by the Seeds and Plant Varieties (Amendment) Act, 2012 (Act No. 53 of 2012), and on 21st September 2016 by the Seeds and Plant Varieties (Amendment) Act, 2016 (Act No. 32 of 2016). Finally, on 31st December 2022, the Act was revised by the 24th Annual Supplement (Legal Notice 221 of 2023).

2. On the other hand, the Seeds and Plant Varieties (Seeds) Regulations (the Regulations) were published on 3rd February 2017 in the Kenya Gazette Vol. CXIX—No. 15, and commenced on even date. The Regulations were revised on 31st December 2022 by the 24th Annual Supplement (Legal Notice 221 of 2023).

3. The 2022 revision of both the Act and the Regulations is the subject matter of this petition. Particularly, the petitioners challenge the constitutionality of Sections 3D (1), 8(1), 8A (1), 10(4)(c, d, e, f and g) 20(1), 20(1E) and Rules 6, 9(5), 16, 19, and the Fifth Schedule (the impugned sections/provisions).

B. Petitioners' Case

4. 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. They contend that this action negates the farmers' rights guaranteed under the Constitution

and international treaties applicable in Kenya.
5. Concerning the violations of International Law obligations, the petitioners urge that Article 2(5) of the Constitution of Kenya (the Constitution) provides that General Rules of International Law shall form part of Kenya’s law, and Article 2(6) of the Constitution incorporates international treaties to which Kenya is a party as part of Kenyan Law. Armed with these constitutional provisions, the petitioners argue that the impugned provisions violate Kenya''s International Law obligations. They rely on the High Court decision in Wanjiku & another vs Attorney General & another; Muna & another (Interested Parties) [2012] KEHC 5410 (KLR) to urge that government, through its executive, ratifies international instruments in good faith on behalf of and in the best interests of the citizens, and that purposive interpretation and application of international law,must be adopted when considering the effect of Article 2(5) and 2(6) of the Constitution.
6. As a starting point, they emphasize that Kenya acceded to the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (the International Treaty) which under Article 9.2 defines farmers rights to include the protection of traditional knowledge relevant to plant genetic resources for food and agriculture; the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture. They further cite, Article 9.3, which provides that nothing under Article 9 shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.
7. The petitioners also contend that the said rights are recognized and guaranteed by the 2001 African Model Legislation (the OAU), whose objective, as per its Preamble, is to recognize, protect and support the inalienable rights of local communities, including farming communities, over their biological resources, knowledge and technologies. Similarly, Article 24(1) of the OAU, justifies the existence of farmers’ rights, from the continued ‘enormous contributions that local farming communities have made in the conservation, development and sustainable use of plant and animal genetic resources that constitute the basis of breeding for food and agriculture production.
8. It is the petitioners’ further case that, Article 24(2) of the OAU affirms that, for farmers to continue making significant contributions to the conservation, development and sustainable use of plant genetic resources, their rights have to be recognized and protected. They also cite 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’.
9. In addition, they rely on Articles 27(3b) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and 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 famers have the right to save, use, exchange and sell farm-saved seed/propagating material.
10. On breaches of fundamental rights guaranteed by the Constitution, the petitioners state that the impugned provisions violate Article 19(3) which provides that the rights and fundamental freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with the Constitution. Consequently, they contend that the accession to the International Treaty and the OAU by Kenya means their respective provisions (on farmers’ rights) form binding obligations capable of enforcement in Kenya by dint of Article 2(6) of the Constitution. Further, that the farmers'' rights recognized therein on saving, sharing, selling and exchanging seeds among local communities are part and parcel of the petitioners’ Bill of Rights, necessitating protection and enforcement by the state.

11. It is the petitioners' case 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. In addition, the provisions are in breach of Kenya's obligation to 'take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the right to food obligated under Article 21(2) and the obligation to ensure the protection and enhancement of intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities guaranteed by Article 11 also, echoed by Articles 9.1 and 9.2 of the International Treaty.

C. Particulars of breach

12. The petitioners contend that Section 10 of the Act is vague and expressed in ambiguous language, does not state the scope or specify the acts or omissions attracting criminal sanctions. More so, the scope of the term seed under section 10(4) is unclear and ambiguous, and the wording "sales or displays for sale any seed" under section 10(4)(e) is too wide and ambiguous. As a result, they urge that the said provision violates the rule of law and principles of legality requiring all laws with criminal penalties to be sufficiently clear, not vague and overbroad to limit understanding of its scope, to avoid its arbitrary enforcement.

13. The petitioners argue that the purpose of the Act excludes, ignores or fails to recognize the existence of indigenous seeds in Kenya, particularly in the informal sector. They contend that the purpose of the Act is directly contrary to the Constitution, which recognizes the existence and importance of indigenous seeds and the biodiversity of local communities and their respective indigenous knowledge. It is asserted that by requiring the registration of seeds merchants, certification and registration of seeds in Kenya, and criminalization of the exchange of uncertified seeds, Section 10 upsets the Constitution. The petitioners insist that the requirement for registration and certification takes away the indigenous characteristic of the seeds informally exchanged by small-scale farmers in the rural setup in Kenya.

14. It is the petitioners' further case that the violations by the impugned provisions are unjustifiable and unreasonable limitations under Article 24 of the Constitution.

15. They expound that first, Sections 3D (1) of the Act and Regulation 21(1, 2, 3, 4, 5) of the Regulations, as far as they provide for the seizure of seeds, are unreasonable and unconstitutional. They add that this amounts to a limitation of the right to privacy enshrined under Article 31(a) of the Constitution, which guarantees the right not to have their person, home, or property searched; and Article 31(b), which guarantees the right not to have their possessions seized. Therefore, they argue that Sections 3D and Rule 21 expose farmers to arbitrary searches of their homes, farms and warehouses and seizure of seeds by the inspectors from the Kenya Plant Health Inspectorate Service (KEPHIS).

16. The petitioners also contend that Sections 3D (1) of the Act and Regulation 21(1, 2, 3, 4, 5) of the Regulations limit the constitutional right to property under Article 40(1) in that they give blanket powers to inspectors to search, seize and detain farmers'' seeds based on their belief. Further, they limit the right to fair administrative action under Article 47(1,2) of the Constitution in that the power given to the inspector to search, seize and detain seeds based on the mere belief that a violation of the Act has been committed denies the farmers and/or owners of these seeds a fair administrative action, and the vague nature of section 3D (1) of the Act can lead to arbitrary arrest and prosecution.

17. Secondly the petitioners submit that Section 8(1) of the Act contravenes Article 11(3) of the Constitution which directs the government in mandatory terms to enact legislation to recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya, by prohibiting the sale of un-indexed seeds hence preventing farmers from selling indigenous seeds. That it also contravenes Article 27 on

equality and equal protection by the law in that the provision allows the sale/use of such un-indexed seeds/indigenous seeds outside Kenya and not in Kenya.
18. Thirdly, the petitioner contends that the mandatory requirement for registration and certification of seeds under Section 10(4c, d, e, f and g) of the Act unreasonably and unjustifiably contravene Kenya's obligations under Article 2(5 & 6) of the Constitution, as read with Article 1, 19(d), 19(2) of UNDROP in that it fails recognize the rights of peasants and/or local Kenyan farmers right to seeds and their realities of limited resources by mandating them to use only certified and registered seeds; fails to recognise the right to save, use, exchange and sell their farm-saved seed or propagating material; and fails to recognize the right to maintain, control, protect and develop their own seeds and traditional knowledge, respectively.
19. It is also their case that Section 10(4c, d, e, f and g) by criminalizing the sale and exchange of uncertified seeds unreasonably and unjustifiably contravene the State's obligation to ensure the realization of the right to food, which is enshrined in Article 21(2) and 43(1) (c) of the Constitution. The petitioners contextualize that these limitations on the use, exchange and sale of farm-saved seeds will make it harder for resource-poor farmers to access improved seeds, obstructing the effectiveness of the informal seed system. Similarly, they contend that Section 10(4) contravenes Article 11(1) of the Constitution, which recognizes culture as the foundation of the Nation, mandating the State to promote all forms of national and cultural expression, including recognizing the role of indigenous technologies in the development of the Nation.
20. It is also submitted that Regulation 6 of the Regulations subjects and limits the registration and certification of seeds to stringent compliance standards set out in the Fourth Schedule, coupled with the criminalization in dealing with unregistered and uncertified seeds under Section 10(4), are punitive to the small-scale farmers, hence in contravention of Articles 21(2) and 43(1)(c) of the Constitution on the right to food. Particularly, that these limitations in the production, inspection and testing of seeds, as seen under the Fifth Schedule of the Regulations, are unfairly costly for resource-poor farmers, obstructing the effectiveness of the informal seed system and potentially negatively affecting food security and household incomes.
21. For these reasons, the petitioners urge that Section 10 (4 c, d, e, f and g) as read together with Regulation 6 and 16(b) of the Regulations contravenes Kenya's obligations under Article 2(5) and (6) of the Constitution as read together with Article 19(8) of UNDROP, and fails to take into account the needs and realities of the local and rural small scale farmers who cannot afford the prescribed registration fees of Kshs 75,000.00 for to be registered as seed merchants and the annual subscription fee of Kshs 10,000.00. Consequently, it is argued that the punitive fees are in further contravention of Article 27 (4), (5) of the Constitution, as they amount to a direct discrimination of the rural and small-scale farmers who cannot afford the said fees.
22. Furthermore, the petitioner contends that the mandatory requirement for certification and registration, involving seed processing and testing contravenes Articles 11(2) and 11(3b) of the Constitution as well as Article 19(1) of UNDROP, in that the Act fails to provide for the recognition and protection of ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the local communities. Further, such mandatory provisions fail to recognize and protect the traditional knowledge held by local and rural farmers with regard to the said indigenous seeds. Moreover, the petitioners assert that the mandatory provisions also limit their rights under Article 32(1) (2) and (4) of the Constitution as they are prohibited from freely sharing, exchanging and selling indigenous seeds, which they believe are of nutritional and medicinal benefits.
23. Fourth, the petitioners argue 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.

24. It is the petitioners' submissions that the amendments to the Act failed the requirement for public participation under Articles 10(2) and 118(1)(b) of the Constitution. They rely on the cases of Legal Advice Centre & 2 others vs County Government of Mombasa & 4 others [2018] eKLR (Civil Appeal No. 46 of 2017) and the South African decision in Doctors for Life International vs Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) to buttress their case.

25. Consequently, the petitioners contend that the Respondents are under an obligation to observe, respect, protect, promote and fulfil the rights and freedoms enshrined in the Bill of Rights, Chapter Four of the Constitution, which the Respondents failed to ensure in the enactment of the impugned provisions. To ensure that the petitioners'' rights are protected, the court has been invited to be guided by the Provisions of Articles 2(4), 2(5), 20(3), 21(1), and 24(1) of the Constitution, in addition to all the pleaded constitutional violations.

26. Finally, in response to the respondent''s challenge of this Court's jurisdiction, the petitioners submit that pursuant to Articles 22 (1) and 22(2) of the Constitution, any legal person, whether acting on behalf of another, being a member of or in the interest of a group/class of persons, acting in the public interest has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated/ infringed or threatened. Further that under Article 23(1) and Article 165(3)(b), this Court has the original jurisdiction to determine the question whether a right or fundamental freedom has been denied, violated, infringed or threatened and subsequently grant the relevant constitutionally provided reliefs. They also urge that the petition is ripe and justiciable as it raises constitutional issues and the Court is not invited to formulate new issues nor to usurp the powers of Parliament. They cite the Court of Appeal in Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 others [2016] eKLR; and Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, to the effect that the Judiciary had the constitutional power to interpret the policies and laws as enacted and approved by the legislature and executive.

D. Reliefs Sought

27. Based on the foregoing, the petitioners seek the following reliefs;

a) A declaration that section 3D (1) 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.

b) A declaration that section 10(4 c, d, e, f and g) 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.

c) A declaration that Section 8(1) 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.

d) A declaration that Section 8A 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.

e) A declaration that Section 20(1) 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.

f) A declaration that Section 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.

g) A declaration that Rules 6, 9(5), 16, 19 and 21(1,2,3,4,5) of the Seed and Plant Varieties (Seeds) Regulations, 2016 are 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.

h) This Honourable Court be pleased to issue an order that each party should bear their own costs on the grounds that this Petition is in the public interest.

i) This Honourable Court be pleased to issue such further or other orders as it may deem just and expedient for the ends of justice.

E. The Respondents' Case

28. The respondents oppose the petition through a replying affidavit sworn by the acting Director in charge of Seed Certification and Plant Variety Protection on 11th May 2023 and written submissions dated 2nd April 2024 to buttress the averments. The respondents contend that the petition is incurably defective, incompetent, frivolous and misleading. They also assert that the alleged violations are speculative, premised on falsehood, and have not been substantiated. They cite the High Court decision in John Harun Mwau vs Attorney General & 2 others, Petition No. 65 of 2011. Further, that the arguments made are mere allegations lacking precision, contrary to the threshold settled in the case of Anarita Karimi Njeri Vs Republic [1976-1980] KLR 1272.

29. Moreover, it is the respondent's case that the petition falls afoul of the ingredients of the political question doctrine. On this note, they urge the Court to decline the invitation to exercise its jurisdiction. The respondents rely on the case of William Odhiambo Ramogi & 2 others vs Attorney General & 6 others, Mombasa Const. Petition No. 159 of 2018, [2018] eKLR; Kenya Association of Stock Brokers & Investment Bank vs Attorney General & another [2015] eKLR; and Patrick Ouma Onyango & 12 others vs Attorney General & 2 others Misc. Application No. 677 of 2005, to urge that the issues raised are non-justiciable.

30. The respondents deny the alleged breaches by the Act of International Treaty obligations or constitutional safeguards to local and small-scale farmers. On the contrary, they assert that the purpose of the Act is to guide in production, processing, testing, certification and marketing of seeds and to protect the consumer (farmer) from deleterious seeds or spread of diseases, pests and weeds through the sale of uncertified seeds.

31. On the place of international law, the respondents urge that, based on the hierarchy of laws in Kenya, the Constitution reigns supreme pursuant to Article 2(5) and (6) of the Constitution. They therefore contend that any law that conflicts with the Constitution is void to the extent of the conflict. In any event, the respondents argue, that the Amendments to the Act are in line with Article 9 of the International Treaty which requires that farmers' rights to save, use, exchange and sell farm-saved seeds or propagating materials can be limited subject to national laws of treaty

members.
32. On the particular alleged breaches, the respondents contend that the petitioners have not proved the allegations to the required standards. Specific to the allegations of breach, the respondent asserts that contrary to the petitioners'' assumption, Section 27A of the Act makes provisions for the protection of indigenous seeds by creation of the center for plant genetic resources, mandated with the conservation and sustainable utilization of plant genetic resources, including indigenous seeds and plant varieties in Kenya. They further argue that the amendments to the Act are in line with Article 11(3)(b), which tasks Parliament to enact a law to recognize and protect ownership of indigenous seeds and plant varieties, their genetic and adverse characteristics and their use by communities of Kenya.
33. They urge that the Act does not take away the indigenous characteristics of seeds or hinder further progress in Kenya’s food security. Instead, the Act defines seeds to include any seed, whether indigenous seeds or otherwise, as long as they meet the prescribed standards. As a result, the respondents contend that the Act does not discriminate or breach the constitutional rights of the small-scale farmers.
34. In response to alleged breaches under Section 3D of the Act, the respondents argue that the said provision is not ambiguous or far-reaching in the powers given to inspectors. They respond that the provision is clear when the inspector attempts entry and seizure of materials, which are held pending finalization of investigations and trial.
35. The respondents also contend that the Act does not criminalize the planting and exchange of uncertified seeds, as it defines seeds to include seeds of indigenous varieties. But rather, Section 20(1) protects breeders of new varieties from exploitation of their varieties and ensures they recover investments in breeding, and encourages them to develop new superior varieties. They add that, be that as it may, the petitioners have not demonstrated any prejudice or loss they will suffer, subject to the requirement of section 20 of the Act.
36. Concerning alleged violations by Section 8 of the Act, it is argued that it relates only to seed varieties that have not been indexed by the national government and must be read with Section 7, which sets out the types of seeds that should be indexed. They argue that the petitioners have merely lumped up indigenous seeds and failed to demonstrate the indigenous seeds that have not been indexed, or the small-scale farmers stopped from selling them.
37. On allegation of breach of Article 27 of the Constitution, the respondents, citing Northern Nomadic Disabled Persons Organization (Nondo) vs Governor Count Government of Garrisa & another [2013] eKLR, posit that no evidence has been tendered in support. It is also urged that the petitioners have failed to demonstrate that the alleged discrimination is unreasonable or arbitrary. They emphasize that the underlying legitimate reason of the Act, including the impugned sections, is to foster agriculture and food security by ensuring the quality standard of availability of seed material, promote consumer protection and in no way prohibit the exchange of indigenous seeds between farmers.
38. On alleged breach of the right to fair administrative action under Article 47, the respondents aver that Section 3C (1) is clear in the manner and conduct of inspection and prohibits the entry of private dwellings. In any event, they contend that the Act sets clear limitations on the powers of the inspectors, an avenue to address any grievances through the Seeds and Plants Tribunal and creates offences under the Act. Moreover, that the petitioners have adopted a selective and narrow approach in the interpretation of Section 3D of the Act.
39. Concerning allegations of violations of Articles 40 and 43 of the Constitution, it is the respondents’ case that no evidence has been tendered to buttress the assertions. Similarly, the petitioners are purporting to circumvent the procedures of the Act. On the limitation of constitutional rights, the respondents contend that any limitations by the Act or Regulations are

justifiable, reasonable and intended to serve an ascertainable objective. The respondents cites R vs Oakes to submit that the limitations have met the three-promoted criteria set by the Supreme Court of Canada.
40. According to the respondents, the petitioners have failed to demonstrate any such breach, and in the interest of justice and public demands, their petition is for dismissal with costs.

F. 1st Interested Party case
41. The 1st interested party participated in the proceedings jointly with the Petitioner.
G. 2nd Interested Party case
42. The 2nd Interested party, through a replying affidavit sworn by Anne Maina on 5th April 2023, and submissions dated 20th October 2024, supports the petition. It affirms the petitioners'' position and arguments in toto. It contends that the Act is unconstitutional because it contravenes the rights guaranteed by the Constitution, and unreasonably restricts farmers' rights by criminalizing the sale, sharing, and exchange of unregistered and uncertified seeds. The 2nd interested party urges that the limitations under the Act on the use, exchange and sale of farm-saved seeds will encumber resource-poor farmers in accessing and selling improved seeds, obstructing the effectiveness of the informal seed system and negatively affecting food security and household incomes.
43. On whether sections 8(1) 8A, and 10 (4) (c) (d) (de) (f) and (g) of the Act violate Articles 11(1), (2) and (3) of the Constitution, the 2nd interested party submits that as Section 8 restricts the sale of seeds of unindexed plant varieties it violates Article 11(3) of the Constitution. Further, that Section 8(A) (1) violates Article 11(3) as read with Article 9 of the International Treaty and Article 19 of UNDROP, as it provides that only the seeds on the National Seeds Plant Variety List prepared by KEPHIS will be commercialized, extinguishing the farmers'' rights to use, exchange, save and sell farm-saved seeds.
44. The 2nd interested party further supports the contention that Sections 10(4)(c) (d) (e) (f) and (g) are in breach of Article 11 because they fail to uphold and recognize culture as the foundation of the Nation and the cumulative civilization of the people of Kenya. It urges that first, the said provisions place a mandatory requirement for farmers to exclusively use only certified and registered seeds, failure to which it attracts criminal sanctions. Second, that the impugned provision mandatorily requires certification and registration of seeds in violation of Articles 10(4) and Articles 19(1) of the UNDROP. Third, that it criminalizes the commercialization of uncertified seeds and the sale of seeds by unregistered merchants.
45. According to the 2nd interested party, these provisions erode the culture and uniqueness of the indigenous people of Kenya and are contrary to Article 11 of the Constitution and similar international obligations. It cites Mohamed Ali Baadi & others Vs Attorney General & 11 others [2018] eKLR; and Gitau & 11 others Vs County Commander Kiambu & 3 others (Petition E020 of 2023) [2024] KEHC 1659 to support this assertion
46. The 2nd interested party further argues that Section 3D of the Act, as read with Regulations 21(1), (2), (3), (4), and (5), contravenes Article 27, so far as it provides for seizure of seeds. Further that Section 10(4)(c), (d), (e), (f), and (g) of the Act and Regulations 6 and 16(b), which creates an offence to sell uncertified seeds without being a registered merchant, requires the payment of Kshs. 75,000 for registration as a seed merchant and Kshs 10,000 annual renewal fees, and limit registration by KEPHIS to persons who have a business for processing, marketing and selling seeds, have adequate training on Kenya's seed industry and have established distribution system, is discriminatory based on social and economic basis and contrary to Article 27(4) and (5) of the Constitution.
47. The interested party also submits that Section 3D (1) of the Act as read with Regulation 21(1), (2), (3), (4) and (5) violates the right to privacy protected under Article 31(a) of the Constitution, in

so far as it provides for the entry, seizure and detaining of farmers' seed by an inspector on a reasonable belief that the Act or the Regulations have been breached. It cites Coalition for Reform and Democracy (CORD) & 2 others vs Republic of Kenya & 10 others [2015] eKLR, and Kenya Human Rights Commission vs Communications Authority of Kenya & 4 others [2018] eKLR to buttress the sanctity of the right to privacy and its interconnectivity to other fundamental rights. It is also submitted that the said provisions arbitrarily deprive farmers of their property and right to property.

48. It submits that Section 10(4)(c), (d), (e), (f), and (g) of the Act as read with Regulation 6 of the Seeds and Plant Varieties (Seeds) Regulations, and Section 20(1E) of the Act violates Articles 21(2) and 43(1)(c) of the Constitution read with Article 21(2) of the Constitution, by criminalizing the sale and use of uncertified Indigenous seeds by those who are not seed merchants.

49. It also urges that Section 3D(1) of the Act read with Rule 21(1),(2),(3), (4) and (5) of the Regulations violates the right to fair administrative action under Article 47(1) and (2) of the Constitution, by providing blanket powers to an inspector to search, seize and detain seeds based on belief that there is a violation of the Act or Regulations, without providing farmers with written reasons of the offence or allowing them to protest the seizure or defend themselves. More so, by giving the 1st respondent the power to be the judge, jury, and executor in terms of charging, investigating, and punishing those they consider have violated the law without allowing those accused to be heard in a fair process.

50. Further, it was urged that Section 3D (1) and Section 10 (4) and 10 (4) (e) of the Act provide for offences which are vague, unconstitutional and illegal and can lead to arbitrary arrest and prosecution. The 2nd interested party contends that Section 10(4) vaguely defines the term seeds and does not clarify whether it includes indigenous seeds, and Section 10(4) (e) does not satisfy the principle of legality, which requires that all criminal penalties be sufficiently clear.

51. In conclusion, the 2nd interested part asserts that the impugned provisions fail the threshold for limitations of rights under Article 24 of the Constitution. It expounds that the limitations are unjustifiable and unreasonable. It cites Karen Kandie Vs Alassane Ba and another S.C Petition No. 2 of 2015; [2017] eKLR and Mohamed Fugicha Vs Methodist church in Kenya (suing through its registered trustees) & 3 others Civil Appeal No. 22 of 2015; [2016] eKLR to describe the procedure to apply in evaluating limitations under Article 24 of the Constitution.

H. 3rd Interested Party's case

52. The 3rd interested party, through the replying affidavit sworn by Florence Muturi on 23rd October 2024 and submissions dated 5th November 2024, supports the Petition. It urges that the petitioners' concerns are legally and constitutionally sound, and the Court is called upon to strike a balance between protecting intellectual property rights and upholding the rights and livelihoods of Kenya''s small-scale farmers.

53. On the specific violations, the 3rd interested party urges that Section 3D of the Act gives the inspector discretionary powers to seize and detain seeds without clearly defining what amounts to 'a reasonable belief', and fails to provide mechanisms to challenge the inspector's action contrary to Article 47 (1) of the Constitution. Similarly, they argue that the impugned section allows for seizure and detention of seeds without requiring prior notice or opportunity for the owner to contest the seizure, contrary to arbitrary deprivation of property in violation of Article 40(2)(a).

54. The 3rd interested party further submits that Sections 10(4) (c, d, e and f) of the Act limit the right to fair administrative action, fair trial, economic and social rights and equality. It is argued that the provision imposes an onerous burden on small-scale farmers and affects traditional agricultural practices. The 3rd interested party submits that by imposing strict penalties on the sale of uncertified or rejected seeds, Section 10(4)(f) disproportionately benefits large-scale seed companies

and sidelines small-scale farmers, reducing consumer access to diverse and affordable seed varieties, contrary to Article 46 of the Constitution.
55. It is also submitted that Section 8 criminalizes the sale of seeds from plant varieties that are not in the index, which limits access to traditional and indigenous seeds essential for biodiversity, sustainable farming practices and food security, undermining the right to freedom from hunger and access to adequate food guaranteed under Article 43(1)(c) of the Constitution. It is argued that this leads to inequality and discrimination against small-scale farmers and marginalized groups, contrary to Article 27 of the Constitution.
56. The 3rd interested party impugns 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.
57. Concerning the Regulations, the 3rd interested party submits that Regulation 6 sets out stringent registration conditions which disproportionately burden small-scale farmers who lack financial and logistical capabilities, contrary to Articles 27(4) and 43(1)(c) on equality and economic rights respectively. As pertains to Regulation 9, the 3rd interested party contends that by prohibiting the certification of seeds unless they comply with standards outlined in the Fourth Schedule, ìt marginalizes small-scale farmers who rely on uncertified indigenous seeds.
58. The 3rd interested party also impugns Regulations 16 and 19, which it argues impose financial and procedural burdens on small-scale farmers and informal traders through the requirement for seed testing, official seed analysts and prohibit the sale of seeds unless they are certified or meet prescribed minimum standards, respectively. Consequently, it submits that Regulations 6, 16 and 19 violate Article 43(1)(c) on economic rights and marginalize indigenous seed systems, contrary to Article 11(2)(b) of the Constitution.
59. In conclusion, the 3rd interested party challenges the constitutionality of Regulation 21, which allows inspectors to seize and dispose of seeds or seed processing facilities if they believe a breach of the Regulations. It submits that the lack of procedural safeguards, such as criteria to determine a “reasonable belief” or an appeals mechanism, violates Article 47(1) on fair administrative action, while the arbitrary seizure of property without due process also contravenes Article 40(2)(a).
I. Analysis for Determination
60. Arising from the petition, the responses thereto, as well as the written and oral submissions, the following issues crystalize for determination:
i. Whether this Court has the jurisdiction to determine the petition;
ii. Whether Sections 3D, 8(1), 8A (1), 10(4) (c), (d), (e), (f) and (g) and 20(1) and 20(E) of the Seeds and Plants Varieties Act and Regulations, 6, 9, 16(b), 19 and 21 of the Seeds and Plants Varieties (seeds) Regulations, 2016 are inconsistent with the Constitution 2010; and
iii. What are the appropriate orders to issue, including on costs?

i. Whether this Court has the jurisdiction to determine the petition
61. The challenge to this Court’s jurisdiction is double-limbed. First, the respondents state that the petition fails the precision test. The precision test requires that a petition must clearly set out the Articles of the Constitution that are alleged to have been infringed or threatened, the manner in which the violation was occasioned, and the nexus with the person aggrieved, must be

demonstrated.
62. It is not enough to merely cite Constitutional provisions and fasten some facts onto them. Instead, the particulars of the violation must set out the grievances with sufficient detail to enable a response by the respondent. This was the Supreme Court holding in Communications Commission of Kenya vs. Royal Media Services Ltd & 5 Others (2014) eKLR, which upheld the decision in Anarita Karimi Njeru v R (1979) KLR by stating:
"… Although Article 22 (1) of the Constitution gives every person the right to institute proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the right said to be infringed as well as the basis of his or her grievance. ….. the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. …"
63. Applying this test, I find that the petitioners' petition, as framed, satisfies this threshold. It challenges the constitutionality of the impugned provisions, precisely setting out the sections they are aggrieved by; how they have been aggrieved, and the manner in which the impugned Sections have infringed or threatened the Constitution. The petitioners have also sufficiently established and demonstrated their nexus with the provisions of the Sections cited for unconstitutionality. The petitioners have also adduced affidavit evidence and proffered arguments in support of the alleged unconstitutionality.
64. Second, the respondents have raised the political question doctrine and urge that this Court lacks jurisdiction to hear and determine the petition. The petitioners and the interested parties are of a contrary view.
65. There is no debate that the High Court has jurisdiction to hear and determine petitions for the breach of constitutional rights. Article 23(1) of the Constitution explicitly states that:
The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights
66. Similarly, Article 165(3)(b) of the Constitution clothes the High Court with jurisdiction to determine questions of constitutional breaches and infringement. Article 165(3)(b) stated:
Subject to clause (5), the High Court shall have—
(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.
67. Article 22 also provides that:
(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
(a) a person acting on behalf of another person who cannot act in their own name;
(b) a person acting as a member of, or in the interest of, a group or class of persons;
(c) a person acting in the public interest; or (d) an association acting in the interest of one or more of its members.
68. As pertains to the doctrine of political questions, Black's Law Dictionary, 11th (ed), defines the doctrine as the judicial principle that a court should decline to exercise its jurisdiction to determine an issue involving the discretionary powers of the Executive or Legislature. The political question goes to the justiciability of a matter before the court.
69. Our courts have dealt with the judicial principle of the political question as an aspect of justiciability of a dispute. In Kiriro Wa Ngugi & 19 others vs Attorney General & 2 others [2020] KEHC 8819 (KLR), a three-judge bench of this court acknowledged the principle as follows:
"99 The political question doctrine focuses on the limitations upon adjudication by Courts of matters

generally within the area of responsibility of other arms of Government……
100 According to the political question doctrine, certain sets of issues categorized as political questions, even though they may include legal issues, are considered to be external to the Judiciary as an arm of Government. Such issues are handed over to other branches of Government for adjudication. The political question doctrine therefore focuses on limiting of adjudication of disputes by courts in favour of the legislative and the executive interventions.
70. The Court of Appeal in Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 Others [2016] eKLR stated that:
…. With this in mind, the role of the legislature is to make laws and policies and that of the executive is to implement those laws and policies. The role of the judiciary is to interpret the policies and laws as enacted and approved by the legislature and executive. Generally, courts have no role to play in policy formulation; formulation of government policy is a function best suited for the executive and legislature. In Marbury vs Madison, 5 U.S. 137, it was stated that:
The province of the court is solely to decide on the rights of individuals and not to enquire how the executive or executive officers perform duties in which they have discretion." (Emphasis mine)
71. It clearly emerges that for the political question doctrine to arise, and be successfully raised, the impugned decision or act must be still within the constitutional mandate of either the Executive and/or the Legislature. The same cannot be raised a bar to proceedings where the other arms of Governments have already executed their mandate. That is, where the Legislature has finalized its law making mandate and the executive has already taken the policy direction.
72. In Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others SC Petition Nos. E031, E032 & Eo33 of 2024 (The Finance Act case) the Supreme Court affirmed that generally, courts should restrain from intervening in policy matters. However, the High Court under Article 165 of the Constitution retains residual jurisdiction to determine the constitutionality of any law, policy matter or decision within the meaning of Article 165(3)(b) & (d) of the Constitution.
73. Consequently, in this matter, having enacted the impugned Act, the legislature formulated the law and discharged its legislative mandate. Any consequent challenge to statutory constitutionality falls squarely within the jurisdiction of this court under Articles 23(1) and 165(3)(b) as read with Article 22(1) of the Constitution. I find that the doctrine of political question has no applicability to this matter, and the Court has jurisdiction to hear and determine the petition.
ii. Whether Sections 3D, 8(1), 8A (1), 10(4) (c), (d), (de), (f) and (g) and 20(1) and 20(E) of the Seeds and Plants Varieties Act and Regulations, 6, 9, 16(b), 19 and 21 of the Seeds and Plants Varieties (seeds) Regulations, 2016 are inconsistent with the Constitution 2010
74. Before determining the above issue, it is important to restate the guiding principles when testing the constitutional validity of a statute or its provisions, and the law on the application of international law under Articles 2(5) and (6) of the Constitution.
a. Unconstitutionality of statutory provisions
75. The Supreme Court in Law Society of Kenya v Attorney General & another [2019] KESC 16 (KLR) aptly settled the principles for consideration in determining the constitutionality or otherwise of a Statute. At the forefront of these principles is a general but rebuttable presumption that a statute or statutory provision is consistent with the Constitution. This presumption streams from the fact that Parliament is constitutionally mandated to make laws and all laws mandate by it are legally sound until otherwise successfully impugned. The party alleging inconsistency has the burden of proving such a contention.
76. Therefore, in construing whether statutory provisions offended the Constitution, courts must subject them to an objective inquiry as to whether or not they conform to the Constitution. It is presumed that the Legislature understood and appreciated the needs of the people, and that the laws it enacted were directed to problems as evidenced by experience. More so that the elected

representatives enacted laws which they considered reasonable for their intended purposes. Therefore, the presumption is in favour of the constitutionality of an enactment.
77. The second principle is the determination of the purpose and effect of a statutory provision. The intention of the legislature is construed by scrutinizing the language used in the provision, which inevitably discloses its purpose and effect. This principle was also set out by the Supreme Court in Munya vs The Independent Electoral and Boundaries Commission & 2 others [2014] KESC 38 (KLR) to the effect that a purposive interpretation should be given to statutes to reveal the intention of the Legislature and the Statute itself.
78. The third test is the literal meaning principle. It is the task of a court to give a literal meaning to the words used, and the language of the provision ought to be taken as conclusive unless there is an express legislative intention to the contrary. The interpretation must also depend on the text and the context. The Court of Appeal in Center for Rights Education and Awareness & 2 others vs Mwau & 8 others; Ghai & 2 others (Amicus Curiae); Governance (Interested Party) [2012] KECA 249 (KLR) restated that in determining whether a statute is consistent with the Constitution, a court must determine the object and purpose of the impugned Act and this can be discerned from the intention expressed in the Act itself.
79. I am also guided by the High Court in John Harun Mwau & 3 others vs Attorney General & 2 others [2012] KEHC 5438 (KLR), wherein the principles for the interpretation of the Constitution were laid out. The court directed that the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance, pursuant to Article 259; that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion; that the Constitution must be interpreted broadly, liberally and purposively to avoid 'the austerity of tabulated legalism'; and that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).
80. More recently, in the Finance Act case, the Supreme Court summarized the test in determining whether to declare a statute or part thereof as unconstitutional, stating that a court should take into account the following:
i. There is a general but rebuttable presumption that a statutory provision is consistent with the Constitution.
ii. The party that alleges inconsistency has the burden of proving such a contention.
iii. In construing whether statutory provisions or part thereof offend the Constitution, courts must subject the same to an objective inquiry as to whether they conform with the Constitution.
iv. The court must determine the object and purpose of the impugned statute and consider the mischief which the statute sought to cure and/or arrest.
v. The court must clearly set out what provision is unconstitutional by juxtaposing the offending provision against the Constitution.
vi. A court must clearly and with precision explain the finding of unconstitutionality.
vii. The court must consider the effect of that declaration and, where necessary, suspend the application of that unconstitutionality for a prescribed of time to allow for Parliament to change the law by either making it achieve its purpose without being unconstitutional or by removing the unconstitutional provision.
b. Applicability of International Law
81. The applicability of International Law is in contest in this petition. Article 2(5) provides, "The general rules of international law shall form part of the law of Kenya". While Article 2(6) provides that, "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this

Constitution”
82. The Supreme Court in Mitu-Bell Welfare Society vs Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) determined the effect of Articles 2(5) and 2(6) of the Constitution regarding the applicability of international law in general and international human rights in particular. With regard to the applicability of treaty law, the Supreme Court directed that the meaning to be attributed to the phrase "shall form part of the law of Kenya” in Articles 2(5) and 2(6) of the Constitution was that in determining a dispute, a domestic court of law had to take cognizance of rules of international law to the extent that the same were relevant and not in conflict with the Constitution, statutes or a final pronouncement.
83. The Supreme Court held that;
“131 It is already clear that in our context, Article 2(5) and (6) of the Constitution embraces both international custom and treaty law. This provision can be said to be both outward, and inward looking. The article is outward looking in that, it commits Kenya-the State, to conduct its international relations in accordance with its obligations under international law. In this sense, the article can be considered to be stating the obvious, in view of the fact that, as a member of the international community, Kenya is bound by its obligations under customary international law and its undertakings under the treaties and conventions, to which it is a party. …

132. On the other hand, Article 2(5) and (6) is inward looking in that, it requires Kenyan Courts of law, to apply international law (both customary and treaty law) in resolving disputes before them, as long as the same are relevant, and not in conflict with, the Constitution, local statutes, or a final judicial pronouncement. (Emphasis mine)
84. Similarly, the High Court in Wanjiku & another vs Attorney General & another; Muna & another (interested parties) [2012] KEHC 5410 (KLR), echoed that:
I think a purposive interpretation and application of international law must be adopted when considering the effect of Article 2(5) and 2(6). These provisions should not be taken as creating a hierarchy of laws akin to that set out in the provisions section 3 of the Judicature Act (chapter 8 of the Laws of Kenya). Article 2(5) and (6) must be seen in the light of the historical application of international law in Kenya where there was a reluctance by the courts to rely on international instruments even those Kenya had ratified in order to enrich and enhance the enjoyment of human rights. I would also draw on the authority of article 19(3) which is part of the Bill of Rights that recognizes other rights other than those protected by the Bill of Rights provided they are not inconsistent with the Constitution. These rights would be founded not only on specific statutes but also international treaties and conventions. (Emphasis mine)
85. Guided by these principles and erudite pronouncements, I now consider whether the petitioners have a valid case on the alleged unconstitutionality of the impugned provisions of the Seeds and Plants Varieties Act and the Seeds and Plants Varieties (Seeds) Regulations, 2016 (which I shall continue referring to as the Act and Regulations, respectively). In doing so, I will consider the constitutionality of the specific provisions of the Act and Regulations as submitted by the parties, respectively.

a) Whether Section 8(1), 8A and 10 (4) (c) (d) (de)(f) and (g) of the Act violates Article 11 of the Constitution.
86. The petitioners contend that Section 8(1) criminalizes and prohibits the sale of unindexed varieties and seeds, and Section 8A (1) provides that only seeds on the National Seed Plant Variety List will be allowed to be commercialized. The petitioners argue that these provisions infringe the farmers'' rights to use, exchange, save and sell farm-saved seeds, in violation of Articles 11 as read

with Article 9 of the International Treaty and Article 19 of the UNDROP. This position is supported by the 2nd and 3rd interested parties.
87. The petitioners further contend that Section 10(4) (c), (d), (f) and (g) places a mandatory requirement for farmers to use only certified and registered seeds failure to which it attracts criminal sanctions. That this places a mandatory requirement for certification and registration of seeds, and criminalizes the commercialization of uncertified seeds and sale of seeds by unregistered merchants, contrary to Articles 11 as read with Article 9 of the International Treaty and Article 19 of the UNDROP. They also challenge the provisions of Regulation 19, which prohibits the sale of seeds unless one is certified or has met minimum standards prescribed for the class and species.
88. On the other hand, the respondents argue that the amendments to the Act, and particularly Section 27A, protect indigenous seeds and are in line with Article 11(3)(b). They also contend that the provisions of Section 8 must be read with Section 7, which sets out the types of seeds to be indexed. They add that the petitioners have failed to prove that farmers have been prevented from dealing, saving, exchanging and selling unindexed indigenous seeds.
89. The impugned provisions provide as follows:
Section 8 Restrictions on sales of seeds of unindexed plant varieties
(1) Subject to the provisions of this section, after a section of the Index has come into force any person who, in selling seed of a plant variety which is within the class to which that section of the Index relates, but which is not in the Index, uses a name which serves or is intended by him to serve to distinguish such seed from seed of other plant varieties within that class, shall be guilty of an offence.
Section 8A Maintenance of national plant variety list
(1) The Service shall cause the preparation of a national plant varieties list, which shall comprise the names of plant varieties released for commercialization.
90. While Section 10((4) (c), (d), (f) and (g) provides that:
Any person who—
a) …
b) …
c) makes or causes to be made any false statement, false advertisement, and or produces or displays any certificates required to be produced or displayed, under this Act which are false in any material particular
d) while not registered as a seed merchant, imports, processes seed and packages seed for sale purposes;
e) …
f) offers for sale, seed that fails to meet the requisite standards or has been rejected at any seed certification stage;
g) otherwise contravenes any other provisions in this Act,
shall be guilty of an offence, and upon conviction, shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years, or to both.

91. Section 27A of the Act provides:
(1) There is established a Plant Genetic Resources Centre for Food and Agriculture, which shall be responsible for the conservation and sustainable utilization of plant genetic resources for food and agriculture, including indigenous seeds and plant varieties in Kenya.
(2) The functions of the Plant Genetic Resources Centre for Food and Agriculture shall be to—
(a) protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics, associated indigenous knowledge and its use by the communities of Kenya;
(b) carry out inventories by evaluating and mapping plant genetic resources distribution in the

country;
(c) conserve plant genetic diversity by devising and implementing management procedure, including ex-situ and in-situ maintenance;
(d) co-operate with international institutions on matters relating to plant genetic resources, including the administration of material transfer agreements;
(e) ensure safe custody and accessibility of all plant bred and naturally occurring germplasm;
(f) document and disseminate plant genetic resources data and information to users;
(g) collaborate with and institutions of higher learning to address adaptive, applied and strategic research;
(h) enhance capacity for the effective conservation of plant genetic resources;
(i) advice the Government on policies governing the conservation and use of plant genetic resources; and
(j) undertake the collection of all plant genetic resources for food and agriculture including wild crop varieties and the relevant intangible knowledge.
(3) There shall be a Plant Genetic Resources Committee for Food and Agriculture, which shall provide oversight on matters relating to the Centre.
(3A) The management of the Centre shall comprise of the Director of the Centre and the Plant Genetic Resources Advisory Committee.
(4) The Cabinet Secretary may make regulations to provide for the membership and functions of the Committee.
92. Regulation 19 of the Regulations sets out that:
(1) A person shall not offer seed for sale unless it has been certified or it has met minimum standards prescribed for the class and species.
(2) A person shall not offer for sale seed of species set out in the Second Schedule unless it has been certified.
(3) Every registered seed merchant shall establish an appropriate system and facilities to maintain the quality of the seed offered for sale.
(4) Pursuant to the provisions of regulation 18(1), a registered seed merchant shall, be responsible for the quality of any seed the merchant sells or offers for sale.
93. Turning to the constitutional provisions invoked by the petitioners Article 11 of the Constitution on culture provides that;
(1) This Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.
(2) The State shall—
a. promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage;
b. recognize the role of science and indigenous technologies in the development of the nation; and
c. promote the intellectual property rights of the people of Kenya.
(3) Parliament shall enact legislation to—
a. ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and
b. recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya. (Emphasis mine)
94. Article 32 of the Constitution provides that:
(1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.
(2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance,

including observance of a day of worship.
(3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.
(4)A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.
95. Similarly, Article 44 of the Constitution further protects the right to culture, as follows;
(1) Every person has the right to use the language, and to participate in the cultural life, of the person's choice.
(2) A person belonging to a cultural or linguistic community has the right, with other members of that community—
(a) to enjoy the person's culture and use the person's language; or
(b) to form, join and maintain cultural and linguistic associations and other organs of civil society.
96. Internationally, Article 17(2) of the African Charter on Human and Peoples' Rights provides that every individual may freely take part in the cultural life of his community. Principle 20 of the Vienna Declaration, adopted by the 1993 United Nations World Conference on Human Rights, recognizes the inherent dignity and the unique contribution of indigenous peoples and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being. Article 27 of the ICCPR guarantees indigenous peoples the right to enjoy their cultures; and the United Nations Human Rights Committee has interpreted Article 27 of the ICCPR to include the protection of cultural integrity.
97. Locally, the courts have also expounded the place of culture as elucidated by the Constitution. In Tatu Kamau vs Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) [2021] eKLR, the Court observed the following on cultural practice being the foundation of the nation:
"In its view, a cultural practice cannot ''be deemed to be a national heritage". We find that statement is not entirely true because Article 11 of the Constitution posits that culture is the foundation of the nation and as the cumulative civilization of the Kenyan people and nation."
98. In Gitau & 11 others vs County Commander Kiambu & 3 others (Petition E020 of 2023) [2024] KEHC 1659 (KLR), the Court directed that the action that erodes the culture of the people of Kenya violates the Constitution. This was echoed in Baadi & others vs Attorney General & 7 others; National Land Commission & 2 others (Interested Parties); Global Initiative for Economic, Social and Cultural Rights & another (Amicus Curiae) (Petition 22 of 2012) [2018] KEHC 5397 (KLR), thus:
"Article 11 (1) of the Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. Respect for indigenous culture is found in several international instruments as well… It follows that state actions that erode the cultural uniqueness of indigenous peoples would be contrary to the Constitution and international conventions." ." (Emphasis mine)
99. Therefore, by virtue of Article 11, of the Constitution a person''s culture is defined and expressed through their literature, art, traditional celebrations, science, indigenous technologies, communication, information, mass media, publications, libraries and other cultural heritage. Most Kenyan farming communities practice the culture of seed saving, exchange, and sharing a facet of indigenous technologies. It is therefore unsurprising that as a constitutional imperative, Parliament is obligated to enact legislation that 'recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.
100. By enacting Sections 8 (1), 8A (1) and Section 10 (4) (c), (d), (f) and (g) of the Act, Parliament failed to protect the indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya, an express obligation under Article 11(3)(b).of the Constitution. Particularly, restricting the sale of unindexed seeds and plant varieties, limiting the

commercialization of seeds to the National Plant Varieties list prepared by the Service (KEPHIS), and criminalizing the importation, processing and commercialization of seeds by non-merchants.
101. The provisions limit access to traditional and indigenous seeds, contrary to the Constitution, violating the petitioners' and small-scale farmers'' cultural rights. They erode the cultural distinctiveness of Kenya''s indigenous peoples. Most Kenyan communities, if not all, have their own unique and specific cultural practices as regards food production and in particular seed selection and preservation. These unique cultural aspects and practices cannot be 'legislated' away. More-so where the specific communities have not been involved and/or there is no finding of repugnance in those practices. That violates Article 11 of the Constitution.
102. Indexing by itself elevates the indexed category of indigenous seeds and plant varieties over the unindexed ones without any proper justification. Appreciating our communal way of life, there exist certain cultural practices that occur on a small-scale level between neighbours at the basic and family level. For instance, sharing of food stuff, barter trade, livestock reproduction, planting and harvesting practices just to mention a few. To expect such small-scale activities to attract statutory limitation such as registration prerequisites will not only stifle but also suppress the adoption and use of such practices. This in turn negates the constitutional expectation to promote such cultural practices that have been in force over time.
103. Sections 8 (1), 8A (1) and Section 10 (4) (c), (d), (f) and (g) of the Act, as read with Regulation 19 are also in contradiction of Kenya's obligations under Articles 9 of the International Treaty, and 19 of the UNDROP, which obligates its members to recognize the contribution of local and indigenous communities and farmers in the conservation and development of plant genetic resources for food and agriculture; to promote and protect traditional knowledge relevant to plant genetic resources; and the obligation not to limit any rights that farmers have to save, use, exchange and sell farm-saved seeds and propagating material, subject to national laws and as appropriate. As a member of the international community of states, it is expected that Kenya's obligations under international instruments to which it is a party would be promoted as opposed to negated through national laws
104. Even if indigenous seeds and propagating materials were eligible for registration under Section 7, as argued by the respondents, such registration, regulation and requirements for registration and certification would still constitute a limitation of cultural rights to save, share, and exchange indigenous seeds and materials, in excess of Article 24, as shall be expounded in this judgment.
105. Section 27A and its provisions on the establishment of a Plant Genetic Resources Centre for Food and Agriculture, responsible for the conservation and sustainable utilization of plant genetic resources for food and agriculture, including indigenous seeds and plant varieties, does not exclude indigenous seeds and propagating materials from the limitations under Sections 8 (1), 8A (1) and Section 10 (4) (c), (d), (f) and (g). Therefore, contrary to the arguments by the respondents, Section 27A, although it attempts to, does not align the Act with the requirements of Article 11(3)(b) of the Constitution.

b) 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.
106. The petitioners contend that to the extent that Section 10(4)(c), (d), (e), (f), and (g), criminalizes the sale of seeds by those not registered as merchants and use of uncertified indigenous seeds, and Sections 20(1) and 20(1E) limits the use by farmers of the product of harvest obtained by planting a protected variety to safeguard the legitimate interests of the breeder, it violates Articles 21(2) and 43(1)(c) of the right to adequate food.
107. The respondents argues that Section 20(1E) protects breeders of new varieties from

exploitation of their varieties, ensures they recover investments in breeding, and encourages them to develop new, superior varieties.
108. I have set the provisions of Section 10(4)(c), (d), (e), (f), and (g) at paragraph 89 (above) and shall not replicate. Section 20(1) provides that:
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, subject to the provisions of this section, infringements of plant breeder's rights shall be actionable at the suit of the holder of such rights, and in any proceedings for such an infringement all such relief, by way of damages, injunction, account or otherwise shall be available as is available in any corresponding proceedings in respect of infringements of other proprietary rights:
Provided that in so far as the production and the stocking for production of the propagating material of a variety for which plant breeder's rights have been granted, is undertaken solely for research purposes or for developing new varieties in the breeder's own nursery this shall not be deemed to be at variance with the exclusive right of the holder of a plant breeder's rights.
109. While Section 20(1E) provides;
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.
110. Regulation 6(1) states as follows:
A person who intends by way of trade or business to produce, purchase or otherwise acquire, sell, expose, keep, store or advertise for sale any seeds purported to be tested and certified shall apply to the Service for registration as a seed merchant.
111. Article 43 (1)(c) provides that every person has the right to be free from hunger, and to have adequate food of acceptable quality. Similarly, Article 21(2) sets out the State obligation to ensure the realization of the right to adequate food, in the following terms:
The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.
112. By 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.
113. 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.
114. 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.

c) Whether Section 3D(1) of the Act, as read with Regulations 21(1), (2), (3), (4) & (5) of the Regulations violates the right to privacy, property and to fair administrative action under Articles 31, 40(2) and 47 of the Constitution.

115. It is the petitioners' and interested parties' case that Section 3D(1) of the Act and Regulation 12 violates Article 31(a) on the right to privacy in that it gives blanket and far reaching powers to an inspector to enter, size and detain any seeds and seed processing facilities on a reasonable belief the provisions of the Act or Regulations have been breached.

116. It is submitted that the provision lacks procedural safeguards on the criteria for establishing 'a reasonable belief'. The petitioners and the interested parties contend that Section 3D(1) is vague and can lead to arbitrary arrest, and prosecution. They also argue that the said provisions allow arbitrary seizure of property and seizure and detention of seeds without requiring prior notice or an opportunity for the farmers/owners to contest the seizure, contrary to Article 40(2) of the Constitution.

117. In response, the respondents contend that Section 3D(1) and Regulation 12 do not give the inspectors far-reaching powers. It is their case that the provisions are not vague because the Act sets out when an inspector may attempt to enter, seize and how the seized property is to be held pending finalization of the investigations or trial. They add that the allegations by the petitioners are speculative and unsubstantiated.

118. Before analyzing the constitutionality of these provisions, it is imperative to set out their provisions and the constitutional provisions it is argued they violate. Section 3D (1) provides:
Whenever an inspector reasonably believes that the provisions of this Act have been breached, the inspector may seize and detain any seeds in respect of which, the breach has been committed.

119. Regulation 21 of the Regulations provides:
(1) An inspector who reasonably believes that the provisions of the Act or these Regulations have been breached, may seize and detain any seeds and seed processing facilities in respect of which the breach has been committed.
(2) The disposal of seed and seed processing facilities seized shall be subject to the provisions of section 3D of the Act.
(3) In this Regulation ,seizure means—
(a) holding in confinement to deprive access by owner;
(b) sealing of materials and equipment in transit; and
(c)impounding materials and equipment.
(4) Any person whose materials and equipment have been seized under this Regulation shall comply with the requirements and instructions of seizure set out in Form SR 11 B set out in the Sixth Schedule.
(5)A person who contravenes the provision of this regulation commits an offence.

120. Articles 31(a), 40(2)(a) and 47 of the Constitution provide:
Article 31(a)
Every person has the right to privacy, which includes the right not to have—
(a) their person, home or property searched;
(b) their possessions seized;

Article 40 (1) and (2)
(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

a) of any description; and
b) in any part of Kenya.
(2) Parliament shall not enact a law that permits the State or any person—
(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
Article 47
(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
(b) promote efficient administration.
121. The High Court in Muthoni vs Solpia Kenya Limited t/a Sista Kenya (Civil Appeal E164 & 178 of 2024 (Consolidated)) [2025] KEHC 34 (KLR) stated that a person's privacy is so sacrosanct that it cannot be violated as a person pleases. In Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others [2017] KEHC 9230 (KLR), the court directed that:
"'Privacy', 'dignity', 'identity' and 'reputation' are facets of personality. All of us have a right to privacy and this right, together with the broader, inherent right to dignity, contributes to our humanity.
It is the personality rights of dignity and privacy that underscore individuality and set both the limits of humanity and of human interaction. But, the reasons for protecting privacy are wider than just protecting the dignity of the individual."
122. Article 31 of the Constitution was not enacted without reason. The purpose is to ensure that arbitrary searches and seizures, arbitrary invasion of privacy or security of person, and arbitrary interference with property rights are curbed and stopped. Article 31 of the Constitution guarantees every person the right to the privacy of their person, home, or property, and not to have their person, home, or property searched or their property seized. This right can be limited by law, but only if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, as per Article 24 of the Constitution.
123. Section 3D(1), as read with Regulation 21, grants overly broad and general search powers. While it is common that enforcement mechanisms by government and other enforcement agencies may be required to access, search and seize illegal products, the Regulation as framed lacks the necessary specificity to protect against arbitrary intrusion and searches. Under the Act, if an inspector 'reasonably believes' that the provisions of the Act have been breached, the inspector may seize and detain any seeds in respect of which the breach has been committed. However, the Act fails to define the parameters of 'reasonable belief'. This opens it up for potential arbitrariness, misuse, abuse and extortion of farmers without the corresponding right for the farmers to accomplish to prevent such violations.
124. Moreover, Section 3D(1), as read with Regulation 21, lacks an effective, independent and impartial oversight mechanism to challenge the inspectors' actions as expected under Article 47 on fair administrative actions act. For this reason, the impugned provision fails to provide an opportunity to an aggrieved owner of the seized property to contest the seizure, or an opportunity to challenge any lack of procedural fairness and is therefore arbitrary in nature. This is in breach of the

right to privacy under Articles 31(a) and 47 of the Constitution.
125. Likewise, Section 3D(1), as read with Regulation 21 (1) to (5), excludes the requirement of the inspector to give written reasons for the decision to seize and detain any seeds and seed processing facilities. Moreover, the lack of procedural safeguards further violates the right to fair administrative action protected under Article 47 of the Constitution.
126. Once a farmer has purchased a protected variety, grows, and produces it, the harvest constitutes the farmer''s property. To limit the saving, sale, exchange, and sharing of a farmer's resultant harvest is tantamount to infringing the right to acquire and own property under Article 40(1)(a). Further, to allow the seizure of the same in the fashion set out under Section 3D(1) and Regulation 12 is to enact a law that arbitrarily deprive a person (petitioners and farmers in general) of property of any description or of any interest in, or right over, any property of any description under Article 40(2) of the Constitution.

d) Whether Sections 8(1) and 10 (4)(c), (d), (e), (f) and (g) of the Act, as read with Regulations 6 and 16(b) violate the right to be free from discrimination and equal treatment of the law under Article 27(2) of the Constitution.
127. The petitioners' case, which is supported by the interested parties, is that Section 8(1) of the Act, and Section 10(4)(c), (d), (e), (f) and (g) as read with Regulations 16 and 16(b) of the Regulations, violates Article 27(1) of the Constitution. They urge that section 8(1) is discriminatory, for it allows the sale of unindexed seeds, including indigenous seeds outside Kenya, but prohibits their sale within Kenya. They also contend that Section 10(4)(c) (d) (e) (f) and (g) creates an offence, being the selling of uncertified seeds without being a registered merchant, while Regulations 6 and 16(b) provides the registration fee of Kshs 75,000.00 and renewal of registration fee of Kshs 10,000.00; and set out stringent registrations requirements, (that is, that one must have a business for processing, marketing and selling seeds, adequate training on Kenya's seeds industry and an established distribution system). That these are discriminatory.
128. They emphasize that the exorbitant registration and renewal fees, coupled with the strict registration requirements, amount to indirect discrimination against small-scale farmers and peasants on grounds of social and economic status, because these farmers are either unable to afford the high registration fees or the stringent registration requirements. It is their case that the said provisions upset Article 27(4) and (5) of the Constitution.
129. In opposition, the respondents contend that no evidence has been tendered to substantiate allegations of breaches of Article 27. In any event, they argue that the petitioners have not demonstrated that the alleged discrimination is unreasonable or arbitrary.
130. Article 27 (4) and (5) of the Constitution provide that :
(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
131. Black's Law Dictionary, 11th Edition, defines discrimination as 'failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.' The High Court in Waweru vs Republic (Miscellaneous Civil Application 118 of 2004) [2006] KEHC 3202 (KLR) defined discrimination as:
"... affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded

privileges or advantages which are not accorded to persons of another such description."
132. The Court of Appeal in Dida vs Debate Media Ltd & another (Civil Appeal 238 of 2017) [2018] KECA 642 (KLR) quoted with approval the Supreme Court of India in the case of Kedar Nath v State of WB (1953) SCR 835 (843) that:
"Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view."
133. The Supreme Court in Gichuru vs Package Insurance Brokers Ltd [2021] KESC 12 (KLR) stated that:
"…it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification."
134. Further, the distinction of direct and indirect discrimination was settled by the Supreme Court in Gichuru vs Package Insurance Brokers Ltd (supra) as follows;
"Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification."
135. The apex Court further adopted with approval the salient features of indirect discrimination settled by the Supreme Court of the United Kingdom in Essop & ors vs Home Office; Naeem vs Secretary of State for Justice [2017] UKSC 27, thus:
"The first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others.
A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual.
A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various (Mr. Sean Jones QC for Mr Naeem called them "context factors").
A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage.
A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence.
A final salient feature is that it is always open to the respondent to show that his PCP is justified - in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test."
136. In this premise, registration fees of Kshs.75,000.00, annual renewal fees of Kshs.10,000.00, and the stringent requirement for registration as a seed merchant put the petitioners and small-scale farmers at a disadvantage when compared with large-scale farmers. It is not clear how the amount of Kshs.75,000.00 was arrived at in relation to the average income of the petitioners and other small-scale farmers who do not necessarily seek to venture into serious commercialization of seeds and plant varieties. Particularly, it is apparent that the petitioners and the small-scale farmers will find it hard to comply with the requirements for registration. I say this in appreciation that most small-scale farming is undertaken through informal arrangements and such formalization may not

necessarily be of any benefit. Lastly, the respondents have not demonstrated to this Court that there is a good reason for the hefty requirements and the fee fixed for registration as a merchant. These measures effectively eliminate such farmers in favour of their well-established counterparts in the large scale and commercial farming who may have no difficulty raising such amounts. Consequently, Regulations 16 and 16(b) are indirectly discriminatory to the petitioners and therefore violate Article 27(4) and (5) of the Constitution.

e) Whether the limitation of rights under the Act and Regulations is in accordance with Article 24 of the Constitution.

137. In addressing the above issues, it is important to first set out the limitation clause in Article 24 of the Constitution, which reads, in part, as follows:

(1)A right or fundamental freedom in the bill of rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a)the nature of the right or fundamental freedom;

(b)the importance of the purpose of the limitation;

(c)the nature and extent of the limitation;

(d)the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e)the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) ...

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this article have been satisfied.

138. This Article 24 has been the subject of interpretation in many cases at all levels of the three superior court systems in Kenya. By the High Court in the case of Union of Civil Servants & 2 others vs Independent Electoral and Boundaries Commission (IEBC) & another, H.C. Petition No. 281 of 2014 & 70 of 2015; [2015] eKLR, The Court of Appeal in Attorney-General & another vs Randu Nzai Ruwa & 2 others, Civil Appeal No. 275 of 2012; [2016] eKLR, and the Supreme Court in Gladys Boss Shollei vs Judicial Service Commission & another, SC Petition No. 34 of 2014; [2022] KESC 5 (KLR); and Karen Njeri Kandie v. Alassane Ba & another, (Petition 2 of 2015) [2017] KESC 13 (KLR), where similar principles were restated in the following words:

“[77] After carefully considering Article 24 of the Constitution and the above cases, we find that the test to be applied in order to determine whether a right can be limited under Article 24 of the Constitution, is the ‘reasonable and justifiable test’, that must not be conducted mechanically. Instead, the Court must, on a case-by-case basis, examine the facts before it, and conduct a balancing exercise, to determine whether the limitation of the right is reasonable and justifiable in an open and democratic society. The insertion of the word ‘including’ in Article 24 also indicates that the factors to consider while conducting the balancing act are not exhaustive but a guide as to the main factors to be taken into account in that consideration”.

139. The Supreme Court in CMM (Suing as the Next of Friend of and on Behalf of CWM) & 6 others vs Standard Group & 4 others (Petition 13 (E015) of 2022) [2023] KESC 68 (KLR), further expounded that;

“64. The two-step threshold for limitation of any constitutional right and fundamental freedoms are, first whether the right limited is by statute. There can be no limitation of a constitutional right except by the Constitution itself or by law; and secondly, it has to be established whether the limitation imposed on a right is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account certain relevant factors listed in Article

24(1)(a) to (e), which list is not exhaustive as explained in Karen Njeri Kandie v Alassane Ba (supra). In other words, the focus on limitation is not based only on the formal existence of the law creating the limitation, but also on the nature of that law itself. Article 19(3)(c) of the Constitution is an emphasis that the rights granted in the Bill of Rights "are subject only to the limitations contemplated in the Constitution", recognizing the fact that there can be no other way of limiting a fundamental right except in the manner and to the extent provided for by the Constitution."
140. Articles 11, 27, 31, 40, 43 and 47 of the Constitution are not absolute but can be limited under Article 24 of the Constitution. However, the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as required under Article 24(1). Moreover, in sub-article (2), a provision in legislation limiting a right or fundamental freedom, in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation.
141. The respondents have failed to satisfy that the limitations in the Act and Regulations satisfy the threshold under Article 24 of the Constitution. The limitations are neither reasonable nor justifiable. The Act and the Regulations have also failed to specifically express the intention to limit the right or fundamental freedom, and the nature and extent of the limitation.

iii. What are the appropriate orders to issue, including on costs?
142. Article 23(3) of the Constitution provides that;
In any proceedings brought under Article 22, a Court may grant appropriate relief, including:
(a) a declaration of rights;
(b) an injunction;
(c) a conservatory order;
(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
(e) an order for compensation;
(f) an order of judicial review.
143. The apex Court considered the scope of Article 23 (3) of the Constitution, as read with Article 165 (3) (d) of the Constitution in Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others; Petition No. 14, 14A, 14B and 14C of 2014 (Consolidated) [2014] eKLR, and determined that;
"… a close examination of these provisions (Article 23 (3) and 165 (3) (d) of the Constitution) shows that the Constitution requires the Court to go even further than the U.S Supreme Court did in the Marbury, and that Article 23 (3) grants the High Court powers to grant appropriate relief " including" meaning that this is not an exhaustive list."
144. In Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR), the Supreme Court expounded Article 23 as follows:
"We are however, in agreement with the submissions of the appellant and Amicus Curiae, to the effect that Article 23 (3) of the Constitution empowers the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right."
145. Having looked at the prayers sought in the petition, I am satisfied that the same are permissible under the circumstances. The cited provisions of the Act and Regulations do not meet the constitutional threshold. Since the respondent did not argue for the suspension of the declaration of invalidity, if the court were to agree as it now has, with the petitioners and interested parties, I will say no more.
146. Regarding orders on costs, the guiding principles were settled by the Supreme Court in Rai & 3

others vs. Rai & 4 others [2014] KESC 31 (KLR), which apex Court guided on when a court may depart from the general rule that costs do follow the event. Consequently, bearing in mind the circumstances of the matter at hand and the principles in the Rai case, I find that due to the public interest nature of this matter, each party should bear their own costs.
147. As I pen off, adequate and meaningful public participation by the respondent would have addressed the concerns by the petitioners. As held by the Supreme Court in British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party) [2019] KESC 15 (KLR) public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. The respondents remain at liberty to engage with the petitioners, interested parties and the public at large in order to streamline its objectives.
148.
J. Disposition
149. Consequently, guided by my findings above, I find the petition meritorious and allow it in the following terms;
a) Section 3D (1) of the Seed and Plant Varieties Act is hereby declared unconstitutional for violating Articles 31(a); 40(2) and 47 of the Constitution.
b) Section 8(1) of the Seed and Plant Varieties Act is hereby unconstitutional for violating Articles 11(3)b and 27(2) of the Constitution.
c) Section 8A of the Seed and Plant Varieties Act is hereby unconstitutional for violating Article 11(3)b of the Constitution.
d) Section 10 (4) (c) (d), (e), (f) and (g) of the Seed and Plant Varieties Act is hereby declared unconstitutional for violating Articles 11(3)b; 21(2) 27(2) and 43(1)c of the Constitution.
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
g) Regulations Rules 6, 16, 19 and 21(1), (2), (3), (4), (5) of the Seed and Plant Varieties (Seeds) Regulations, 2016 are declared unconstitutional, for violating Articles 21(2) 27(2)(4) and (5) 40(2) 43(1)c and 47 of the Constitution
h) Each party should bear their own costs.
Orders accordingly.

Delivered, Dated and Signed this _27th _ day of _November 2025

SIGNED BY/FOR:
HON. LADY JUSTICE RHODA RUTTO

THE JUDICIARY OF KENYA.

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