Symposium: Kenya's Seeds Case: The Enduring African Commons of Plant Genetic Resources

By:

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1. Introduction

The 2025 landmark judgment by the High Court of Kenya in the case of *Samuel Wathome and 14 others v Kenya Plant Health Inspectorate Service and another (Samuel Wathome case)* fundamentally reaffirmed a broad conceptualization of the previously diminished farmers' rights to save, exchange, and sell seeds. There had previously been a discernible trend, since the year 2012, of undermining the farmers' rights through domestic legislation and the ratification of the 1991 International Union for the Protection of New Varieties of Plants (UPOV) Treaty in 2016. Until the 2025 High Court Judgment, the ratification of UPOV 1991 and consecutive amendments to the Seeds and Plant Varieties Act (SPVA) and its implementation Regulations had resulted in an extremely liberal conceptualization of plant breeder's rights (PBRs) to an extent that they were patent like. The 2022 amendments to the SPVA and

implementing Regulations particularly proceeded to the extent of criminalizing the exchange of ‘unregistered’, ‘uncertified’ and ‘unindexed’ indigenous seeds that have, historically, been part of the African commons.

2. The Samuel Wathome Case in Context: From Subdued Farmers’ Rights to a Liberal Conceptualization of Indigenous Seed Practices

The constitutional petition in the Samuel Wathome case challenged the 2022 amendments to the SPVA and implementing Regulations that required registration, certification and indexing of indigenous seeds, and criminalized sale or exchange of such propagating materials without the stated compliance. The petition also disputed the amendments that: criminalized the sale of indigenous seeds by farmers unless they were registered as merchants, penalized sale of any uncertified seeds, in addition to restricting dealings in the farmers’ harvest from protected varieties without the consent of the plant breeders. In addition, the petitioners also contested the granting of exclusive reproduction and marketing control to the plant breeders, even in the case of harvest by farmers from the use of protected varieties.

2.1 Affirmation of Constitutional Protection of the Culture of Seed Saving and Exchange

Lady Justice Rhoda Rutto of the High Court found that the cultural rights recognized under Article 11 of the Constitution are expressed through indigenous technologies and traditional heritage, among other practices. In that context, the High Court rightly affirmed the cultural practice of Kenyan communities ‘of seed saving, exchange, and sharing’ which it regarded as being ‘a facet of indigenous technologies.’ According to the Court, the registration and certification requirements also violated Article 24 of the Constitution, which require limitation the cultural rights of Kenyan farmers to save, share, and exchange indigenous seeds be reasonable and justifiable, among other factors. The Court also rationally affirmed the obligation of the state under Article 11 of the Constitution to enact legislation that protects ownership of indigenous seeds and their utility by communities. As the Court validly opined, the unique cultural aspects and practices relating to seed saving and preservation, and food production processes, could not be ‘legislated’ away. The Court was further of the persuasive view that enacting statutory

limitations and registration prerequisites regulating the communal way of life of Kenyan farmers and their seeds management system would subdue the adoption and utility of such practices, in addition to contravening the obligation under Article 11 of the Constitution that such cultural practices be promoted.

The Court findings in the *Samuel Wathome* case are valid and merited, since indigenous cultural practices that have prevailed in Kenya, including those relating to seeds management, are informal and unwritten, and are not based on certification or registration. Indeed, they often constitute knowledge and skills passed across generations, and requiring registration and certification of indigenous seeds would actually be an affront on the constitutional obligation to promote cultural practices, including that relating to the management of propagating materials.

2.2 Kenyan and Global Context in the Evolution of Plant Breeders' Rights: From Common Heritage to Apportionment of Private Rights

Farmers' rights (also referred to as farmer's privilege) connotes agronomists liberty to freely save, exchange and sell seeds, and is often postulated as being an essential exemption to a strict formulation of PBRs. As we have explained elsewhere, plant genetic resources (PGRs) and seeds were, historically, part of the common heritage of mankind, to be exchanged, exploited and propagated without any restrictions. In that context, Article 1 of the 1983 'soft law' International Undertaking on Plant Genetic Resources (International Undertaking) adopted in 1983, had espoused a 'universally accepted principle that plant genetic resources are a heritage of mankind and consequently should be available without restriction.'

Nonetheless, there has been gradual shift, globally and in Kenya, from the contextualization of PGRs as part of unrestricted commons, to promulgation of expanding PBRs through the principle of states sovereignty over the resources within their jurisdictions. Consequently, there has been varying degrees of the tension between farmers' privilege to freely save and sell seeds, and plant breeders' rights, in international instruments and, more recently, under Kenya's domestic legislation. With regard to select international instruments relevant to Kenya, whilst the 1992 Convention on Biological Diversity (CBD) espouses the sovereignty principle, supporting the grant of PBR's, it nonetheless does not

explicitly limit the farmers' rights. Article 9 of the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (International Treaty) progressively obligates states to preserve farmers' rights despite their grant of PBRs under the sovereignty principle. The most significant restriction of farmers' rights in Kenya resulted from the ratification of UPOV 1991 in 2016. Article 15(2) of UPOV only allows member states to permit farmers to save and replant harvested seeds of a protected variety in their own farms, thus extinguishing the traditional freedom to sell and exchange. Kenya had earlier on, in 2012, amended its domestic SPVA to facilitate its ratification of UPOV 1991, as conformity of municipal legislation is a requirement before a state becomes a party to the Treaty. Consequently, the SPVA was similar to UPOV 1991 in the context of the narrow scope of farmers' rights after the 2012 amendments. As we have explained elsewhere, lobbying by actors in the seed industry was a major contributor to legal reforms and ratification of UPOV 1991 that attempted to entrench an extremely liberal construction of PBRs.

The Court in the *Samuel Wathome* case rightly relied on favorable provisions of international legal instruments in the context of farmer's rights and the protection of indigenous seeds exchange and preservation practices. For instance, the Court affirmed that the amendments to the SPVA and the implementing Regulations violated Kenya's obligations under Article 9 of the International Treaty, and Article 19 of the 2018 'soft law' United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP). Article 9 of the International Treaty requires states to protect traditional knowledge and preserve the rights that farmers have to save, exchange and sell seeds, which obligations are also espoused by Article 19 of UNDROP. The Court proceeded to affirm that Kenya, being part of the international community of states, is expected to promote rather than negate, through its domestic laws, its international law obligations in the context of PGRs. This Court pronouncement has significant implications. First, it offers essential guidance on how Kenya should progressively navigate conflicting provisions of international legal instruments, for instance, by affirming the liberal conceptualization of farmers' rights under the International Treaty and disregarding the retrogressive restrictions under UPOV 1991. As we have argued elsewhere, there is the necessity of such well informed choices in the context of conflicting international obligations. Second, affirming the provisions

of the International Treaty over conflicting ones under the SPVA, the High Court elevated the significance of international law, utilizing it as a strong interpretative guide for constitutional obligations.

It is also noteworthy that Lady Justice Rhoda Rutto rightly found the SPVA amendments unconstitutional as there would be registration (of seeds, and of farmers as seeds merchants) inconveniences, hardships and impossibilities occasioned by the applicable prerequisites and costs that discriminatively disadvantaged small-scale agronomists compared to large scale and commercial ones. As the Court credibly argued, small-scale farming in Kenya is essential undertaken through informal arrangements, and the attempted formalization was unlikely to be of any benefit in the context of prevailing circumstances.

2.3 Significance of Incidental Constitutional Rights: Right to Food and Livelihood

The High Court in the *Samuel Wathome* case further plausibly determined that the SPVA amendments and the implementing Regulations violated Article 43 of the Constitution in relation to the protection of economic and social rights, including the right 'to be free from hunger, and to have adequate food of acceptable quality'. While acknowledging the significance of small scale agronomists to the food, nutrition and livelihood sustenance in Kenya, the Court affirmed the factual reality that most farmers are highly dependent on saving, exchanging and selling their harvest to ensure the continuity of their produce. As we have argued elsewhere, the affirmation and protection of such small scale farmers' rights are particularly essential in Africa since seed management is largely carried out by such agronomists. It is in that context that the High Court justifiably opined that 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' was a blatant violation of Article 43 of the Constitution.

2.4 Extremely Liberal Farmers' Rights: Proprietary Rights on Harvests of Protected Varieties

Whereas the focus of the petition was essentially the 2022 amendments to the SPVA, the judgment had far reaching consequences of earlier amendments

including those of 2012 that sought to limit farmers privilege in the context of freely saving, exchanging, and selling seeds obtained from harvests of mainstream protected and certified seeds. The Court progressively argued that limiting the saving, sale and exchange of a farmer's resultant harvest of protected varieties constituted an infringement on their right to acquire and own property under Article 40 of the Constitution. According to the Court, the prohibition unreasonably contravened the farmers' constitutional right to deal in their harvests and product. This was a valid argument by the Court even from the Lockean labor theory of acquisition of intellectual property, as the famers not only purchase the seeds of a protected variety, but also invest labor, effort and prudence to obtain the harvest.

By virtue of the High Court judgment, farmers seed management activities are part of the sphere in which harvests of previously protected varieties become part of the commons. Nonetheless, despite the stated Court pronounced freedom, there may be some limitations to particular practices that could result in farmers' liability. For instance, selling or distributing seeds that are part of a protected variety harvest can result in liability for farmers where the naming, branding or packaging of their produce infringes the protected variety, particularly in the context of the law on counterfeiting, passing off and misrepresentation.

3. Conclusion

The High Court judgment was merited, was informed by the reality of agricultural practices in Kenya, and is suitable as it affirms the previously diminished farmers' rights to freely access seeds, which historically and in contemporary times remains part of the African commons of plant genetic resources. Such indigenous and informal seeds management practices have been the basis of food security and livelihood for most of Kenyan farming communities. It is noteworthy that the High Court judgment had the merited effect of effectively extinguishing the retrogressive effects of amendments to the SPVA since 2012 and its implementation Regulations, in addition to the regressive effects of the ratification of UPOV 1991 in 2016, even though the petition had largely challenged the 2022 legislative and regulatory amendments. A strong regime of PBRs that is patent like is not ideal in Kenya as PGRs constitute essential food, nutrition and livelihood resources that have historically been part of the common heritage of mankind.

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