Symposium on the Wathome Decison: Whose Seeds, Whose Future? Seeds Sovereignty and Farmers Rights in Kenya

By:

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March 19, 2026

Introduction

Freedom from hunger is a constitutionally guaranteed right in Kenya. Yet the realization of the right to food depends not only on formal legal protections but also on the existence of functional food systems, efficient supply chains, and resilient agricultural production. At the most foundational level of this regime lies the seed. Seeds planted by farmers grow into the plant food that sustains households, markets, and economies. The place of seeds is further cemented by the fact that plants account for over 80% of the human diet and nutrition. Smallholder resilience is not only a food security imperative but also an economic lifeline for rural livelihoods.

Up to 75% of Kenya's agricultural output is from smallholder farmers. This means that the practical realization of the constitutional right to food rests, in significant part, on their labor, knowledge, and continued ability to produce. Their centrality is not only a domestic reality but also a global one. The African Union's Agenda 2063 framework, which includes the goal of increasing agrifood output by 45% by 2035, depends on this demographic to be attained. The majority of smallholder farmers depend on informal seed systems to source seeds for food production. Accordingly, informal seed systems are the primary means by which agricultural production is sustained, especially in the developing world. Smallholder farming must also be understood not merely as a food security imperative but also as a source of income.

This contribution places small-scale farmers at the centre of the right to food and examines the informal seed sovereignty as a foundational dimension of food security. It begins by outlining the structure and function of Kenya's informal seed system and its role in sustaining livelihoods and biodiversity. It then considers how state regulation, through provisions that sought to criminalise the exchange and sale of uncertified or unregistered seeds, threatened these long-standing practices. Against this backdrop, the article analyses the High Court's decision in *Wathome & 14 others v Kenya Plant Health Inspectorate Service & another; Greenpeace Environmental Kenya & 2 others (Interested Parties) [2025] KEHC 18166 (KLR)* (the Wathome Decision), focusing on the arguments advanced and the Court's response to the tension between plant variety protection and farmers' rights. Finally, it reflects on what a more balanced legal and policy framework might entail, while also engaging with emerging challenges related to the place of genetically modified crops and the growing reliance on toxic agrochemical inputs in food production.

The Stakes: The Case for Kenya's Informal Seed System

Eugénie Tenezakis aptly describes Kenya's informal seeds system as a living, community-driven infrastructure of seed saving, exchange, and stewardship that sustains the everyday food production of smallholder farmers. These systems are built on farmers' own practices of conserving seed from previous harvests, as well as through farmer-to-farmer gifts, exchanges, and local trade. These farmer-managed systems provide a rich diversity of planting material, including crop varieties that are culturally relevant, locally preferred, and

adapted to specific ecological conditions.

Informal seed systems also function as dynamic channels of distribution, reaching even the most remote farming communities where certified commercial seed is often inaccessible. Beyond ensuring access, these systems play a critical role in sustaining biodiversity. By maintaining a wide range of indigenous and farmer-bred varieties, informal seed networks preserve genetic diversity that is essential for resilience in the face of climate variability and environmental shocks.

Indigenous seeds remain crucial to Kenyan farmers and consumers for additional reasons. They are not only generally more affordable for small-scale producers but also sustain diverse, nutritious, and culturally valued crops, even as evidence suggests that informal seed networks remain better positioned than emerging formal markets to meet farmers' needs for reliable, high-quality seeds. Further, informal seed systems sustain cultural identity by preserving traditional diets, farming practices, and local knowledge embedded in seed use.

On the flip side, while commercial seeds may deliver higher yields under ideal conditions, they frequently require intensive external inputs, increasing production costs for farmers. Moreover, research increasingly associates the expansion of commercial seed regimes with monoculture and the erosion of agrobiodiversity. As farming becomes more dependent on uniform commercial varieties, traditional seed diversity declines, undermining ecological sustainability and heightening vulnerability to crop failure. This, in turn, raises the risk of famine under increasingly erratic weather patterns driven by climate change.

Commercial seeds are also often embedded in production models that demand escalating chemical use, raising concerns about long-term soil health, farmer dependency, and environmental harm. Unlike indigenous seeds, which can be saved and replanted across seasons, many commercial varieties are not renewable within farmer-managed systems, further entrenching reliance on external markets and corporate supply chains for access to seeds.

Legislating Away Seed Autonomy

Informal seed systems have sustained farming communities for generations. Through saving, exchanging, and replanting seeds, small-scale farmers have preserved biodiversity, adapted crops to local ecologies, and ensured household food security outside commercial markets. Yet the contemporary push toward formalization increases the risks of seed grabbing. As such, this project bears a resemblance to the colonial pattern in which local systems were "othered" and displaced by legal regimes that privileged certain models of property and production.

Kenya's Seeds and Plant Varieties Act, Cap 326, (the Act) was first assented to in 1972, and has undergone amendments in 1998, 2002, 2012, 2016, and was revised in 2022. There is also a proposed amendment under consideration by the Kenyan parliament that seeks to introduce a standards-based seed registration system that would be overseen by the Kenya Bureau of Standards. These legal reforms have steadily tightened state control over seed circulation.

The 2012 amendment specifically sought to align the statute with the 1991 Act of the International Union for the Protection of New Varieties of Plants (UPOV 91). Kenya joined UPOV 91 in 1999 and deposited instruments of accession in 2016. UPOV 91 strengthens breeders' rights and restricts farmers' ability to save, reuse, and exchange protected seeds without authorization. Under such a model, seeds become proprietary commodities rather than shared cultural resources.

Indeed, advocacy actors have noted that the 2012 amendment Kenyan framework has been described as "mirroring" of UPOV 1991, enabling breeders to legally challenge farmers over ordinary seed practices. This transformed seeds from a shared commons into a controlled asset, which displaced indigenous systems that have long anchored resilience, biodiversity, and rural livelihoods. As the litigation over the amendments and regulations revealed, the law was not neutral but rather reflected a deeper political economy tension between state-led "modernization" and farmer-managed systems.

In that connection, it has been argued that the case for a legal system that exclusively favors formal seed systems in Kenya has been fueled by foreign seed companies and industrialized countries. Some donor institutions and seed companies have also been reported to pressurize the Kenyan government to lift

the ban on genetically engineered products. This underscores the extent of the interests at play.

The Contradictions, Criminalization, and Small Holder Farmer Survival

The attempt to protect innovation through the law, while simultaneously criminalizing the very informal seed systems upon which smallholder survival depends, triggered a legal showdown at the Kenyan High Court. In the Wathome Decision rendered on 27 November 2025, farmers and civil society actors challenged legal provisions in the Act as an unconstitutional enclosure of seeds and one that legislated away seed sovereignty in the name of progress.

By prohibiting the sale of unindexed seed varieties under Section 8 and restricting commercialization to varieties listed on the National Plant Variety List under Section 8A, the Act effectively rendered indigenous seeds legally invisible unless recognized by the state. The petitioners argued that these provisions directly contravened Article 11(3)(b) of the Constitution, which obliges Parliament to recognize and protect the ownership and use of indigenous seeds by Kenyan communities.

The contention deepened through Section 10(4), which imposed criminal sanctions, including imprisonment, for seed processing, packaging, or sale by persons not registered as seed merchants, and for offering seed that failed to meet prescribed certification standards. Read together with Regulation 19, which barred the sale of seed unless certified or meeting minimum standards, these provisions placed informal seed exchange networks under constant threat of prosecution. The petitioners contended that this punitive framework violated Article 43(1)(c) of the Constitution of Kenya on the right to food, because criminalizing uncertified seed directly undermined access to affordable planting material for resource-poor farmers.

Beyond criminalization, the petition challenged the coercive enforcement architecture of the amendments. Section 3D, read with Regulation 21, empowered inspectors to enter premises, search, seize, and detain seeds on the basis of a “reasonable belief.” The petitioners argued that these seizure powers unjustifiably limited the right to privacy under Articles 31(a) and (b), which protect against arbitrary searches and seizure of possessions. They further contended that the blanket discretion vested in inspectors amounted to

an arbitrary deprivation of property contrary to Article 40, and denied farmers fair administrative action under Article 47 by permitting the detention of seeds without adequate procedural safeguards.

The petitioners grounded their challenge not only in domestic constitutional guarantees but also in Kenya's international obligations. This is because Kenya is a party to the International Treaty on Plant Genetic Resources for Food and Agriculture (the ITPGRFA), which, under Article 9, recognizes farmers' rights to conserve traditional knowledge, equitably share benefits, and participate in decision-making over plant genetic resources. They further invoked Article 9.3 of the ITPGRFA, which affirms that nothing in the Treaty should be interpreted to limit farmers' rights to save, use, exchange, and sell farm-saved seed, subject only to appropriate national law. Kenya is also a signatory to the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP), which provides for the rights of peasants to save, use, exchange, and sell farm-saved seed and propagating material.

The Court held that Parliament, by enacting Sections 8(1) and 8A(1), failed to fulfil its express obligation under Article 11(3)(b) to recognize and protect indigenous seeds and their community use. By restricting sales to indexed varieties and commercialization to the National Plant Variety List, the Act rendered indigenous seed practices legally invisible and eroded cultural rights protected under Article 11. The criminal sanctions in Section 10(4)(c), (d), (f) and (g), reinforced by Regulation 19's prohibition on sale of uncertified seed, were found to burden smallholders unjustifiably and violate Articles 21(2) and 43(1)(c) on the State's duty to realise the right to food.

Sections 20(1) and 20(1E) were for granting breeders extensive control even over farmers' harvest from protected varieties, entrenched economic dependency, and further undermined food rights. Section 3D(1) and Regulation 21's sweeping inspection and seizure powers were found to offend Articles 31, 40, and 47 by enabling arbitrary searches, depriving property, and denying a fair administrative process, respectively.

By striking down these provisions, the Court affirmed that the saving, sharing, and exchange of seed are not criminal acts but constitutionally protected cultural and economic practices. These everyday forms of farmer stewardship

are integral to indigenous knowledge systems, rural livelihoods, and the realization of the right to food. Seed autonomy, as the Court's analysis made clear, lies at the intersection of culture, property, and survival, and cannot be muzzled away through legislation.

Even more, the Court recognized that attempts to restrict the sale of unregistered seeds and plant varieties, to confine commercialization to the National Plant Varieties List prepared by KEPHIS, and to criminalize the importation, processing, and exchange of seeds by non-licensed actors would risk the "erosion of cultural distinctiveness of Kenya's peoples" that are "unique and specific cultural practices as regards food production and in particular seed selection and preservation". In doing so, the Court tacitly recognized that knowledge embedded in indigenous seed systems is scientific knowledge accumulated over centuries of experimentation, adaptation, and ecological stewardship, worthy of constitutional protection as required under Article 11 (3) b.

The state has since appealed the decision to the Court of Appeal (the Appeal). It will be critical to follow how the Court of Appeal ultimately holds.

Beyond the Wathome Decision

What the Wathome decision demonstrates is the agency of smallholder farmers in pushing back against legal regimes that threaten their rights to food and livelihood. The case shows how constitutional litigation can become a site of resistance, where farmers insist that food security cannot be secured by criminalizing the very seed systems that sustain it. The central question, as the petition revealed, is not whether regulation is necessary, but whether regulation serves the survival, cultural autonomy, and biodiversity of farmers, or instead entrenches enclosure, dependency, and corporate control.

In that regard, the farmers in Wathome may be seen as part of a wider movement of farmers challenging the legal and regulatory foundations of commercial agriculture in Kenya. A petition is currently pending before the High Court seeking to ban the use of hazardous pesticides in Kenya and to hold both the government and agrochemical companies accountable for allegedly failing to protect citizens from pesticide-related harm. Filed on behalf of communities said to have been exposed to chemicals such as glyphosate, paraquat, and

chlorpyrifos, the case was recently allowed to proceed as a class action, enabling other affected farmers to join the suit against multinational companies. There is also ongoing litigation concerning the lifting of the 2012 ban on open cultivation of genetically modified crops and the importation of food crops and animal feeds produced through biotechnology innovations and genetically modified foods that is pending before the Court of Appeal. Although the Environment and Land Court held that the lifting of the ban was procedurally valid, the ban remains in force because the Court of Appeal issued a status quo order.

The Wathome decision also exposes the duality of Kenya's international legal commitments. Kenya is simultaneously bound by regimes that pull in opposite directions. First, there is the breeder-centered logic of UPOV 1991. Second, there is the farmer-rights-centered framework of the ITPGRFA and UNDROP, as well as the flexibilities allowed under the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights. The question would now be, when international legal obligations conflict in practice, which vision of agriculture will the Kenyan state prioritize, and whose interests will those choices seek to advance?

This question assumes significance as commercial agriculture takes root in Kenya through public-private partnerships. These projects are critical, not only for commercial development but also for food security. The investors will no doubt require commercial protection of their plant breeder rights and similar forms of legal and regulatory support to secure their interests.

The challenge going forward is therefore not to reject formal seed regulation altogether, nor to dismiss the important role of formal seed systems, commercial breeders, and large-scale farms in Kenya's agricultural economy. Rather, it is to construct a framework that balances innovation with sovereignty. This will be a framework that protects farmers' customary practices while also ensuring seed quality, plant health, and responsible investment. Regulation must not become a tool for extinguishing the informal sector in favour of market consolidation by a few.

Finally, Wathome opens onto the broader emerging debates that Kenya can no longer avoid, including the contested expansion of genetically modified crops, the growing dependence on toxic agrochemical inputs, and the health and

ecological harms associated with pesticide-intensive agriculture. Seed law cannot be separated from these questions. The future of food sovereignty will turn not only on who controls seed markets, but also on what kinds of agriculture, ecologies, and livelihoods the law is willing to enable and sustain.

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