

Kenya's GMO Ban: The Court of Appeal upholds the ban on GM Crops

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On 3rd October 2022, amidst the worst drought Kenya has faced in over 40 years, the Cabinet of the Republic of Kenya lifted a 10-year ban on the cultivation within Kenya as well as importation of genetically modified (GM) crops and animal feed.¹ The prohibition that had been implemented in 2012 was based on concerns regarding the lack of sufficient scientific evidence concerning the impact on public health of consumption of such food. The ban however, only prohibited the introduction of foods untested by local regulatory agencies, it did not prohibit the use of biotechnology – for instance, insect-resistant bacillus thuringiensis (Bt.) cotton is the only GM product that has been commercialised in Kenya. On December 19, 2019, Kenya's Cabinet approved cultivation of Bt. cotton and allowed importation of Bt. Cottonseeds.²

In 2022, with an estimated 4.1 million people facing high levels of food insecurity, the ban was lifted. Food insecurity was driven by a combination of factors including: a fourth successive below-average rainy season, below average crop production bordering on crop failure, low levels of livestock production, localised resource-based conflict, high food prices as well as low in-country production.³

Lifting the ban on GM Crops was to allow farmers to grow crops that are modified to be drought resistant, reduce the use of pesticides, lower the cost of raw material for animal feed, reduce grain damage, and help curb shortages that are caused by lack of rain.⁴

¹ Joseph Maina, Kenya approves GMOs after 10-year ban, Alliance for Science, 6 October 2022

<https://allianceforscience.org/blog/2022/10/kenya-approves-gmos-after-10-year-ban>

² Global Agricultural Information Network, United States Department of Agriculture, Foreign Agricultural Services, 15 December 2022

<https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=Agricultural%20Biotechnology%20Annual%20Report%20Nairobi%20Kenya%20KE2022-0010.pdf>

³ Kenya – ASAL persistent drought, coupled with high commodity prices, poor trade conditions and high inflation continue to impact food insecurity across the arid and semi-arid lands (asal) counties, integrated food security phase classification <https://reliefweb.int/report/kenya/kenya-ipc-acute-food-insecurity-and-acute-malnutrition-analysis-july-december-2022-published-september-28-2022> 28 September 2022.

⁴ Brian Otieno, President Ruto defends GMO imports, says no quick fixes to high cost of living, The Standard, January 2023 <https://www.standardmedia.co.ke/national/article/2001464498/president-ruto-defends-gmo-imports-says-no-quick-fixes-to-high-cost-of-livin>

The Kenya Peasants League – a lobby representing peasant farmers – was not happy with this Executive decision and petitioned the High Court to maintain the 2012 ban on GM Crops and animal feed, while the matter before the Court was being heard and until a determination was made. They stated that the Government should tighten biosafety regulations to protect citizens against health risks associated with the consumption of GM crops.

The League averred that lifting the ban on the cultivation within and importation of foods and animal feeds that are produced from genetically modified seeds and other organisms is unconstitutional, as it threatens the right of access to information, the right to food of acceptable quality as well as consumer protection rights.

They argued that Cabinet, in making this decision, effectively lifted the ban on all necessary restrictions and controlling measures that were put in place to protect indigenous seeds and other indigenous genetic resources, and as such actually threatens food security in the country.

The High Court adopted the precautionary principle and issued interim orders upholding the 2012 ban on importation and cultivation of GM Crops and animal feed, pending the hearing and determination of the petition. The Judge stated that this was a matter of great public interest in Kenya and noted the global uncertainties surrounding GMOs.⁵

The discord over the importation of GM Crops came while the Kenya-United States negotiations for a Strategic Trade and Investment Partnership (STIP) were already underway. The STIP lists Agriculture as a priority area for the negotiations. The United States is the world's biggest producer of GMO Crops. The US Trade Representative's office (USTR), in the 2022 Trade Policy Agenda and 2021 Annual Report, stated that lifting the ban on GM Crops could boost agricultural exports from the US to Kenya. The ban restricts imports of agricultural products by Kenya from the US and is therefore listed as a trade barrier in the above report.⁶

The Attorney General (AG) of Kenya appealed the High Court order before the Appellate Court on the 16th of December 2022, stating that there are already structures in place such as the National Biosafety

⁵ Mwangi & another v Attorney General & 3 others; Kenya University Biotechnology Consortium (KUBICO) & 2 others (Interested Parties) (Constitutional Petition E475 of 2022 & Petition E519 of 2022 (Consolidated)) [2023] KEHC 3943 (KLR) (Constitutional and Human Rights) (28 April 2023) (Ruling).

⁶ 2022 Trade Policy Agenda & 2021 Annual Report of the President of the United States on the Trade Agreements Program <https://agoa.info/images/documents/15965/2022-trade-policy-agenda-and-2021-annual-report.pdf>

Authority; the Biosafety Act, 2009 and the Biosafety Regulations which regulate biotechnology within Kenya. Further, Kenyans have the right to information of the benefits of GMO products. Lastly, the AG argued that the ruling was not based on any scientific evidence and has interfered with the freedom and rights of Kenyans who want to trade and consume GMO products.⁷

The Court of Appeal, on 31st March 2023, denied the issuance of an order of stay of execution of the order of the trial court. It upheld the ban on cultivation and importation of GM Crops and animal feed. The Appellate Court dismissed the Attorney General's application and stated that the effect of the High Court order was to return to the status quo pertaining before the directive was issued. An appeal would not be rendered nugatory based on this.

The Court of Appeal stated that the High Court is yet to determine the matter before it, and directed the intended appeal be listed for hearing on a priority basis.⁸

The question that now arises is: what are the consequences of the maintenance of the ban on cultivation and importation of GM Crops and animal feed on US-Kenya STIP Negotiations?

This was raised in a stakeholder meeting with the Ministry of Investments, Trade, and Industry, on 31st of May 2023 on the Agricultural Chapter within the US-Kenya STIP Negotiations.

The Ministry stated that the negotiation on biotechnology encompasses a larger agenda than just GM Crops and noted that the United States is strong in GM commodity supply. It was further noted that Kenya has not imported GM crops and animal feed since the Court ruling. The Ministry stated that the STIP Negotiations will not interfere with the Judicial process and that the Kenyan Government will abide by the outcome of the Court Ruling.

⁷ Attorney General, National Biosafety Authority & 2 others vs Paul Mwangi & 4 others, Constitutional Petition No. E519 OF 2022 as Consolidated with Constitutional Petition No. E475 of 2022, Civil Appeal (Application) No. E474 Of 2022 (Ruling).

⁸ *Ibid.*

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