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The Senate  
The Clerk

TO: The Speaker of the Senate

THRO: The Clerk of the Senate

THRO: The Deputy Clerk

THRO: Director, Committee Services-recommended & forwarded, 05/11/2020

FROM: Research Officer 1

DATE: 4<sup>th</sup> November, 2020

SUBJECT: REPORT ON THE CROPS (TEA INDUSTRY) REGULATIONS 2020

Forwarded for your approval  
[Signature]  
5/11/20

② Rt. Hon. Speaker  
You may approve for tabling 05/11/20

Approved  
[Signature]  
5/11/20

The Sessional Committee on Delegated Legislation and the Standing Committee on Agriculture Livestock and Fisheries have concluded consideration of the Crops (Tea Industry) Regulations, 2020 and resolved not to accede to the Regulations. Pursuant to section 15 (1) of the Statutory Instruments Act and standing order 221 (4) (b) of the Senate Standing Orders the Committee considered and adopted a Report on the Regulations.

This is to seek your approval of the Report for tabling in the House

CLARE KIDOMBO

② Dir, DLPS  
Kindly Seal  
5/11/2020

THE SENATE RECEIVED  
05 NOV 2020  
DIRECTOR COMMITTEE SERVICES

③ Mr. Moger (AD LPS)

pls facilitate tabling and further necessary action.  
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REPUBLIC OF KENYA



TWELFTH PARLIAMENT

FOURTH SESSION

*APPROVED*  
*5/11/2020*

THE SESSIONAL COMMITTEE ON DELEGATED LEGISLATION  
AND THE  
STANDING COMMITTEE ON AGRICULTURE, LIVESTOCK AND FISHERIES

.....  
A REPORT ON THE CROPS (TEA INDUSTRY) REGULATIONS, 2020  
.....

PAPERS LAID	
DATE	10.11.2020
TABLED BY	Chairperson
COMMITTEE	Delegated Legislation
CLERK AT THE TABLE	J. Mbaye

Clerk's Chambers,  
First Floor,  
Parliament Buildings,  
NAIROBI.

NOVEMBER, 2020

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## **ABBREVIATIONS AND ACRONYMS**

AFA	Agriculture and Food Authority
EATTA	East Africa Tea Trade Association
KTDA	Kenya Tea Development Agency
MP	Member of Parliament
Sen	Senator



## PREFACE

**Honourable Speaker,**

### **Establishment of the Committees**

The Senate Sessional Committee on Delegated Legislation is established under standing order 221 of the Senate Standing Orders. The Committee is mandated to scrutinize statutory instruments laid before the House to ensure that they are consistent with the provisions of the Statutory Instruments Act, 2013.

The Standing Committee on Agriculture, Livestock and Fisheries is established under 218 of the Senate Standing Orders. The Committee is mandated to consider all matters relating to agriculture, irrigation, livestock, fisheries development and veterinary services.

### **Membership of the Committees**

The Sessional Committee on Delegated Legislation is comprised of the following members:-

Sen. Mohammed Faki, MP	- <b>Chairperson</b>
Sen. Boniface Kabaka MP	- <b>Vice Chairperson</b>
Sen. Samuel Poghiso, EGH, MP	
Sen. (Dr.) Michael Mbito, MP	
Sen. Abshiro Halake, MP	
Sen. Anuar Loitiptip, MP	
Sen. Judith Pareno, MP	
Sen. Mary Seneta, MP	
Sen. (Prof.) Imana Malachy Ekal, MP	

The Standing Committee on Agriculture, Livestock and Fisheries is comprised of the following members: -

Sen. Njeru Ndwiga, EGH, MP	- <b>Chairperson</b>
Sen. Enoch Wambua, MP	- <b>Vice Chairperson</b>
Sen. (Canon) Naomi Waqo, MP	
Sen. Kipchumba Murkomen, EGH, MP	
Sen. (Dr.) Michael Mbito, MP	
Sen. (Eng.) Ephraim Maina, EBS, MP	

Sen. Justice (Rtd.) Stewart Madzayo  
Sen. Issa Juma Boy, MP  
Sen. Boniface Kabaka, MP

**Honourable Speaker,**

The Crops (Tea Industry) Regulations, 2020 were prepared by the Ministry of Agriculture, Livestock, Fisheries and Irrigation and published by the Cabinet Secretary on 22<sup>nd</sup> May, 2020. The regulations were forwarded to the Senate by the Cabinet Secretary pursuant to section 11(1) of the Statutory Instruments Act, 2013. The regulations were tabled before the Senate on 16<sup>th</sup> June, 2020 and subsequently stood committed to the Senate Sessional Committee on Delegated Legislation. Pursuant to section 15(2) of the Statutory Instruments Act, the Committee is required to scrutinize the regulations within 28 sitting days from 16<sup>th</sup> June, 2020.

The Sessional Committee on Delegated Legislation and the Standing Committee on Agriculture, Livestock and Fisheries considered the Regulations at length and received submissions from various stakeholders.

**Honourable Speaker,**

Some of the key observations by the Committees on the Crops (Tea Industry) Regulations, 2020 were as follows: -

- (1) Devolved Functions-** The Committees observed that some of the functions assigned to the Agriculture and Food Authority are devolved functions under the Fourth Schedule of the Constitution. In particular, the Committee observed that registration of warehouses by the Agriculture and Food Authority which flies in the face of the law, noting that the Warehouse Receipts System Act, 2019 has tasked county governments, through the respective County Executive Committee Members, to register and license all warehouse operating within respective counties.

It also does not provide for County Tea Inspectors and dispute resolution mechanisms at the county level with regard to registration and licences. Additionally, the registration of tea packers should be assigned as a county government function.



- (2) Import of the Regulations-** While the Regulations seek to address problems faced by small holder farmers and to increase direct control of the industry by the farmers, they seem to have left out other players in the industry. The Regulations are generally too prescriptive as they are aimed at controlling one industry player instead of providing incentives for other industry players to grow. The Regulations should therefore be reviewed with a holistic view of the industry and especially noting the interests of County Government.
- (3) Meaningful Public Participation-** The Committee observed that while indeed significant public participation was conducted on the Crops (Tea Industry) Regulations, 2020, stakeholders, including County Governments felt that their views were ignored. Agriculture is a devolved function under the Fourth Schedule of the Constitution and the Regulations should include the views of all County Governments pursuant to section 40 (1) of the Crops Act.
- (4) The Regulatory Impact Assessment-**The Committee observed that due to the potential impact of the Regulations on Regulatory Impact Assessment should be done on the final version of the Regulations and not the initial one.
- (5) The Regulation will interfere with the internal affairs of private companies and may amount to over-regulation of the industry thus stifling growth-** The Committee observed that the Regulations violate the provisions of the Companies Act which require that the internal affairs of private companies.

The Committee noted that under Regulation 18, the determination of whether directors are fit and proper is likely to interfere with the internal management of duly registered and licenced companies and deny the company a license on that basis. The company is at law a different entity from its directors and shareholders. In this principle, the corporate veil of a company is protected and a regulation cannot purport to pierce the corporate veil without going through the court process and establishing the legal requirements for piercing the corporate veil.

**Honourable Speaker,**

This Report provides detailed observations and the findings of the Committee on specific provisions of the Regulations which offend section 13 of the Statutory Instruments Act, 2020 and are not in the interest of Counties as follows-

- (1) Regulation 2 on Interpretation
- (2) Regulation 9 (18) of the Crops (Tea Industry) Regulations, 2020 on the Tea Manufacturing Licence

- (3) Regulation 10 on Boards of Smallholder Tea Factories
- (4) Regulation 13 on Registration of a Warehouse
- (5) Regulation 14 on Registration of Tea Packers
- (6) Regulation 15 on Monthly Return for a Tea Packer
- (7) Regulation 16 on Registration of Tea Buyer or Exporters
- (8) Regulation 18 on considerations before Registration and Licensing and Renewal
- (9) Regulation 19 on the Monthly Return for Buyer, Exporter, Importer, Brokers and Warehouse
- (10) Regulation 20 on Cancellation of a Licence or Registration
- (11) Regulation 22 on Management Agent Agreement
- (12) Regulation 24 on Auction Operations
- (13) Regulation 35 on Appointment of Crop Inspectors
- (14) Regulation 36 on Tea Standards
- (15) Regulation 39 on the Imposition of Fees by the County Governments
- (16) Regulation 43 on No compensation for revocation, variation or suspension of licence or registration
- (17) First Schedule Forms
- (18) Second Schedule on Fees

**Honourable Speaker,**

**After careful consideration of the Crops (Tea Industry) Regulations, 2020, pursuant to section 15 (1) of the Statutory Instruments Act and Standing Order 221 (4) (b), the Sessional Committee on Delegated Legislation and the Standing Committee on Agriculture, Livestock and Fisheries do not accede to the Crops (Tea Industry) Regulations, 2020 and recommends that the Senate resolves that the Statutory Instrument be annulled.**

### **Acknowledgement**

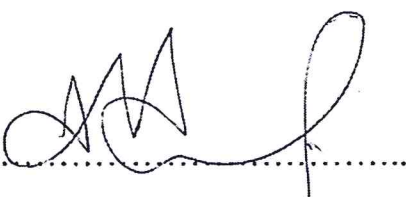
The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate as well as the Secretariat for the support extended to it in the conduct of the public hearings and in fulfilling its mandate.

Further it wishes to thank stakeholders who made both written and oral submissions including farmers from Nandi, Bomet, Kericho and Murang'a Counties; Kenya Tea Development Agency and its subsidiary companies and their representatives; East African Tea Trade Association; and the Council of County Governors.



**Honourable Speaker,**

It is now our duty, pursuant to section 15 (1) of the Statutory Instruments Act and standing order 221 (4) (b) of the Senate Standing Orders, to present a Joint Report of the Sessional Committee on Delegated Legislation and the Standing Committee on Agriculture, Livestock and Fisheries on the Crops (Tea Industry) Regulations, 2020.

Signed.....

Date.....*4th Nov. 2020*

**SEN. MOHAMED FAKI, MP**

**CHAIRPERSON**

**SESSIONAL COMMITTEE ON  
DELEGATED LEGISLATION**

Signed.....

Date *4<sup>th</sup> November, 2020*

**SEN. NJERU NDWIGA, MGH, MP**

**CHAIRPERSON**

**STANDING COMMITTEE ON  
AGRICULTURE, LIVESTOCK AND  
FISHERIES**

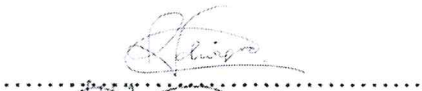
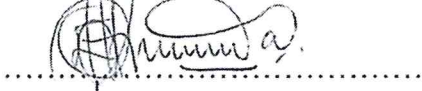
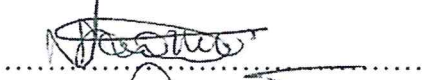
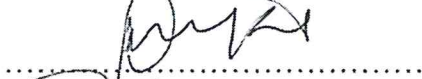




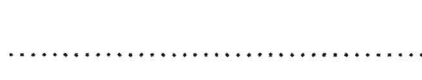
**ADOPTION OF THE REPORT OF THE SESSIONAL COMMITTEE ON DELEGATED LEGISLATION AND THE STANDING COMMITTEE ON AGRICULTURE, LIVESTOCK AND FISHERIES STANDING ON THE CROPS (TEA INDUSTRY) REGULATIONS, 2020.**

**We, the undersigned Members of the Sessional Committee on Delegated Legislation and the Standing Committee on Agriculture, Livestock and Fisheries Standing Committee on the Crops (Tea Industry) Regulations, 2020, do hereby append our signatures to adopt the Report-**

**SESSIONAL COMMITTEE ON DELEGATED LEGISLATION**

- |  |                  |  |
|--|------------------|--|
| 1. Sen. Mohammed Faki, MP              | Chairperson      | .....<br>  |
| 2. Sen. Boniface Kabaka MP             | Vice-Chairperson | .....<br> |
| 3. Sen. Samuel Poghiso, EGH, MP        | Member           | .....  |
| 4. Sen. (Dr.) Michael Mbito, MP        | Member           | .....<br>  |
| 5. Sen. Abshiro Halake, MP             | Member           | .....<br> |
| 6. Sen. Anuar Loitiptip, MP            | Member           | .....<br> |
| 7. Sen. Judith Pareno, MP              | Member           | .....  |
| 8. Sen. Mary Seneta, MP                | Member           | .....<br>  |
| 9. Sen. (Prof.) Imana Malachy Ekal, MP | Member           | .....  |

**STANDING COMMITTEE ON AGRICULTURE, LIVESTOCK AND FISHERIES**

1. ✕ Sen. Njeru Ndwiga, EGH, MP	<b>Chairperson</b>	
2. ✕ Sen. Enoch Wambua, MP	<b>Vice-Chairperson</b>	
3. ✕ Sen. (Canon) Naomi Waqo, MP	Member	
4. Sen. Kipchumba Murkomen, EGH	Member	
5. Sen. (Dr.) Michael Mbito, MP	Member	
6. Sen. (Eng.) Ephraim Maina, EBS, MP	Member	
7. ✕ Sen. Justice (Rtd.) Stewart Madzayo	Member	
8. ✕ Sen. Issa Juma Boy, MP	Member	
9. Sen. Boniface Kabaka MP	Member	

## CHAPTER ONE

### INTRODUCTION

#### 1.0 BACKGROUND

1. The Crops (Tea Industry) Regulations, 2019 were prepared by the Ministry of Agriculture, Livestock, Fisheries and Irrigation and published by the Cabinet Secretary on 22<sup>nd</sup> May, 2020 in exercise of the powers conferred on the Cabinet Secretary pursuant to section 40 of the Crops Act, 2013. Section 40 of the Crops Act, 2013 authorises the Cabinet Secretary responsible for agriculture to, in consultation with the Agriculture and Food Authority and county governments, make regulations to facilitate the operationalisation of the Act.
2. The Regulations were forwarded to the Senate by the Cabinet Secretary pursuant to section 11(1) of the Statutory Instruments Act, 2013. The regulations were tabled before the Senate on 16<sup>th</sup> June, 2020 and subsequently stood committed to the Senate Sessional Committee on Delegated Legislation. Pursuant to section 15(2) of the Statutory Instruments Act, the Committee scrutinized the regulations within 28 sitting days from 16<sup>th</sup> June, 2020.

#### 1.1 SCRUTINY OF THE REGULATIONS

3. The Sessional Committee on Delegated Legislation and the Standing Committee on Agriculture, Livestock and Fisheries held eighteen (18) meetings to consider the Crops (Tea Industry) Regulations (*Annex I*). The Committees received written submissions and held virtual meetings with stakeholders on 13<sup>th</sup> and 14<sup>th</sup> August, 2020; the Council of Governors on 28<sup>th</sup> August, 2020; and the Cabinet Secretary for Agriculture, Livestock, Fisheries and Cooperatives on 17<sup>th</sup> September, 2020. The Committee also received written submissions from farmers from Nandi, Bomet, Murang'a and Kericho Counties.
4. The Committee considered the stakeholder submissions and responses from the Ministry of Agriculture, Livestock, Fisheries and Cooperatives at length and subsequently made various observations and recommendations and contained in this report.



## **1.2 PROVISIONS OF THE REGULATIONS**

### **1.2.1 Part I – Preliminary**

5. **Part I** of the regulations contains preliminary provisions. It makes provisions with regard to the title of the regulations, definition of terms, application of the regulations and their purpose.
6. Paragraph 3 of the regulations provide that they would apply to tea produced and marketed in Kenya, and imported or exported into and out of Kenya.
7. Paragraph 4 thereafter state that their purpose is to guide the development, promotion, and regulation of the tea industry for the benefit of the tea growers and other stakeholders in the tea industry.

### **1.2.2 Part II—Registration and Licensing Provisions**

8. **Part II** of the regulations makes provisions with regard to registration and licensing of commercial tea nurseries, tea growers, tea manufacturers, tea warehouses, tea packers, tea buyers or exporters, tea brokers, management agents, auction organisers and tea importers.
9. Paragraph 5 of the regulations mandates operators of commercial tea nurseries to apply for a licence from relevant county governments before commencing such operations and further mandates the operators to submit annual returns to the respective county governments and copy the Agriculture and Food Authority.
10. Paragraph 6 of the regulations allows small-holder tea growers to register with tea factories and mandates tea factories to share information of small-holder tea grower registration with the relevant county governments and the Agriculture and Food Authority by 15<sup>th</sup> January every year. It also restricts the selling of green leaf tea to tea farmers and further prohibits the selling of the tea to factories where the growers are registered, effectively mandating farmers to register with specific factories and only sell green leaf tea to the respective factory. The regulation provides that failure to adhere to the provisions of the paragraph is an offence punishable by a fine not exceeding Kshs. 500,000/= or imprisonment for a term not exceeding one year, or both.

11. Paragraph 7 of the regulations prohibit smallholder growers from registering one parcel of planted land with more than one factory unless it is for different types of tea. It also provides that contravention of the provisions of the paragraph is an offence and those convicted will be liable to a fine not exceeding Kshs. 20,000/= or imprisonment for a term not exceeding six months, or to both such fine and imprisonment.
12. Paragraph 8 of the regulations mandate tea factories to sign green leaf agreements with their registered growers.
13. Paragraph 9 of the regulations require potential manufacturers to apply to the Agriculture and Food Authority for a licence before proceeding with manufacturing of tea. The Authority is required to consult relevant county executive committee members and ensure compliance with the following terms and conditions before issuing the licences—
  - a) submission of a feasibility study of the proposed cottage tea manufacturing factory;
  - b) submission of a certified copy of the growers' register;
  - c) demonstration of adequate financial capacity to construct the cottage tea factory and commence operations;
  - d) where a cottage tea manufacturing factory intends to use wood as a source of energy, submission of a wood fuel sustainability plan equivalent to the ratio of 4:1 tea planted to woodlots planted;
  - e) compliance with the provisions of the Crops Act, the regulations and any other relevant law; and
  - f) the potential manufacturer has a procurement policy providing for competitive procurement of goods and services, including management agency services, fertilizer, machinery and equipment, warehousing and transportation of tea.
14. Paragraph 9 further mandates the Agriculture and Food Authority to take into consideration the National Processing Capacity Survey when issuing manufacturing licences. The regulations do not provide any information on the National Processing Capacity Survey and makes no further reference to it.
15. The paragraph also mandates manufacturers to facilitate remittance of contributions to duly registered organizations pursuant to any agreements entered between the tea growers and those organizations. It also mandates green leaf transporters to comply



with the Tea Industry Code of Practice, the Public Health Act, Cap. 242 and any other relevant laws. The regulation provides that failure to adhere to the provisions of the paragraph is an offence punishable by a fine not exceeding Kshs. 500,000/= or imprisonment for a term not exceeding one year, or both.

16. Paragraph 10 of the regulations makes provision regarding the boards of smallholder tea factories. It mandates election of board members of the factories through a democratic system of one man one vote and limits board membership to three members. It also restricts the terms of board members to two three year terms and mandates the factories to put in place measures to ensure the two-thirds gender rule is implemented in the membership of their boards.
17. Paragraph 11 of the regulations prohibit the manufacturing or processing of tea without a licence, with those in breach liable to a fine not exceeding Kshs. 10,000,000/=, or to imprisonment for a term not exceeding five years, or to both such fine or imprisonment.
18. Paragraph 12 of the regulations mandates manufacturers to submit to the Agriculture and Food Authority and copy the respective county government Annual and Monthly Production Statistical Returns.
19. Paragraph 13 thereafter mandates warehousemen to register with the Agriculture and Food Authority before conducting such a business. Likewise, paragraphs 14, 16, 17, 21, 23 and 31 mandates tea packers, tea buyers or exporters, tea brokers, management agents, auction organiser and tea importers respectively to register with the Agriculture and Food Authority before conducting their respective business.
20. Paragraph 22 of the regulations allows persons intending to manufacture or in any way deal in tea to engage the services of a management agent and sign a management agreement to that effect.
21. Paragraphs 24 and 25 on the other hand makes provision for auction operations. They mandate all teas processed and manufactured in Kenya for the export market, with the exception of orthodox and purple teas, to only be sold at the tea auction floor. They further mandate the approval of Auction trading rules and regulations by the Cabinet Secretary before their application.

### **1.2.3 Part III—Quality Assurance**

22. **Part III** of the regulations makes provision for quality assurance for the tea industry. It provides for the appointment of inspectors to carry out inspections to ascertain compliance to the regulations and provides the qualifications of their appointment.
23. The regulations also prescribe standards to be met by all persons dealing in tea. They also prohibit the importation and exportation of tea seed, living tea plants, or any living parts of tea plants without a written permit by the Authority, with those in breach liable to a fine not exceeding Kshs. 500,000/= or imprisonment for a term not exceeding one year, or to both such fine and imprisonment.

### **1.2.4 Part IV - General Provisions**

24. **Part IV** of the regulations makes general provisions. It provides mechanisms for dispute resolution at the national levels through the Cabinet Secretary. It prohibits the transfer of licences or registration certificates and provides that all licences and registration certificates expire 30<sup>th</sup> June each year.
25. The regulations also provide for the revocation of licences and certificates of registration by the Authority or county governments, as the case may be. They also allow the modification of forms by the Authority and county governments. The regulations finally make provision for general penalties, revocation of current regulations and transition of existing licences and registrations.

### **1.2.5 Schedules**

26. The Regulations also contains Two Schedules as follows—
- (1) the First Schedule prescribes the various forms to be used in making applications or issuing documentation under the regulations; and
  - (2) the Second Schedule prescribes the fees chargeable by the Agriculture and Food Authority or County Governments, as the case may be, for manufacturers, management agents, marketing agents, buyers or exporters, warehousemen, importers, brokers, auction organisers, tea packers, commercial green leaf transporters and commercial tea nursery operators.



## CHAPTER TWO

### STAKEHOLDER ENGAGEMENT

#### **2.0 CONSULTATION WITH STAKEHOLDERS**

27. The Sessional Committee on Delegated Legislation and the Standing Committee on Agriculture, Livestock and Fisheries received written submissions (**Annex 2**) and held virtual meetings with stakeholders on 13<sup>th</sup> and 14<sup>th</sup> August, 2020; the Council of Governors on 28<sup>th</sup> August, 2020; and the Cabinet Secretary for Agriculture, Livestock, Fisheries and Cooperatives on 17<sup>th</sup> September, 2020. The Committees therefore considered the written and oral submissions from the following stakeholders-

- (1) Cabinet Secretary for Agriculture, Livestock, Fisheries and Cooperatives;
- (2) Farmers of Chebut and Kaptumo, Nandi County (vide letter dated 3<sup>rd</sup> May, 2020);
- (3) Farmers of Kapset, Bomet County (vide letter dated 2<sup>nd</sup> June, 2020);
- (4) Farmers of Momul, Kericho County (vide letter dated 3<sup>rd</sup> June, 2020);
- (5) Farmers of Kiru, Murang'a County (vide letter dated 3<sup>rd</sup> June, 2020);
- (6) KTDA Power Company Limited (in person and through Messrs. IKM Advocates);
- (7) Messrs. G & A Advocates, LLP on behalf of the employees of Kenya Tea Development Agency Holdings Limited;
- (8) Messrs. Milimo Muthomi & Company Advocates on behalf of the Kenya Tea Development Agency Holdings Limited and KTDA Management Services Limited;
- (9) East African Tea Trade Association (in person and through Messrs. J.K. Kibicho & Company Advocates); and
- (10) Council of County Governors.

#### **2.1 GENERAL COMMENTS BY STAKEHOLDERS**

28. The following is a summary of the submissions from stakeholders on the Regulations)-

##### **2.1.1 Public Participation and Stakeholder Consultation**

29. All stakeholders submitted that the regulations be revoked for lack of consultations and adequate public participation for the following reasons-

**(1) Meaningful public participation-** A majority of stakeholders submitted that there was no meaningful public participation as required by the Constitution, the Statutory Instruments Act and section 40(1) of the Crops Act and that no effective public participation could be conducted during the Covid-19 pandemic.

Additionally, farmers from various counties submitted to the Committee that public participation could not be effectively conducted through the submission of comments by email as farmers, who are the most affected by the regulations, do not ordinarily have access to the internet and are not email technology savvy.

**(2) Public participation on the regulations was rushed and stakeholders not given adequate time to scrutinise the regulations-** KTDA Holdings submitted to the Committee that KTDA and the entire small scale tea industry was not consulted prior to the formulation of the regulations yet the regulations have a direct and substantial effect on the structure, operations, management and business of both KTDA and the small scale tea industry factory companies and farmers.

**(3) Lack of consultation with County Governments-** The Council of Governors were of the view that County governments, including county assemblies, are integral players on matters crops such as tea. County governments had a Constitutional and statutory right to participate from inception of the regulations and such core function cannot be taken away by the Cabinet Secretary who, utmost, only consulted the Agriculture and Food Authority.

The formulation of the regulations ought to have been subjected to the wider public scrutiny in all the respective counties and subsequently to the legislative county assemblies for debate prior to publication. Tea growers in various counties have divergent issues and it is incorrect to assume that the all issues touching on the tea sector are uniform in all counties.

**(4) Public Participation on the Regulatory Impact Assessment-** The Regulatory Impact Assessment was conducted on a different set of regulations, i.e. the proposed Crops (Tea Industry) Regulations, 2018. The current regulations have different and more adverse financial implications on the tea industry.



**2.1.1.1 Response from the Cabinet Secretary, Ministry of  
Agriculture, Livestock, Fisheries and Cooperatives**

30. The Cabinet Secretary disputed that claim that there was inadequate public participation was not adequate and submitted as follows-

**(1) Consultations with all relevant stakeholders were comprehensive and widely conducted between 2014 and 2020-** The Cabinet Secretary submitted that the process of drafting the tea regulations under the Crops Act commenced in 2014 and has undergone numerous consultative processes over the years until 2020 when the regulations were published. The regulations published by the Cabinet Secretary may differ in some respects with the draft of the regulations of 2018 due to the changes that have occurred over time after review and incorporation of stakeholder input.

**(2) Evidence of stakeholder consultation-** The Cabinet Secretary submitted that stakeholders who were consulted and submitted their inputs included; County Governments, COG, tea growers, tea factories, management agents, buyers/exporters/importers, brokers, packers, warehousemen, auction organizer, farmers' organizations and other government agencies. He stated that-

- (i) Invitations were sent to all tea industry stakeholders including KTDA and EATTA to send their comments on the regulatory impact statement and the tea regulations in 2019 through letters and through newspaper adverts;
- (ii) Notices for public participation were published in Kenya Gazette, local dailies, websites of MOALF&C & AFA requesting members of the public to submit their comments on the Regulatory Impact Statement and the Tea Regulations in 2019;
- (iii) Validation forums were held thereafter in Nairobi and Mombasa in 2019 where KTDA and EATTA directors and staff among others attended;
- (iv) Comments received from stakeholders were considered and regulations reviewed where appropriate;
- (v) Following further review of the regulations further public participation was conducted in 2020;
- (vi) Notices were published in the local dailies and the websites of MOALF&C & AFA requesting members of the public to submit their comments on the draft tea regulations; and

(vii) Further comments were received from various stakeholders including tea growers, tea growers association, tea factories, KTDA (Holdings) Ltd., EATTA, KEPSA, KAM, KTGA, ASNET Ltd., Cooperative Bank of Kenya, Meru County Assembly Tea Association, Members of Parliament, Government agencies, advocates, County governments of Nyamira and Embu, law consultants, tea importers among others.

**(3) Consultation with County Governments and Council of Governors-** The Cabinet Secretary submitted that several forums with the County Governments and Council of Governors (COG) were held on the tea regulations.

**(4) Threshold for public participation-** The Cabinet Secretary submitted that the requirement for public consultation is for Consultations to be inclusive not exhaustive. The public consultations undertaken during development of the regulations were exhaustive as outlined above. All stakeholders and members of the public were given an opportunity to present their views on the draft tea regulations.

### **2.1.2 Inconsistency with the Constitution**

31. KTDA Holdings Limited and its affiliates submitted to the Committee that the Regulations should be revoked as they are inconsistent with the Constitution for the following reasons-

**(1) The Regulations are discriminatory in contravention of Article 27 –** KTDA Holdings submitted to the Committee that the Constitution as they disadvantage the tea sector as compared to other crop sectors provided for under the Crops Act by selectively making prescriptive and disruptive regulatory provisions. Further, that they discriminate against small-scale tea shareholders who will no-longer have freedom to contract or power to appoint directors or company secretaries in accordance with their Articles of Association. KTDA was also of the view that the Regulations only target the small scale tea sub sector, especially the small scale tea farmers managed by KTDA, but not its competitors or persons engaged in the same business of tea in Kenya.

**(2) The Regulations violate the right to private property as stipulated under Article 40 of the Constitution-** KTDA was of the view that the Regulations offend Article 40 of the Constitution as they purport to fix the prices of green leaf tea; require persons to have at least 250ha of collective tea bushes within a 50 km radius to



qualify for a tea manufacturing licence; restricts the sale of tea to public auctions; and prohibits tea collection centres from being within 250m from other tea collection centres, rendering existing tea collection centres redundant.

KTDA further submitted that the Regulations disregard the pre-existing contractual and other financial obligations owed to third parties hence it is dictatorial, oppressive, capricious and unconstitutional.

- (3) *The Regulations violate the labour rights of employees of KTDA Holdings Limited under Article 41 of the Constitution-*** KTDA Holdings Limited and its affiliates submitted to the Committee that and its affiliates as stipulated under Article 41 of the Constitution as they will be adversely affected and lose their jobs with most being declared redundant.
- (4) *The Regulations infringe on the right to freedom of contract as envisaged and protected under Article 19(3) of the Constitution-*** KTDA Holdings was of the view that the regulations interfere with existing commercial arrangements and dictate the content of future commercial arrangements. Privity of contract and freedom of contract are fundamental and protected rights in any commercial setting which rights the regulations will compromise.
- (5) *The Regulations deny the companies their freedom of association as guaranteed under Article 36 of the Constitution*** – KTDA submitted that the regulations dictate the terms of engagement among the Small Scale Tea Factory Companies and further limits their engagement with their own management agent, KTDA. The regulations also limit brokerage services by an appointed broker to a maximum of fifteen companies hence denying the companies their freedom of association as guaranteed under Article 36 of the Constitution.
- (6) *The Regulations have introduced Alternative Dispute Resolution Mechanisms through the Agriculture and Food Authority and the Cabinet Secretary which violate the right to a fair hearing under Article 25 of the Constitution-*** KTDA Holding Limited both the Agriculture and Food Authority and Cabinet Secretary are part of and or exercise delegated authority of the executive arm of Government and ought to have no place to preside over and or determine disputes emanating from enforcement of their legislation.

***(7) The Regulations subject the parties in the small scale tea farmer chain to unfair administrative action and therefore a violation of article 47 of the Constitution-***  
KTDA Holdings Limited submitted to the Committee that the impose engagement terms on the small scale tea farmers without their consent as well as the third parties with whom they would deal or are already dealing with. By failing to take into consideration the parties' rights under the current contracts, the regulations are subjecting the parties in the small scale tea farmer chain to unfair administrative action and therefore a violation of article 47 of the Constitution.

**2.1.2.1 Response from the Cabinet Secretary, Ministry of  
Agriculture, Livestock, Fisheries and Cooperatives**

32. On the submissions that the Regulations violate sections of the Constitution, the Cabinet Secretary submitted as follows-

- (1) The regulations do not fix the prices of green leaf
- (2) The regulations do not violate any rights stipulated under Article 41 of the Constitution.
- (3) The tea regulations endeavour to bring equity in the distribution of the proceeds from sale of tea by ensuring both farmers and other players in the tea value chain get fair returns for their efforts. In order to reduce the administrative costs that eats into farmers' earnings, the percentage of management agency fee has been capped at 1.5%.
- (4) To ensure equity in the distribution of the proceeds from tea, staff interest should be evaluated against the interests of the tea growers who are the principal stakeholders.
- (5) Based on the tea production for 2019, the management fee charged by KTDA at a rate of 2.5% translates to over K.sh.1.5 Billion, which is excessive and exorbitant to be borne by the tea grower given the fact that the factories pay for salaries of the staff seconded from the management agent and other administrative and operational expenses.
- (6) Over the years, the volume and earnings of tea by smallholder tea factories has exponentially increased resulting to increase in management agency fees collected by the management agent. For instance, in the last 15 years, the management agency fee has gradually increased from Kshs. 600 million to over Ksh.1.6 Billion. It is only fair that this advantage should trickle back to the tea growers through reduction of the management agency fees and other costs.
- (7) KTDA has also established several subsidiaries which generate profits. The profits from the subsidiaries should be used to offset staff costs of the management agency.



(8) In addition, the joint submission by KEPSA on behalf of KTDA, EATTA, KTGA, KAM and others proposed that staff costs should be borne by the management agents and not the tea factories. This was a welcome proposal which has been taken on-board in the tea regulations.

### **2.1.3 Inconsistencies with various existing Legislation, International Treaties and Case Law**

33. KTDA and its affiliates submitted to the Committee that the Regulations should be revoked as they are inconsistent with the following legislation-

- (i) Statutory Instruments Act.
- (ii) Interpretation and General Provisions Act
- (iii) Crops Act
- (iv) Law of Contract Act
- (v) Companies Act
- (vi) Competition At
- (vii) Standard Act
- (viii) International Treaties
- (ix) Case Law

34. According to stakeholders, the Regulations should be revoked as they inconsistent with existing Legislation, International Treaties and Case Law as follows-

**(1) Inconsistencies of the Statutory Instruments Act-** The regulations do not conform with the requirements of section 4, 5 and 7 of the Statutory Instruments Act. The Cabinet Secretary did not prepare a Regulatory Impact Statement prior to the making of the regulations in breach of section 6 of the Statutory Instruments Act. The Cabinet Secretary did not notify the public, especially the over 620, 000/= small scale tea growers as well as KTDA, of the preparation of a Regulatory Impact Statement in breach of Section 8 of the Statutory Instruments Act.

**(2) Inconsistent with the Interpretation and General Provisions Act-** The regulations provide penalties that are higher than that stipulated under section 31(e) of the Interpretation and General Provisions Act.

**(3) The Regulations are ultra vires the Crops Act-** The regulations were not drafted in accordance with the spirit of the Crops Act and blatantly ignore the significant



negative effects they will have on tea farmers, tea factories and communities that rely on the tea sector in one way or another. The outcome likely to occur as a result of the regulations will be contrary to the objects of the Crops Act (section 3 (a), (b) and (c)). The regulations are contrary to the purpose of the Crops Act as they over-regulate the tea sector among other reasons.

- (4) ***The Regulations are inconsistent with the Law of Contract Act-*** The Regulations interfere with privity of contract and other well established provisions of the Law of Contract Act. The Regulations will compromise existing commercial arrangements and make private investors wary of any involvement in the tea sector. This will in effect undermine the potential for efficiency and growth in the sector and create barriers to investment which would otherwise not exist.
- (5) ***The Regulations are inconsistent with the Companies Act-*** Under the Companies Act, the management of a company has been provided for. The statutory mandate relating to the management of companies are not under the purview of the Cabinet Secretary. However, despite not having any power to control the internal management of a private company, the Cabinet Secretary has purported to control the internal affairs of private companies through the regulations.
- (6) ***The Regulations are inconsistent with various treaties to which Kenya is a signatory-*** The Regulations are inconsistent with the objectives of the Constitution of the Food and Agriculture Organisation of the United Nations brought into force in Kenya by the Crops Act. Further, the Regulations ring-fence the Kenyan tea market, making it more difficult and inefficient to operate within. This is not consistent with the object of the East African Community Protocol on Sanitary and Phytosanitary Measures (concluded under Article 151 of the Treaty for the Establishment of the East Africa Community).
- (7) ***The Regulations are inconsistent with the Competition Act-*** Regulations 6 (4), 7 (5), 8 and 32 (12) introduce anti-competition conduct in the form of zoning green leaf suppliers, pricing fixing, and arbitrary value addition targets, thereby contravening the provisions of section 21 (3) (b) and (e) and section 21 (3) (a) and (i) of the Competition Act.
- (8) ***The Regulations are inconsistent with the Standards Act-*** The Kenya Bureau of Standards provides pre-shipment verification of conformity services in accordance

with section 4 (1) (c) and (i) of the Standards Act. Regulation 32 duplicates this law and function for tea by allocating it to AFA.

(9) ***The Regulations are inconsistent with case law-*** In a decision of the High Court in Nairobi, vide *High Court Miscellaneous Application No. 627 of 2000, Samuel Muchiri W'Njuguna & 6 Others v/s the Minister for Agriculture*, the court quashed regulations that had an effect similar to the current regulations and the publication of the current regulations is in breach of the court decision that has never been appealed. The regulations are also in breach of various other court judgements that have been made by the High Court. The regulations are also in breach of the *sub judice* rule as the matters contained therein are in active litigation in various courts in Kenya.

#### **2.1.4 The Regulations irregularly transfer County functions to the National Government**

35. The Council of Governors submitted to the Committee that the Regulations do not respect the institutional and functions integrity of the County Governments given that fact that agriculture and trade development and regulation are primarily functions of the County Governments under the Fourth Schedule to the Constitution. The regulations should be reviewed in their entirety to align them to the Constitution. The regulations should be amended to the effect that the following licenses are issued by the respective county governments-

- (i) appointment of county tea inspectors;
- (ii) manufacturing licences;
- (iii) registration and licensing of the warehouse premises or renewal of the same; and
- (iv) registration and licensing of tea packers.

#### **2.1.5 Cost implications of the Regulations**

36. According to KTDA Holdings, the Regulations will have the following implication on cost, the Regulations increase the operational costs of tea farmers and tea factories. The Regulations introduce overbearing administrative requirements for registration and licensing (Regulation 6-17).



### **2.1.6 The Regulations interfere with the functions of other public bodies.**

37. The Regulations should be revoked as they encroach on, and interferes with, the functions of other public bodies. This duplication of obligations and regulatory ambiguity will discourage external investment in the sector. Various provisions of the regulations cut across the controls, functions and authority of established entities such as-

- (i) Kenya Plant Health Inspectorate Service;
- (ii) Kenya Bureau of Standards;
- (iii) The Registrar of Companies;
- (iv) The Customs Department; And
- (v) The Kenya National Bureau of Statistics.

### **2.1.7 Overregulation and Impact of the Regulations of the Market**

38. EATTA submitted to the Committee that the regulations should be revoked as they over-regulate and negative impact of the Regulations on the market. Some of the key submissions were as follows-

- (1) ***Overregulation-*** The overregulation of the tea sector will disrupt regional trade and threaten Kenya's position as a regional leader in the market. It is unlikely that international investors seeking a secure investment grounded in law would feel comfortable with such inconsistencies.
- (2) ***The Regulations increase significant bureaucracies in the tea sector-*** The prescription of extensive forms, new multi-layered deviations between the types and nature of growers, farmers, plantation owners and manufacturers and the application of registration and licensing fees are not the best or most effective way to properly regulate the sector. Small-scale farmers may not be able to comply with the regulations, and if they did it will be at a financial hit. The regulations will grind the sector to a halt or create a significant lag as parties bring themselves to compliance.
- (3) ***The Regulations will create uncertainty in the market-*** Investors do not respond positively to uncertainty, legal ambiguity or government interference in



commercial dealings, an significant fallout may be inevitable, in which case the tea sector as a whole will suffer.

- (4) ***The Regulations will disrupt the Mombasa auction***-The regulations make the Agriculture and Food Authority and the Ministry of Agriculture an active participant of the auction process instead of playing a regulatory and supervisory role. The regulations are too rigid and will cause Kenya to lose largely the advantages that come with EATTA's setup of the auction in Mombasa having the regional auction centre by other regional countries will set up their own auction centres.

### **2.1.8 Response from the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives**

39. On the submissions that the Regulations should be revoked as they inconsistent with existing Legislation, International Treaties and Case Law, the Cabinet Secretary submitted to the Committee as follows-

- (1) Section 40(1) of the Crops Act, 2013 gives the Cabinet Secretary powers to make regulations for the better carrying into the effect of the provisions of the Act, or for prescribing anything which is to be prescribed under the Act. In particular, regulations made by the cabinet secretary may provide for the regulation of standard industry agreements including management agreements and green leaf supply agreements;
- (2) The current management agreements and green leaf supply agreements are restrictive by nature which is anti-competitive. The management agreements between smallholder tea factories and the management agents are for a duration of 10 years and lopsided in favor of the management agents.
- (3) These agreements are prepared by the management agent and tea factories have no independent legal counsel to take care of their interests. To enable tea factories to evaluate the performance of management agents and renegotiate fresh agreements, a shorter timeline is ideal.
- (4) In order to reduce the administrative costs that eats into farmers' earnings, the percentage of management agency fee has been capped at 1.5%.

- (5) Based on 2019, tea production the management fee charged by KTDA at a rate of 2.5% translates to over K.sh.1.5 Billion, which is excessive and exorbitant to be borne by the tea grower given the fact that the factories pay for salaries of the staff seconded from the management agent and other administrative and operational expenses.
- (6) In addition, the management agreement signed between smallholder tea factory limited company and KTDA MS provides that the management fee net of all taxes shall be 2.5% of the net proceeds of sale or any other revised rate as the parties may mutually agree. This therefore provides room for revision of the management fee. The capping of management agents fee will force inefficient management agents out of the market and encourage competition.
- (7) Inconsistencies with the Law of Contract- According to the law of contract an agreement may be discharged or amended by operation of the law.
- (8) All the management agreements between the tea factories and KTDA MS have provided for revision of the agreement in the event of a change in legislative or physical measures where KTDA MS is entitled to request the factory to agree to a revision of the agreement or any facts thereof.
- (9) The agreement also contains a provision to cater for any changes in the law, rules or regulations. The tea factories undertake to immediately abide by all changes in pertinent laws, rules or regulations and to cooperate with KTDA MS to carry out any of the responsibilities placed upon the factory or KTDA MS by the said laws, rules or regulations.
- (10) The Regulations are only limiting the term to a maximum of 5 years but not disallowing renewal of the management agreements by the parties upon evaluation of performance and on mutually agreeable terms.
- (11) The power of the Cabinet Secretary to make regulations and prescribing anything under the Crops Act including standard industry agreements, relationship between farmers and other dealers is provided for under Section 40 of the Crops Act, 2013. The Tea Regulations, 2020 have not violated the Companies Act but has prescribed issues that tea factories should incorporate in their articles of association for better management of the factories for the benefit of tea farmers. Articles of Associations are living documents that should be amended to conform to the provisions of the law.



- (12) The purpose of regulations is to operationalize an already existing Act of parliament. Section 40 of the Crops Act, 2013 gives the Cabinet Secretary responsible for agriculture powers to make regulations.
- (13) Smallholder tea factories are the principals and KTDA MS is the Management Agent. However, by maintaining the Group Company Secretary of KTDA Holdings Limited as the Company Secretary for the KTDA Management Services, all 54 tea factories companies and 7 KTDA subsidiaries, the role of principal and agent has been reversed in practical terms.
- (14) In addition, the Group Company Secretary doubles up as a director of elections for all smallholder tea factories and the Legal Adviser of the Vetting and Appeal Committees as well as the Management Agents. This creates a conflict of interest.
- (15) The Vetting and Appeal Committees for nomination of directors are made up of managers from the management agents which means that managers of the agent vet their bosses (factories directors) who also supervises the management agent. This is a conflict of interest.
- (16) Section 244 of the Companies Act provides that a company should retain its own Company Secretary. This means that a tea factory should have its own company secretary and the management agent should have a different company secretary
- (17) The Tea Task Force Report of 2016 also recommended that each tea factory should retain its own Company Secretary.

## **2.2 SUBMISSIONS ON SPECIFIC REGULATIONS**

40. The Kenya Tea Development Agency Holdings Limited; KTDA Management Services Limited, KTDA Power Company Limited and the Council of County Governors made the following submissions on specific Regulations.

### **PART I—PRELIMINARIES**

#### **Regulation 2 on Interpretation**

41. Stakeholders proposed that the Regulations be revoked for the following reasons-



- (1) The definition of a “plantation tea grower” has the effect of—
  - (a) excluding a person cultivating tea in a single parcel of land; and
  - (b) only capturing such a person if they exclusively ‘own’ a tea processing facility.
  
- (2) By purporting to define what a “tea factory company limited” means, the Cabinet Secretary has proceeded to take up legislative role of amending the definition of the term limited liability company as defined under the Companies Act. The Registrar of Companies under the Companies Act is the only person with power to register companies for whatever business intended. By purporting to create a Tea Factory Company limited as an entity, an error of law was committed.
  
- (3) The Regulations should include in the definition County Tea Inspectors appointed under these regulations to assist the County Governments in the enforcement and implementation of the regulations. The regulation be amended in the definition of the term “crop inspector” to read as follows—

*“crops inspector” means a person appointed as an inspector in accordance with section 27 of the Act and includes County Tea Inspector appointed under these regulations;*

**Regulation 4 on Object and purpose of these Regulations.**

42. KTDA Power Company Limited submitted that the Regulation 4 be revoked as the Regulations do not achieve the object and purpose of the regulations under paragraph 4.

**PART II—REGISTRATION AND LICENSING PROVISIONS**

**Regulation 6 on Registration of a Tea Grower**

43. Council of County Governors submitted the Regulation be amended in subparagraph (5) and (6) (*sic*) by deleting the word “Authority” and replacing it with the words “respective County Executive Committee Member” as well as amending the First Schedule accordingly.

44. Pursuant to the Fourth Schedule to the Constitution, agriculture and trade development and regulation has been devolved to County Governments, this therefore means that all the agricultural activities happening with the respective County Government

jurisdiction is regulated by that County. Registration of plantation tea growers should be regulated by the County Governments.

Response from the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives

45. Registration of growers is provided for in Section 14 (1) of the Crops Act, 2013 which provides that “every smallholder grower for the purposes, of accessing economies of scale, shall have the freedom to register with the tea factory where the persons delivers their green leaf by supplying such particulars as the Authority may, by regulations, prescribe.
46. A tea grower has a commercial relationship with the factory which makes it necessary for them to register with the factory where the supply green and also sign a green leaf supply agreement. The Agreement stipulates the obligations of the grower and also of the factory. However, the counties may also register the tea growers if they wish to do so.

Regulation 7 on Double registration

47. Council of County Governors submitted that there is need to provide for the duration of the notice for which the factory shall comply with before removing the name of a farmer from its register and registered that the Regulation be amended in subparagraph (8) to read as follows—

*(8) Where the factory has reasonable cause to believe that a person whose particulars are so recorded has ceased to be a grower, it may, after giving that person a seven day written notification of its intention to do so, remove the name of such person from the register.*

Response from the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives

48. Though regulation 7(8) does not provide for the duration of the notice which the factory should comply with, regulation 7(6) requires a tea factory to release the grower who wishes to leave their factory within one month after receipt of the notice subject to the grower clearing all outstanding obligations with the factory.



### **Regulation 8 on Green Leaf Agreement**

49. Employees of Kenya Tea Development Agency Holdings Limited and its affiliates and Kenya Tea Development Agency Holdings Limited and KTDA Management Services Limited proposed that the Regulation should be revoked for the following reasons-

- (1) Paragraph 8(1) of the regulations creates uncertainty and is prejudicial to employees who are on permanent and pensionable employment as it restricts agreements between growers and factories to two years.
- (2) The introduction of the terms of the green leaf agreement under paragraph 8(1) impedes the freedom to contract between small-scale tea factories and growers.
- (3) Paragraph 8(1) of the regulations provide that there can only be addition to the terms of the agreement as provided thereunder. This limits the freedom of contract between the parties.
- (4) A comparison of other laws where standard agreements have been provided, for instance the LSK Conditions of Sale, have allowed parties to either adopt the standard contract or make their own contract with their own independent terms and conditions. By stipulating that one may only add to the standard terms, then the freedom to contract has been limited.

### **Response from the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives**

50. Section 8(o) of the Crops Act, 2013 relates to additional functions of the Authority. In addition to Section 8(o) of the Crops Act which gives power to the Authority to recommend general industry agreements Section 40 (2)(t) under which the tea regulations are made provides that “*without prejudice to the generality of the foregoing, regulations made under this section may provide for the regulation of standard industry agreements*”.

### **Regulation 9 on the Tea Manufacturing Licence**

51. KTDA Power Company Limited and employees of Kenya Tea Development Agency Holdings Limited and its affiliates and Kenya Tea Development Agency Holdings Limited and KTDA Management Services Limited proposed that the Regulations should be revoked as they increase the operational costs of tea farmers and tea factories for following reasons-



- (1) Paragraph 9(18) of the regulations introduces a requirement for manufacturing licensees to develop and disclose a procurement policy.
- (2) Further, tea factories are engaged in manufacturing of tea and not responsible for providing fertilizers to the Country.
- (3) Requiring tea factories to have a procurement policy on the provision of fertilizers prior to the issuance or renewal of a manufacturing licence creates an unnecessary condition that does not involve the business of the tea manufacturing factories.

52. The Regulations, and specifically paragraph 9(1) and (7), should be revoked for the following reasons-

- (1) The regulations provide that a tea factory can only be registered or a licence renewed if it has 250 hectares of planted tea bushes. This would mean that small scale tea factories must convert themselves from tea manufacturing to cultivation. Tea factories are involved in the business of manufacture of tea and not the cultivation of tea. For the avoidance of doubt, the process of manufacture of tea is different from cultivation of tea. As defined in the regulations, the manufacture of tea is “*the mechanical or chemical processing and conversion of green tea leaf into made tea or other tea products and includes the packaging, labelling, distribution of tea and tea products for sale*”. By requiring tea factories to change from their main manufacturing businesses to cultivation of tea is an unnecessary regulatory bureaucracy.
- (2) Further, this requirement on the issuance of a manufacturing license converts the small scale tea factories to plantation tea growers for the reason that to comply with the regulations, all the small scale tea factories will have to acquire their own farms in order to be issued with or renew a manufacturing licence, which automatically converts them to plantation tea growers.
- (3) The regulations further purport to dispossess the small holder growers of their interests in ownership of tea factories as they would no longer have the ability to own a tea factory being that over 88% of the 620,000 small scale tea farmers have less than one acre of planted tea.

Response from the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives

53. With regard to the submissions under Regulation 9, the Cabinet Secretary responded as follows-

- (1) This requirement is not new and was existing under Form C of the old Tea (Licensing, Registration and Trade) Regulations, 2008 on the application for issuance of tea manufacturing licenses. The tea factories are required to demonstrate that they have the minimum green leaf either through their own farms or through recruiting tea growers to supply the green leaf for processing. The 250 hectares is the minimum acreage of tea that can economically sustain a conventional one-line tea factory for black CTC based on optimal yield per bush.
- (2) The KTDA managed smallholder tea factories are owned by smallholder tea growers who jointly have over 250 hectares under tea as required under the regulations. The requirement does not require tea factories to hold any right or interest over the parcels of land owned by smallholder tea growers other than supply green leaf as may be agreed between the tea factory and the tea grower.
- (3) The National government is charged with policy formulation which includes regulation, development and maintenance of sector standards and is also charged with the functions of international trade, national statistics and data. Issuance of the manufacturing licence is provided for under sections 18 and 19 of the Crops Act, 2013. However, the licence envisaged under the Crops Act and under the tea regulations is a manufacturing licence and not a trade license. The counties issue trade licenses to all entities operating within their counties for which they charge a fees. Some of the counties are charging as much as Kshs 100,000 to tea factories for the trade licence.
- (4) Tea is majorly an export commodity with 92% of Kenyan tea being exported. There is need to ensure that the manufacturers comply with standards in manufacturing of tea. The purpose of the manufacturing licence is primarily to ensure that tea manufacturers comply with requisite national and relevant international standards (including Good manufacturing standards). It is the tool through the Authority uses to ensure that tea manufacturers comply with the Crops Acts and the tea regulations.
- (5) The tea regulations are made under the Crops Act which provides under Section 6(1) that pursuant to the fourth schedule of the Constitution the Authority on behalf of the national government shall be responsible for licensing and charging of levies and breeder royalties.

#### **Regulation 10 on Boards of Smallholder Tea Factories**

54. KTDA Power Company Limited, the Council of County Governors and Kenya Tea Development Agency Holdings Limited and KTDA Management Services Limited made various proposals on the Boards of small holder tea factories as follows-



55. That the Regulations should be revoked for the following reasons-

- (1) They are inconsistent with the Companies Act. Paragraph 10 is inconsistent with the provisions of the Companies Act which, in addition to increasing costs, will also likely result in administrative and legal confusion.
- (2) The Companies Act stipulates how directors of a company are to be elected, number of directors as well as their tenure, being in accordance with their respective Articles of Association. KTDA and its affiliates has an express mode of election, the number as well as tenure of its directors.
- (3) The regulations abruptly nullify the provisions under the constituting documents of companies in the tea sector as protected under the Companies Act and seeks to impose a preferred mode and style, such as maximum of three (3) directors for each tea factory to a two (2) term tenure of three (3) years each. There is no valid foundation of such an imposition.

56. The Council of Governors proposed that the Regulation be amended by deleting the word “Authority” and replacing it with the words “respective County Executive Committee Member” as well as amending the First Schedule accordingly. Pursuant to Part 2, section 2 of the Fourth Schedule to the Constitution and the Kenya Gazette Supplement No. 116 of 9th August, 2013, development and regulation of agriculture and trade excluding international trade are functions devolved to County Governments.

57. It is therefore imperative that the regulation of manufacturing is regulated by the respective County Government where such manufacturing plant is situated. The Authority should only develop the standards which the County shall implement as well as offer technical assistance to enable the Counties discharge the mandate.

### **Regulation 12 on Annual and Monthly Production Statistical Returns**

58. The Council of County Governors proposed that the Regulation be amended in subparagraph (1) to read as follows—

*(1) A holder of a manufacturing licence shall—*

*(a) not later than the fifteenth day of January of every year, complete and submit to the respective county government with a copy to the Authority, an Annual Statistical Return in Form AFA\TD\ F1 set out in the First Schedule;*



*(b) not later than the fourteenth day of each month, complete and submit to the respective county government and a copy to the Authority, a Monthly Production Statistical Returns in Form AFA\TD\F2 set out in the First Schedule.*

59. The amended will align the proposal above that the manufacturing within the county jurisdiction be regulated by the respective County Government as per section 7 of Part 2 of the Fourth Schedule to the Constitution. Thus it follows that the annual and monthly production statistical returns should be shared with the County and a copy to the Authority.

### **Regulation 13 on Registration of a Warehouse**

60. The Council of County Governors proposed that the regulation be amended in subparagraphs (1) and (2) to read as follows—

*(1) A person who intends to carry out the business of tea warehousing shall apply to the respective County Executive Committee Member for registration of the warehouse premises or renewal of the registration certificate in Form AFA\TD\G1 set out in the First Schedule and pay the fee set out in the Second Schedule.*

*(2) The County Executive Committee Member shall issue the applicant a registration certificate for the tea warehouse in Form AFA\TD\G2 as set out in the First Schedule.*

61. Under the Fourth Schedule to the Constitution, agriculture and trade development and regulation have been devolved to County Governments. Further, the Warehouse Receipts System Act, 2019 tasked the County Governments through the respective County Executive Committee Members to register and license all warehouse operating within the County, it is therefore important that the regulations be amended to allow County Governments register and license the warehouses operating in their respective jurisdiction.

### **Response from the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives**

62. With regard to Regulation 13, the Cabinet Secretary responded as follows-

(1) Under the Fourth Schedule of the Constitution, the national government is responsible for international trade, agriculture policy, standards, consumer

protection, capacity building and technical assistance to the counties. The county governments are responsible for Agriculture, including crop husbandry, plant disease control, trade development and regulation, including markets and trade licenses.

- (2) All the tea warehouses (18) currently registered by the Agriculture and Food Authority (AFA) are located in Mombasa and they all warehouse teas destined for export including transits teas from the region.
- (3) The purpose of licensing the warehouses is to ensure that they meet and adhere to the required national and international standards for storage and blending of teas destined for the international markets. Licensing of tea warehouses does not therefore fall under the county governments. International Trade and standards under the Fourth schedule of the Constitution is a function of the National Government.
- (4) In addition, the objective of Warehouse Receipt Systems Act is to facilitate trading of agricultural commodities and is ideally for cereals and pulses such as maize and not for export produce. Approximately 92% of Kenya's tea is exported to international markets. The Warehouse Receipt Systems Act has to be interpreted in a manner that is consistent with the Constitution.

#### **Regulation 14 on Registration of a Tea Packers**

63. The Council of County Governors proposed that the Regulation be amended in subparagraphs (1) and (2) to read as follows—

*(1) A person who intends to carry out the business of tea packing shall apply to the respective County Executive Committee Member for registration or renew their certificate in Form AFA\TD\H1 set out in the First Schedule and pay the fee set out in the Second Schedule.*

*(2) The County Executive Committee Member shall issue a registration certificate to a tea packer in Form AFA\TD\H2.*

64. Pursuant to the section 7 of Part 2 of the Fourth Schedule of the Constitution, trade development and regulation including trade licenses is a function devolved to County Governments, the Council therefore opines that the registration and licensing of tea packers falls under this category and as such should be regulated by the Counties.



*Response from the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives*

65. Registration of growers is provided for in Section 14 (1) of the Crops Act, 2013 which provides that *“every smallholder grower for the purposes, of accessing economies of scale, shall have the freedom to register with the tea factory where the persons delivers their green leaf by supplying such particulars as the Authority may, by regulations, prescribe.”*
66. A tea grower has a commercial relationship with the factory which makes it necessary for them to register with the factory where the supply green and also sign a green leaf supply agreement. The Agreement stipulates the obligations of the grower and also of the factory. However, the counties may also register the tea growers if they wish to do so.

*Regulation 15 on Monthly return for a Tea Packer*

67. The Council of County Governors proposed that the regulation be amended in subparagraph (1) to read as follows—
- (1) Every tea packer shall, not later than the fourteenth day of each month, complete and submit to the respective the county government with a copy to the Authority, Monthly Statistical Returns in Form AFA\TD\H3 set out in the First Schedule.*
68. This is to align the regulation to the proposed amendment under regulation 14 on Registration of Tea Packers.

*Regulation 16 on Registration of a Tea Buyer or Exporter*

69. KTDA Power Company Limited, the East African Tea Trade Association (EATTA) and Kenya Tea Development Agency Holdings Limited and KTDA Management Services Limited proposed that the Regulations be revoked for the following reasons-
- (1) Paragraph 16, which prescribes how a tea buyer or exporter may become registered, ignores that the East African Tea Trade Association (EATTA) already has established processes for the registration of its members and creates an additional layer of bureaucracy.



- (2) Paragraph 16(2) imposes an arbitrary percentage for value addition with the subsequent subparagraphs creating confusion as to when and how compliance to the provision is to be achieved. Value addition, though important, does not require the imposition of unnecessary and uncommercial burdens which will inevitably deter new entrants.
- (3) Paragraph 16(6) requires tea buyers and exporters to make extensive and commercially sensitive disclosures to the Agriculture and Food Authority in order to conduct business. This provision will undermine the competitiveness of the sector while interfering with proprietary rights of businesses and investors.
- (4) Implementation of this Regulation will require huge capital investments and requires serious government support hence cannot be left to buyers to achieve on their own within two years.
- (5) Whereas section 34 (1)(b) of the Crops Act empowers the Agriculture and Food Authority to establish bodies to undertake value addition and marketing, the Cabinet Secretary has purported to assign himself this function(s) and instead of compelling the Authority to undertake its statutory duty, he (CS) has removed these functions and imposed them on private persons, for instance tea buyers/exporters. By usurping the statutory duty of the Authority and further imposing such responsibilities on private persons, the regulations are ultra-vires the Crops Act.
- (6) The requirement for value addition introduces new terms to existing contract between the buyer/exporter and a tea producer/ manufacturer. This additional requirement has the potential of chasing away buyers and exporters from the purchase of tea from Kenya as for instance, not all the buyers and exporters are purchasing the tea for blending. This has the potential of changing and controlling the business model of the tea buyers and exporters without their consent and initiative and hence discourage the tea exporters and buyers from engaging with Kenyan tea.
- (7) The regulation is also ultra-vires Section 3 of the Crops Act as it creates unnecessary Regulation by directing that the tea exporter or buyer must have a business plan providing all the details as required thereunder. The purpose and use of the said business plan have not been elaborated and the creating of business plan can only be construed to create an unnecessary burden upon the tea buyer and exporter which results in unnecessary regulations and overregulation of the tea industry players. Section 3 of the Crops Act expressly provides that regulations made should not create unnecessary and additional expenses upon the industry players.

**Regulation 18 on Considerations before Registration and Licensing and Renewal**

70. KTDA Power Company Limited, employees of Kenya Tea Development Agency Holdings Limited and its affiliates, the Council of County Governors and Kenya Tea Development Agency Holdings Limited and KTDA Management Services Limited made various proposals on considerations before registration and licensing and renewal as follows-

- (1) Paragraph 18(2)(a) of the regulations vests in the Agriculture and Food Authority significant subjective and arbitrary powers.
- (2) Paragraph 18 is inconsistent with the provisions of the Companies Act which, in addition to increasing costs, will also likely result in administrative and legal confusion.
- (3) It is clear that directors of tea factories are not the ones who manufacture tea. The manufacture of tea in the context of small scale tea factories is undertaken by the tea factory companies themselves not the directors. On the manufacture of tea, directors of a tea factory company are not a valid point of consideration as they are not the ones who convert green leaf to made tea.
- (4) Further, under company law as well elaborated in the *Salmon vs. Salmon* case, the company is at law a different person from its directors and shareholders. In this principle, the corporate veil of a company is protected and a regulation cannot purport to pierce the corporate veil without going through the court process and establishing the legal requirements for piercing the corporate veil. By imposing that one of the requirements for issuance and renewal of a manufacturing license is the assessment of the directors, the Cabinet Secretary is purporting to pierce the corporate veil of the Tea Factory Companies without following the well laid down process under the Companies Act and other relevant law.

71. The Council of Governors proposed that the Regulation be amended in the introductory clause to subparagraph (1) to read as follows—

*(1) The licensing authority before registering, licensing or renewing a registration or licence under these Regulations, satisfy itself that—*

72. The proposed amendment will align the Regulation to the proposed amendments regarding registration and licensing by the County Governments.



**Regulation 19 On The Monthly Return for Buyer, Exporter, Importer, Brokers and Warehouse**

73. The Council of County Governors proposed that the regulation be amended in subparagraph (3) to read as follows—

*(3) Every warehouseman shall, not later than the fifteenth day of January of every year, complete and submit to the respective County Government and a copy to the Authority an Annual Statistical Return in Form AFA\TD\ M2 set out in the First Schedule.*

74. The amendment will align the Regulation to the proposed amendment under regulation 13 on the registration and licensing of warehouses by the respective county governments.

**Regulation 20 on the Cancellation of a Licence or Registration**

75. KTDA Power Company Limited and employees of Kenya Tea Development Agency Holdings Limited and its affiliates proposed that the regulation should be revoked for the reason that Paragraph 20(3), (4) and (5) of the regulations vests in the Agriculture and Food Authority and the Cabinet Secretary significant subjective and arbitrary powers.

**Regulation 22 on Management Agent Agreement**

76. KTDA Power Company Limited, employees of Kenya Tea Development Agency Holdings Limited and its affiliates and the East African Tea Trade Association and Kenya Tea Development Agency Holdings Limited and KTDA Management Services Limited proposed that the regulation should be revoked for the following reasons-

- (1) They increase the operational costs of tea farmers and tea factories. Paragraph 22 of the regulations introduces changes to management agreements which will reduce the economies of scale currently enjoyed in the tea sector.
- (2) The regulations should be revoked as they are inconsistent with the Companies Act. Paragraph 22 is inconsistent with the provisions of the Companies Act which, in addition to increasing costs, will also likely result in administrative and legal confusion.



- (3) Under the regulation, the Management Agent Agreement is restrictive to a maximum of 5 years which is against the Law of Contracts Act and the principle of privity of contract.
- (4) Paragraph 22(6) interferes with the clear and established requirements of the Companies Act by restricting and controlling the appointment of company directors, which may also run afoul of the articles of association of the relevant companies. The paragraph will also have the effect of winding up the subsidiary companies of Kenya Tea Development Agency Holdings Limited as they share directors (seconded) with the parent company.
- (5) Under the Companies Act, there is no such a condition that the Company Secretary is required not to be part of a managing agent. The regulations purport to dictate from where the Company Secretary is to be sourced, which in essence is an express amendment to section 246 of the Companies Act, and is therefore a step contrary to law.
- (6) The regulation requires tea factories to procure and pay company secretaries themselves thereby compromising uniformity, economies of scale, the conduct of elections and annual general meetings.
- (7) The regulation is very prescriptive and will affect the ability of parties to genuinely negotiate terms of management agreements.
- (8) The regulation will lead to a significant drop in the scope of services provided by management agents to the detriment of tea factories and farmers who are ill equipped to undertake such services.
- (9) The regulation will lead to the loss of jobs for employees currently employed in the tea sector.
- (10) The regulation seeks to disrespect the existing farmers contractual terms both as stipulated under the Articles of Associations of their Companies and the Management Agreements, thereby rendering such an act ultra vires Section 14(3) of the Crops Act.
- (11) How companies appoint and remunerate their staff is not within the purview of the Crops Act and cannot be regulated by the Cabinet Secretary. The same is under the Companies Act, the respective Companies' Articles of Association, Management agreements and employment contracts. For instance, under sections 243 to 247 of the Companies Act, the role of appointing a company secretary for a company has been left to the directors of the company and it is therefore not for the Government to dictate through regulations.

- (12) Paragraph 22(3) has limited the right of parties from contracting, yet the freedom to contract is a guaranteed right under the Constitution of Kenya and the Law of Contract Act.
- (13) The regulation has also set the remuneration at 1.5% of net sales, without any legal and or factual foundation, that would be charged by the management agent. The issue on how much fees is to be charged, is an issue to be determined by agreement between the parties. All parties to a contract have privity of contract. By purporting to set the amount to be charged as fees, the regulation is interfering with the privity of contract between the parties to the management agreement. Prior to the entry of the term of the remuneration in the existing contractual management agreements, the parties costed the functions and mutually agreed that the set remuneration is fair and reasonable in the circumstances. It is therefore not for the regulations to interfere with such agreed terms.

#### **Regulations 23 On Registration of a Marketing Agent.**

77. The East African Tea Trade Association (EATTA) proposed that the regulations should be revoked. While Paragraph 23(3) was applauded by stakeholders as a good proposal but the stipulated period of two months for setting up a robust system is not realistic.

#### **Regulation 24 on Application for Registration as an Auction Organizer**

78. KTDA Power Company Limited, East African Tea Trade Association (EATTA), employees of Kenya Tea Development Agency Holdings Limited and its affiliates and Kenya Tea Development Agency Holdings Limited and KTDA Management Services Limited proposed as follows-

- (1) The regulations should be revoked as they increase the operational costs of tea farmers and tea factories.
- (2) Paragraph 24(8) of the regulations introduces a requirement to register and participate directly at auction.
- (3) The regulations should be revoked as they are inconsistent with the Competition Act. Regulation 24 (1) contradicts section 21 of the Competition Act. Tea producers make commercial decisions which include direct sales and offloading their teas through their channels of choice. The Regulation seeks to restrict all teas save for the orthodox and purple teas exclusively at the tea auction floor and if not sold then they will be re-listed for sale at a subsequent tea auction.



- (4) Dependence on one channel can only lead to lowering of tea prices. Having two channels is important since they complement each other in obtaining the best possible average prices. Tea, like many other products need competition to obtain the best price. The auction is indeed the leading selling channel with the Petitioner ensuring that the Mombasa auction has grown by a tremendous 900% in the last 30 years however private sales create extra competition.
- (5) The regulation should be revoked as it proposes arbitrary timeframes by which certain processes must be completed. Paragraph 24(1), which proposes the establishment of electronic trading platforms within two months, is unachievable.
- (6) Paragraph 24(12) mandates smallholder tea factory limited companies to pay tea growers at least 50% of payment due within 30 days of receipt of the proceeds of the sale of tea for green leaf every month. It is not clear whether the 50% is based on tea sold or the delivered to the factory. Whatever the case, if introduced immediately, this provision will cause significant confusion and cash flow issues.
- (7) The regulation interferes with existing commercial sales and supply arrangement made for specific durations. The regulation will lead to loss of the Kenyan tea market share in the region due to overregulation of the sale and auction provisions and because of different provisions being applied to the various jurisdictions. The regulation will lead to oversupply of tea at auctions leading to losses to farmers.
- (8) The regulation will reduce the sophistication and streamlining of the auction process with all factories being directly involved and roles of management agents and brokers being curtailed.
- (9) The regulation will lead to the loss of jobs for employees currently employed in the tea sector.
- (10) There is disconnect between regulation 22 and regulation 24.
- (11) Paragraph 24 (1) and (2), in requiring all tea to be sold at the auction, has limited the right of the parties to deal with their proprietary interest in the tea produced. One of the ways in which tea factories have been cushioning themselves from the adversities of the export market is through direct sales under agreed terms of sale. The regulations outlaw direct sales yet it is the same Government that is pursuing direct sales in respect to Coffee, a clear act of policy contradiction and discrimination against the tea sector.
- (12) Paragraph 24(2) provides that tea not sold at the auction shall be sold at subsequent auctions. It is important to take into consideration that re-printed tea

(tea not sold in first auction and put for sale in subsequent auction) is regarded as “old tea” and are usually discounted by buyers in subsequent auctions. A study of auction sale data be undertaken to establish the realized price for re-printed teas before implementation of the regulation.

- (13) The requirement under Paragraph 24(3)(4) and (5) is not necessary since the tea is only collected from warehouses upon payment by buyers. The consequence of this requirement is that costs will be increased to the buyer which will pass to the farmers and the investors. Small and Medium Size Enterprises constitute the majority of tea buyers and will be most affected by implementation of this regulation. Currently, the KTDA properly vets all buyers before admission into membership.
- (14) Paragraph 24(8) directs factories to register and enlist with the Authority to participate in the auction process directly and prohibits management agency service providers or other service providers shall not register at the auction on behalf of the factories. This means that brokers and other service providers are expressly stopped from dealing at the auction on behalf of tea factories.
- (15) The regulation does not take cognizant of the fact that the auction centre does not only deal with Kenyan teas, also that it is very impractical for factories to attend the auction which is held on a weekly basis and the tea factories may not appreciate the sensitive dynamics of the trade. The current practice is that all tea factories obtain a license from the Agricultural Food Authority Tea Directorate, obtain membership from EATTA and appoint a broker to sell their tea.
- (16) Paragraph 24(8) is in violation of section 14(3) of the Crops Act as it purports to end the contractual relationship that the tea factories have with their managing agent abruptly.
- (17) Paragraph 24(9) restricts a registered broker to offer tea brokerage services to a maximum of 15 tea factories at the auction. There has been no basis for this restriction which in any event is a restrictive trade practice thus unlawful. Further, the regulation does not take into consideration that each factory has different capacities thus the workload will not be equal.
- (18) The provision under Paragraph 24(11) is not necessary as it already exists under EATTA’s Rules and Regulations. Further, the rule for direct remittance to factories’ accounts does not take factor other service providers such as brokers and warehousemen. Other tea factories also prefer payment through their respective broker.
- (19) Paragraph 24(3) has limited the right of parties to contract. Further, it is bound to chase away the buyers of Kenyan tea, making them uncompetitive in



comparison with teas from other regional countries and will have the impact of bringing down the entire tea industry, as a buyer would just discount the price of Kenya teas by that amount of bond. This would negatively impact Kenyan Tea sold in the auction more so in light of the fact that tea sold at the auction includes tea from other countries which have no such arbitrary and unreasonable requirements.

Response from the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives

79. With regard to Regulation 24 the Cabinet Secretary responded as follows-

- (1) In the recent past, some players have abused direct sales channel with a view to distorting auction prices by deliberately decreasing the demand at the tea auction. The objective of the regulation 24 (8) is to enhance bidding competition at the auction which will ultimately enhance price discovery at the auction.
- (2) To avoid exploitation of farmers through direct sales, all tea sales for export should be channeled through the tea auction. However, Orthodox and Purple teas have been exempted from sale through the auction.
- (3) The regulation is meant to promote competition by ensuring that the tea is bided for in an open and transparent manner. Direct sales are not subjected to competition.
- (4) In the recent past, some players have abused direct sales channel with a view to distorting auction prices by deliberately decreasing the demand at the tea auction. The objective of the regulation 24 (8) is to enhance bidding competition at the auction which will ultimately enhance price discovery at the auction.
- (5) The buyers of tea through direct sales will have a chance to bid for the same tea at the auction floor hence increased demand and competition, leading to better prices.
- (6) The performance bond is a best practice in business and is meant to indemnify the seller from any loss due to failure by the buyer to pay for teas bided for.
- (7) Regulation 24(8) relates to enlisting of all tea factories with the Authority and auction organizer to participate in the tea auction directly. It does not deal with marketing agents.
- (8) The regulation is meant to ensure that there is no dominance in the provision of brokerage services as espoused by Section 44 of the Agriculture and Food Authority Act (AFA), and Sections 23 and 24 of the Competition Act.
- (9) Section 44 of the AFA Act provides that the Authority shall ensure that there are no dominant undertakings in the Sector as defined in Section 23 of the Act.
- (10) The regulations are applicable to Kenya tea factories only.

- (11) Over the years the volumes of tea offered for sale at the auction have increased significantly yet the number of brokers have remained the same. This means that the earnings by brokers have increased significantly without passing that advantage to the tea farmer in form of reduction in commission charged by the broker.
- (12) Regulation 24(15) stipulates that the Cabinet Secretary may take further administrative action or other lawful sanctions against a dealer for any actions that undermine the proper, efficient, competitive and transparent operation of the auction process.
- (13) The import of this provision is that, whatever the action / sanction the Cabinet Secretary may undertake must be lawful and guided by the provisions of the Crops Act, 2013, Fair Administrative action Act, 2015, the Companies Act, 2015 the Constitution and any other relevant law.

#### **Regulation 25 on Approval of Trading Rules and Regulations**

80. The East African Tea Trade Association (EATTA) proposed that the regulation be revoked for the following reasons-

- (1) The regulation requires that the auction trading rules and regulations be submitted to the Cabinet Secretary for approval before application. The regulation should be in compliance with the Crops Act, Competition Act and other relevant written laws.
- (2) Subparagraph (4) provides for what the trading rules and regulations should provide for. This is over regulation by the Government.

#### **Regulation 32 on Tea Imports**

81. The East African Tea Trade Association (EATTA) proposed that the regulation be revoked for the following reasons-

- (1) Provision of the commercially sensitive information required from importers before importation will interfere with proprietary rights of businesses.
- (2) Paragraph 32(11) provides that teas imported for blending or export shall be so exported within six (6) months of import. The provision has not made a distinction for auction teas brought in by the member countries which participate in the Mombasa Tea auction.



## **PART III—QUALITY ASSURANCE**

### **Regulation 35 on Appointment of Crop Inspectors**

82. To enable County Governments appoint County Inspectors for purposes of assisting them undertake the responsibilities assigned under these regulations, the Council of County Governors proposed that the regulation be amended by inserting a new subparagraph immediately under subparagraph (1) to read as follows—

*(1A) The respective County Government may appoint County Tea Inspectors to assist in the enforcement and implementation of these regulations.*

### **Regulation 36 on Tea Standards**

83. The KTDA Holdings Limited and KTDA Management Services Limited proposed that the regulation be revoked for the following reasons-

- (1) violation of Section 3 of the Crops Act (paragraph 36(4)). Under the current Kenyan small scale tea farming business model and the existing tea buying centres by-laws, the tea buying centres were and/or are constructed by the tea farmers themselves. To put a demand on tea factories to build buying centres would mean either that all the tea factories will have to make monetary provisions for the purchase of land and building of the tea buying centres or that the factories would have to purchase the existing buying centres as constructed by the tea farmers themselves.
- (2) This indeed will have a direct cost and hence increase expenses incurred in the production of made tea. This increased costs is in violation of Section 3 of the Crops Act which discouraged such endeavours. Indeed, there can be no justification in the Government being interested in dictating who constructs a business facility for citizens' private businesses.
- (3) Section 14(3) of the Crops Act provides that all the agreements entered into between different tea dealers should be respected. By proposing that the TFCL's be responsible for the building of the tea buying centers, yet the small scale tea buying centers were constructed and would be constructed under an arrangement by the tea farmers themselves as a private investment, the regulations are indeed interfering with the existing contractual duties that the tea growers have with their tea factories.

Response from the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives

84. With regard to Regulation 36 the Cabinet Secretary responded as follows-

- (1) The objective of this regulation is to curb green leaf hawking where different factories establish their green leaf collection centre a few meters away from each other. This causes conflict when a tea factory poaches the green leaf from the collection centre of the other factory.
- (2) The regulation will ensure order in green leaf collection and maintenance of the required standards on green leaf handling and collection.

**PART IV - GENERAL PROVISIONS**

**Regulation 39 on the Imposition of Fees by the County Governments**

85. The Council of Governors proposed that the regulation be deleted. The regulation is repeating what has already been provided for under the Article 209 of the Constitution and section 17 of the Crops Act, 2012.

**Regulation 43 on No compensation for revocation, variation or suspension of licence or registration**

86. The East African Tea Trade Association (EATTA) proposed that the regulation be revoked. The regulation provides that a holder of a license or registration certificate shall not be entitled to claim from the Agriculture and Food Authority or the Government for compensation or any damages where a license or registration is revoked, varied or suspended under the regulations. There is need for guidelines to provide more details in circumstances where there is registration certificate revocation, variation or suspension.

**SCHEDULES**

**FIRST SCHEDULE: FORMS**

87. KTDA Power Company Limited and the East African Tea Trade Association and Kenya Tea Development Agency Holdings Limited and KTDA Management Services Limited proposed that the regulations should be revoked for the following reasons-



- (1) Form AFA/TD/C of the First Schedule makes reference to the term “force majeure” without defining the term. This brings ambiguity as the term has to be defined for a proper contract to be effected.
- (2) Form AFA/TD/E1 and Form AFA/TD/E2 (sic, D1, K1 & N1) require presentation of audited financial statements which are private and confidential business information. The Petitioner recommends the provision for audited financial statements deleted and replaced with “audit certificate”.
- (3) Form AFA/TD/E1 provides power to the Agricultural Food Authority (AFA) to seize and remove or order the removal of any manufactured tea or processing capacity if installed contrary to conditions of the licence; it should be amended to propose AFA serves notice to the offending party to remedy the situation within a reasonable timeline. And if production is more than the licensed capacity due to favourable weather, the factory should not be penalized.
- (4) Form AFA/TD/C of the First Schedule stipulates that compensation for uncollected green leaf be borne by tea factories (clause 3.3). The property in the tea leaf can only pass the risk to tea factories, if at all, after the tea leaf has been handed over to the factory. To provide otherwise is to expose the factories to a risk they have not assumed.
- (5) Form AFA/TD/C of the First Schedule seeks to predetermine green leaf price (clause 5.1). This has not taken into consideration that there are other factors that determine the price of green leaf, e.g. market forces of demand and supply and that tea sold at auction has no fixed prices.
- (6) Form AFA/TD/C of the First Schedule introduces dispute resolution mechanisms (clause 7). This limits the freedom to contract between the tea factory and tea grower. There is already existing mechanisms between the tea factory and the tea grower on dispute resolution including arbitration under the tea factory Memorandum and Articles of Association. By providing for the mode of dispute resolution, the regulations are in violation of already existing contracts on the mode of dispute resolution.
- (7) Form AFA/TD/C of the First Schedule introduces terms that breach the Constitution as they limit freedom of contract as follows-
  - (a) Clause 5 of the form on payment to the grower where the agreement requires the pre-setting of the price of the tea; and
  - (b) Clause 7 of the form on Arbitration which appoints the Agriculture and Food Authority as the Arbitrator yet they have enacted the said laws and therefore there is a likelihood of open biasness against either of the would-be parties to a dispute.

**SECOND SCHEDULE: FEES**

88. The KTDA Power Company Limited proposed that the regulations should be revoked. The Second Schedule provides for the application and renewal fees for commercial green leaf transporters but the body of the regulations do not provide for the registration or licensing of commercial green leaf transporters.



## CHAPTER THREE

### COMMITTEE OBSERVATIONS

#### 3.0 GENERAL OBSERVATIONS

89. The Sessional Committee on Delegated Legislation and the Standing Committee on Agriculture, Livestock and Fisheries considered the submissions by stakeholders and made the following general observation on cross-cutting issues-

##### **(1) Devolved Functions**

90. The Committee observed that some of the functions assigned to the Agriculture and Food Authority are devolved functions under the Fourth Schedule of the Constitution. In particular, the Committee observed that registration of warehouses by the Agriculture and Food Authority which flies in the face of the law, noting that the Warehouse Receipts System Act, 2019 has tasked county governments, through the respective County Executive Committee Members, to register and license all warehouse operating within respective counties.

##### **(2) Import of the Regulations**

91. The Committee observed that the motivation of the Regulations was to curb the monopoly by the Kenya Tea Development Agency and its affiliates which controls 60% of the current market share of the tea industry in Kenya. The Committee observed that while the Regulations seek to address problems faced by small holder farmers and to increase direct control of the industry by the farmers, they seem to have left out other players in the industry.

92. The Regulations are generally too prescriptive as they are aimed at controlling one industry player instead of providing incentives for other industry players to grow. The Regulations should therefore be reviewed with a holistic view of the industry and especially noting the interests of County Government.

##### **(3) Meaningful Public Participation**

93. The Committee observed that various stakeholders were of the view that there was lack of adequate stakeholder engagement and public participation on the regulations and the

regulatory impact assessment. However, the Committee noted that the Cabinet Secretary for Agriculture Livestock, Fisheries and Cooperatives submitted that stakeholders were consulted and submitted their inputs including County Governments, Council of Governors, tea growers, tea factories, management agents, buyers/exporters/importers, brokers, packers, warehousemen, auction organizer, farmers' organizations and other government agencies.

94. The Committee noted that while indeed significant public participation was conducted on the Crops (Tea Industry) Regulations, 2020, KTDA and its affiliates were of the view that even though they were consulted and submitted submissions to the Ministry of Agriculture, Livestock, Fisheries and Cooperatives, their views were ignored.

95. Additionally, Section 40 of the Crops Act states that, "*The Cabinet Secretary may, in consultation with the Authority and the county governments, make regulations for the better carrying into effect of the provisions of this Act, or for prescribing anything which is to be prescribed under this Act.*" The Council of Governors were of the view that the consultations were inadequate since the Ministry only consulted the Council of Governors and County Governments in tea growing areas while there should have been consultation with all County Governments.

96. The Committee observed that agriculture is a devolved function under the Fourth Schedule of the Constitution and the Regulations should include the views of all County Governments.

#### **(4) The Regulatory Impact Assessment**

97. The Committee observed that some stakeholders were of the view that the Regulatory Impact Assessment was conducted on a different set of regulations, i.e. the proposed Crops (Tea Industry) Regulations, 2018 and not on the published Regulations especially with regard to financial implications.

98. The Committee the Regulatory Impact Assessment should be done on the final version of the Regulations and not the initial one.

#### **(5) Inconsistency with the Constitution and other laws**



99. The Committee observed that with regard to submissions that the Regulations are discriminatory, the distribution of the proceeds from tea and the KTDA staff interest should be evaluated against the interests of the tea growers who are the principal stakeholders.

100. The Committee further observed that under the law of contract, an agreement may be discharged or amended by operation of the law. Additionally, section 40 of the Crops Act allows the Cabinet Secretary to make regulations and prescribe anything under the Crops Act including standard industry agreements.

**(6) The Regulation will interfere with the internal affairs of private companies and may amount to over-regulation of the industry thus stifling growth**

101. The Committee observed that some stakeholders were of the view that the Regulations violate the provisions of the Companies Act which require that the internal affairs of private companies be guided by the respective companies' articles of association.

102. The Committee noted that under Regulation 18, the determination of whether directors are fit and proper is likely to interfere with the internal management of duly registered and licenced companies and deny the company a license on that basis. The company is at law a different entity from its directors and shareholders. In this principle, the corporate veil of a company is protected and a regulation cannot purport to pierce the corporate veil without going through the court process and establishing the legal requirements for piercing the corporate veil. The matter is well settled under *Salmon vs Salmon* as well as other case law.

### **3.1 OBSERVATIONS ON SPECIFIC REGULATIONS**

#### **3.1.1 Part I – Preliminary**

103. The Committee made the following observations on the interpretation of various terms under regulation 2 -

- (a) the definition of a “plantation tea grower” has the effect of excluding a person cultivating tea in a single parcel of land

- (b) the terms “Kenya Standard 1927 Tea Packets and Containers” and “type of tea planted” have not been used in the regulations do not therefore serve any purpose;
- (c) the paragraph defines the term “crops inspector” whereas the body of the regulations uses the term “crop inspectors”;
- (d) the definition of the term “warehouse” ought to make reference to their definition under the Warehouse Receipt System Act, 2019;
- (e) the definition of the term “warehouseman” ought to comply with the Warehouse Receipt System Act, 2019; and
- (f) the Regulations should include in the definition, County Tea Inspectors appointed under these regulations to assist the County Governments in the enforcement and implementation of the regulations and therefore the regulation be amended in the definition of the term “crop inspector” to read as follows—
 

*“crops inspector” means a person appointed as an inspector in accordance with section 27 of the Act and includes County Tea Inspector appointed under these regulations”*

### **Regulation 9 on the Tea Manufacturing Licence**

104. The Committee observed that Paragraph 9(18) of the regulations introduces a requirement for manufacturing licensees to develop and disclose a procurement policy. The Committee observed that requiring tea factories to have a procurement policy on the provision of fertilizers prior to the issuance or renewal of a manufacturing licences creates an unnecessary condition that does not involve the internal management of the tea manufacturing factories.
105. The Committee observed that the Council of Governors proposed that the Regulation be amended to allow County Governments to regulate manufacturing where such manufacturing plant is situated and the Agriculture and Food Authority only develop the standards which the County shall implement as well as offer technical assistance to enable the Counties discharge the mandate. However, the Committee observed that Manufacturing Licence has to be provided by AFA as it is provided for under section 18 of the Crops Act, 2013. The Committee observed that the Crops Act should be reviewed to ensure proper functional assignment between the national and county governments in line with devolution.



### **Regulation 12 on Annual and Monthly Production Statistical Returns**

106. The Committee observed that based on the previous proposal by the Council of Governors, manufacturing within the county jurisdiction be regulated by the respective County Government as per section 7 of Part 2 of the Fourth Schedule to the Constitution. Thus it follows that the annual and monthly production statistical returns should be shared with the County and a copy to the Authority. However, the Committee reiterates that the Manufacturing Licence has to be provided by the AFA as provided under section 18 of the Crops Act, 2013. The Crops Act would have to be amended to include County Governments in regulation of manufacturing licences.

### **Regulation 13 on Registration of a Warehouse**

107. The Committee observed that under the Fourth Schedule to the Constitution, agriculture and trade development and regulation have been devolved to County Governments. Further, section 17 of the Warehouse Receipts System Act, 2019 tasked the County Governments through the respective County Executive Committee Members to register and license all warehouses operating within the County. It is therefore important that the regulations be amended to allow County Governments register and license the warehouses operating in their respective jurisdiction.

### **Regulation 14 & 15 on Registration and Monthly Returns for Tea Packers**

108. The Committee observed that pursuant to the section 7 of Part 2 of the Fourth Schedule of the Constitution, trade development and regulation, including trade licenses, is a function devolved to County Governments. The registration and licensing of tea packers falls under this category and as such should be regulated by the Counties. The Committee noted that although Section 14 (1) of the Crops Act, 2013 provides for registration of growers, it does not provide for registration of tea packers. This function should therefore be undertaken by County Governments.

### **Regulation 16 on Registration of a Tea Buyer or Exporter**

109. The Committee observed that Paragraph 16 (2) which requires that, “*All tea buyers/exporters shall value add at least forty percent (40%) of their annual Kenya tea exports*” imposes an arbitrary percentage for value addition with the subsequent subparagraphs creating confusion as to when and how compliance to the provision is to

be achieved. Value addition, though important, does not require the imposition of unnecessary and uncommercial burdens which will inevitably deter new entrants.

110. The Committee further observed that the requirement for value addition has the potential of changing and controlling the business model of the tea buyers and exporters without their consent and initiative and hence discourage the tea exporters and buyers from engaging with Kenyan tea. It noted that the Ministry could provide incentives for value addition as opposed to imposing blending percentages for the industry e.g. declaration of economic processing zones.

#### **Regulation 18 on Considerations before Registration and Licensing and Renewal**

111. The Committee observed that Paragraph 18(2)(a) of the regulations vests in the Agriculture and Food Authority powers to investigate directors of a company which is inconsistent with company law. The Committee noted that as argued by stakeholders, the company is at law a different person from its directors and shareholders. In this principle, the corporate veil of a company is protected and a regulation cannot purport to pierce the corporate veil without going through the court process and establishing the legal requirements for piercing the corporate veil.

112. The Committee noted that the determination of whether directors are fit and proper is likely to interfere with the private affairs of private companies. The Agriculture and Food Authority would therefore be looking at the directors of the companies rather than the company itself even where directors are duly elected by the shareholders. The Committee further agreed that the matter has been settled under *Salmon vs Salmon* as well as other case law. With the regulation imposing the assessment of directors as a requirement for issuance and renewal of a manufacturing license, the Cabinet Secretary is lifting the corporate veil of the Tea Factory Companies without following the process under the Companies Act and other relevant law.

#### **Regulation 19 On The Monthly Return for Buyer, Exporter, Importer, Brokers and Warehouse**

113. The Committee observed that Regulation 19 (3) was inconsistent with the Warehouse Receipts Systems Act, 2019. The Regulation should be aligned the proposed amendment under regulation 13 on the registration and licensing of warehouses by the respective county governments in line with section 17 of the Warehouse Receipts Systems Act.



### **Regulation 20 on the Cancellation of a Licence or Registration**

114. The Committee observed that some stakeholders were of the view that paragraph 20(3), (4) and (5) of the regulations vests in the Agriculture and Food Authority and the Cabinet Secretary significant subjective and arbitrary powers. The Committee observed that Regulation 20(3) gives AFA the power to revoke, alter, suspend or vary a licence and places an appeal on such a decision (under Regulation 20(5)) with the Cabinet Secretary. The Committee observed that AFA and the Cabinet Secretary are more or less the same entity as AFA reports to the Cabinet Secretary and that there is need to allow parties to a dispute to seek redress in court where they are aggrieved.
115. The Committee further observed that there is need for a separate the dispute resolution mechanism at the county government level on licences or registration certificates issued by the counties whereby a dispute resolution should be referred to the County Executive Committee Member of the respective county governments to align it with devolution.

### **Regulation 22 on Management Agent Agreement**

116. The Committee observed that Regulation restricts the Management Agent Agreement to a maximum of 5 years and limiting the remuneration between the tea factory and the management agent to a maximum of 1.5 percent. The Committee observed that there is need for a balance between the conflict of interest with regard to management agent agreements and the economies of scale currently enjoyed in the tea sector. The Committee observed that the Cabinet Secretary is within his authority to cap the management agent fees and that this will be in the interests of the farmer.
117. The Committee further observed that the provisions under Regulation 22 (5) requiring smallholder tea factory limited companies to recruit their own in-house Company Secretaries or outsource the service and regulation 22 (6) providing that a director or affiliate of a management agency service provider shall not serve as a director or have any direct commercial relationship with the tea factory limited company that they offer management agency services ensures that there is no conflict of interest.

### **Regulation 24 on Application for Registration as an Auction Organizer**

118. The Committee observed that the regulation is meant to ensure that there is no dominance in the provision of brokerage services vis a vis protecting the earnings of farmers. The Committee noted concerns by the Cabinet Secretary that the earnings by brokers have increased significantly without passing that advantage to the tea farmer in form of reduction in commission charged by the broker. The Committee observed that under Regulation 24 (9) a registered broker shall offer tea brokerage services to maximum of fifteen (15) tea factory limited companies at the auction, noting that KTDA currently manages fifty-four (54) tea factories and other private entities and also offers brokerage services.

119. However, the Committee observed that the regulation is too prescriptive and it is aimed at taming a few industry players which will affect other players in the market. The Committee noted that the Regulations would essentially be delegitimizing the innovation and efficiency of one industry player rather than incentivizing other brokerage firms and does not guarantee that farmers will get better services if the brokerage services are provided by another entity. Further, there is no scientific rationale as to reduction to fifteen (15).

### **Regulation 25 on Approval of Trading Rules and Regulations**

120. The Committee observed that East African Tea Trade Association (EATTA) proposed that the regulation requires that the auction trading rules and regulations be submitted to the Cabinet Secretary for approval before application. The Committee further noted that subparagraph (4) provides for what the trading rules and regulations should provide for and this, according to EATTA, is over regulation by the Government. The Committee however observes that the regulation is proper and within the powers of the Cabinet Secretary under section 40 of the Crops Act.

### **Regulation 32 on Tea Imports**

121. The Committee observed that the East African Tea Trade Association (EATTA) raised concerns that the regulation mandates the provision of the commercially sensitive information from importers before importation and will interfere with proprietary rights of businesses. However, the Committee observed that the regulation does not mandate the provision of commercially sensitive information but is rather based on the protection of the farmer and the consumer particularly with regard to the sanitary and phytosanitary certificate required under paragraph 32 (3) (b).



122. The Committee also observed that whereas paragraph 32(11) provides that teas imported for blending or export shall be so exported within six (6) months of import, the provision has not made a distinction for auction teas brought in by the other countries which participate in the Mombasa Tea auction.

#### **Regulation 35 on Appointment of Crop Inspectors**

123. The Committee observed proposals that county governments should appoint County Inspectors for purposes of assisting them undertake the responsibilities assigned under these regulations. The Committee observed that there is need to provide for appointment of crop inspectors at the county level and further observed that the Cabinet Secretary has the power to make provision for county crop inspectors under section 40 (1) of the Crops Act.

#### **Regulation 36 on Tea Standards**

124. The Committee observed that stakeholders raised concerns that paragraph 36(4) which provides that, “*A tea factory limited company shall construct its green leaf collection centre at least 250 metres away from the green tea leaf collection or buying centre of another tea factory*” is a violation of Section 3 of the Crops Act.

125. The Committee also observed that as pointed out by stakeholders, the tea buying centres are constructed by the tea farmers themselves and the provision would mean either that all the tea factories will have to make monetary provisions for the purchase of land and building of the tea buying centres or that the factories would have to purchase the existing buying centres as constructed by the tea farmers themselves.

126. The Committee observed that the provision is restrictive and would interfere with competition and will dictate who constructs a business facility for citizens’ private businesses. The Committee observed that the response by the Cabinet Secretary that the objective of this regulation to curb green leaf hawking or that there is conflict when a tea factory poaches the green leaf from the collection centre of the other factory does not suffice and will curtail competition. The farmer should be able to get the best price for his tea from the tea factories.

**Regulation 39 on the Imposition of Fees by the County Governments**

127. The Committee observed that the regulation is repeating what has already been provided for under the Article 209 of the Constitution and section 17 of the Crops Act, 2012 and is therefore superfluous.

**Regulation 43 on no compensation for revocation, variation or suspension of licence or registration**

128. The Committee observed that the regulation curtails the freedom to seek redress in court as it provides that a holder of a license or registration certificate shall not be entitled to claim from the Agriculture and Food Authority or the Government for compensation or any damages where a license or registration is revoked, varied or suspended under the regulations.



## CHAPTER FOUR

### COMMITTEE FINDINGS

#### 4.0 Committee Recommendations

129. The Sessional Committee on Delegated Legislation and the Standing Committee on Agriculture, Livestock and Fisheries examined the Crops (Tea Industry) Regulations, 2020 against the Constitution of Kenya, the Interpretations and General Provisions Act, the Crops Act and the Statutory Instruments Act (No 23 of 2013) and pursuant to Standing Order 221 (4) (b) of the Senate Standing Orders.
130. On specific provisions of the Crops (Tea Industry) Regulations, 2020, the Committees made the following findings on specific provisions of the Statutory Instrument-

##### (19) **Consultation with County Governments**

The Cabinet Secretary should not only conduct adequate and effective public participation but also consult all County Governments in accordance with Section 40 (1) of the Crops Act, 2013 before publishing regulations under the Crops Act.

##### (20) **Regulation 2 of the Crops (Tea Industry) Regulations, 2020 on Interpretation.**

The following definitions should be amended-

- (a) the definition of a “plantation tea grower” has the effect of excluding a person cultivating tea in a single parcel of land
- (b) the terms “Kenya Standard 1927 Tea Packets and Containers” and “type of tea planted” have not been used in the regulations do not therefore serve any purpose;
- (c) the paragraph defines the term “crops inspector” whereas the body of the regulations uses the term “crop inspectors”;
- (d) the definition of the term “warehouse” ought to make reference to their definition under the Warehouse Receipt System Act, 2019;
- (e) the definition of the term “warehouseman” ought to comply with the Warehouse Receipt System Act, 2019;
- (f) the regulation be amended in the definition of the term “crop inspector” to read as follows—

*“crops inspector” means a person appointed as an inspector in accordance with section 27 of the Act and includes County Tea Inspector appointed under these regulations”*

(g) Define definition of the term *“force majeure”* contained in Form AFA/TD/C of the First Schedule which makes reference to the term.

**(21) Regulation 9 (18) of the Crops (Tea Industry) Regulations, 2020 on the Tea Manufacturing Licence.**

The requirement that tea factories have a procurement policy on the provision of fertilizers prior to the issuance or renewal of a manufacturing licences creates an unnecessary condition that involves the business of private tea manufacturing factories and should be removed.

**(22) Regulation 10 of the Crops (Tea Industry) Regulations, 2020 on Boards of Smallholder Tea Factories.**

The Regulation is too prescriptive, intrudes into the affairs of private companies, will stifle private enterprise and thus amounts to over-regulation.

**(23) Regulation 13 of the Crops (Tea Industry) Regulations, 2020 on Registration of a Warehouse.**

The Regulation is inconsistent with the section 17 of the Warehouse Receipts System Act, 2019 which tasked the County Governments, through the respective County Executive Committee Members, to register and license all warehouses operating within the respective County.

**(24) Regulation 14 of the Crops (Tea Industry) Regulations, 2020 on Registration of Tea Packers.**

Registration of Tea Packers should be a function of the County Governments pursuant to section 7 of Part 2 of the Fourth Schedule of the Constitution and not the Agriculture and Food Authority.

**(25) Regulation 15 of the Crops (Tea Industry) Regulations, 2020 on Monthly Return for a Tea Packer.**

As noted under regulation 14 above, registration of Tea Packers should be a function of the County Governments pursuant to section 7 of Part 2 of the Fourth Schedule of the Constitution and not the Agriculture and Food Authority. Monthly returns should therefore be made to county governments and shared with the Agriculture and Food Authority.



**(26) Regulation 16 of the Crops (Tea Industry) Regulations, 2020 on Registration of Tea Buyer or Exporters.**

The Committee observed that Paragraph 16 (2) which requires that, “*All tea buyers/exporters shall value add at least forty percent (40%) of their annual Kenya tea exports*” imposes an arbitrary percentage for value addition with the subsequent subparagraphs creating confusion as to when and how compliance to the provision is to be achieved. The Tea Industry should be allowed to come up with stipulations on value addition and percentages of blending required.

**(27) Regulation 18 of the Crops (Tea Industry) Regulations, 2020 on considerations before Registration and Licensing and Renewal.**

The Committee noted that the determination of whether directors are fit and proper is likely to interfere with the internal management of duly registered and licenced companies and deny the company a license on that basis. The company is at law a different entity from its directors and shareholders. In this principle, the corporate veil of a company is protected and a regulation cannot purport to pierce the corporate veil without going through the court process and establishing the legal requirements for piercing the corporate veil. The matter is well settled under *Salmon vs Salmon* as well as other case law.

**(28) Regulation 19 of the Crops (Tea Industry) Regulations, 2020 on the Monthly Return for Buyer, Exporter, Importer, Brokers and Warehouse.**

Regulation 19 (3) is inconsistent with the Warehouse Receipts Systems Act, 2019. The Regulation should be aligned the proposed amendment under regulation 13 on the registration and licensing of warehouses by the respective county governments in line with section 17 of the Warehouse Receipts Systems Act.

**(29) Regulation 20 of the Crops (Tea Industry) Regulations, 2020 on Cancellation of a Licence or Registration.**

Regulation 24 (5) should be deleted as the Agriculture and Food Authority and the Cabinet Secretary are more or less the same entity as the Authority reports to the Cabinet Secretary. There is therefore need to allow parties to a dispute to seek redress in court where they are aggrieved.

There is also need for a separate the dispute resolution mechanism at the county government level on licences or registration certificates issued by the counties

whereby a dispute resolution should be referred to the County Executive Committee Member of the respective county governments to align it with devolution.

**(30) Regulation 22 of the Crops (Tea Industry) Regulations, 2020 on Management Agent Agreement.**

The Regulation introduces changes to management agreements which will reduce the economies of scale currently enjoyed in the tea sector and therefore increase the operational costs of tea farmers and tea factories.

Regulation 22(5) should be amended to ensure that company secretary services are not excluded from services offered by management companies.

Regulation 22(6) should be amended to ensure that a farmer can be appointed as a Director of a management agency service provider as the current provision is too wide and includes smallholder farmers in its scope.

**(31) Regulation 24 of the Crops (Tea Industry) Regulations, 2020 on Auction Operations.**

The Regulations is too prescriptive and the basis for some of the provisions are unclear. Particularly, Regulation 24(9) restricts a registered broker to offer tea brokerage services to a maximum of 15 tea factories at the auction. The Regulation would essentially be delegitimizing the innovation and efficiency of one industry player rather than incentivizing other brokerage firms and does not guarantee that farmers will get better services if the brokerage services are provided by another entity. Further, there is no scientific rationale as to reduction to fifteen (15).

Additionally, Regulation 24 (14) is superfluous and allocates the Cabinet Secretary powers that are not provided under section 40 of the Crops Act, for instance price discovery. The provision also excludes the requirement to consult County Governments on the issuance of guidelines on the issues listed including, *“operation procedures on the organization, rules, regulations, management and governance structures for tea auctions in furtherance of competition, good governance, auction efficiency, transparency and price discovery”*.

Regulation 24(1), (2), (3), (4), (5), (6), (9), (10) and (14) should therefore be amended accordingly. Further, regulation 24(11) should be amended to ensure that all parties in the tea value chain are paid within the stipulated period.



**(32) Regulation 35 of the Crops (Tea Industry) Regulations, 2020 on Appointment of Crop Inspectors.**

The Regulation does not provide for the appointment of crop inspectors by County Government noting that agriculture is a devolved function. County Governments should appoint County Inspectors for purposes of assisting them undertake the responsibilities assigned under these regulations. The Committee observed that there is need to provide for appointment of crop inspectors at the county level. The Cabinet secretary has the power to make this provision for crop inspectors under section 40 (1) of the Crops Act.

**(33) Regulation 36 of the of the Crops (Tea Industry) Regulations, 2020 on Tea Standards**

The provision is restrictive, would interfere with competition and will dictate who constructs a business facility for citizens' private businesses. The Committee observed that the response by the Cabinet Secretary that the objective of this regulation to curb green leaf hawking or that there is conflict when a tea factory poaches the green leaf from the collection centre of the other factory does not suffice. The farmer should be able to get the best price for his tea from the tea factories. Paragraph 36(4) should therefore be reviewed accordingly.

**(34) Regulation 39 of the Crops (Tea Industry) Regulation, 2020 on the Imposition of Fees by the County Governments**

The regulation is repeating what has already been provided for under the Article 209 of the Constitution and section 17 of the Crops Act, 2012 and is therefore superfluous.

**(35) Regulation 43 of the Crops (Tea Industry) Regulation, 2020 on No compensation for revocation, variation or suspension of licence or registration**

The regulation is too wide in scope and may be abused. It should therefore be qualified and its application specified.

**(36) First Schedule to the Crops (Tea Industry) Regulations, 2020 on Forms**

Form AFA/TD/C of the First Schedule makes reference to the term “*force majeure*” without defining the term. This brings ambiguity as the term has to be defined for a proper contract to be effected.

Form AFA/TD/E1 should be amended to ensure that farmers and factories alike are not penalised for producing more tea e.g. if production is more than the licensed capacity due to favourable weather.

Amend clause 3.3 of Form AFA/TD/C of the First Schedule to ensure that property in the tea leaf can only pass the risk to tea factories, if at all, after the tea leaf has been handed over to the factory. To provide otherwise is to expose the factories to a risk they have not assumed.

**(37) Second Schedule to the Crops (Tea Industry) Regulations, 2020 on Fees**

The Second Schedule provides for the application and renewal fees for commercial green leaf transporters but the body of the regulations do not provide for the registration or licensing of commercial green leaf transporters.

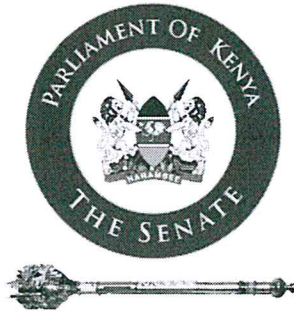


## CHAPTER FIVE

### COMMITTEE RECOMMENDATION

131. Pursuant to section 15 (1) of the Statutory Instruments Act and Standing Order 221 (4) (b), the Sessional Committee on Delegated Legislation and the Standing Committee on Agriculture, Livestock and Fisheries do not accede to the Crops (Tea Industry) Regulations, 2020 and recommends that the Senate resolves that the Statutory Instrument be annulled.

## ANNEX 1- MINUTES



### TWELFTH PARLIAMENT |FOURTH SESSION

**MINUTES OF THE TWENTY- FIRST JOINT MEETING OF THE SESSIONAL COMMITTEE ON DELEGATED LEGISLATION AND THE STANDING COMMITTEE ON AGRICULTURE, LIVESTOCK AND FISHERIES HELD ON TUESDAY, 3<sup>RD</sup> NOVEMBER, 2020 ON THE ZOOM ONLINE MEETING PLATFORM FROM 10.00 A.M.**

#### **PRESENT**

##### **SESSIONAL COMMITTEE ON DELEGATED LEGISLATION**

1. Sen. Mohammed Faki, MP - Chairperson (*Chairing*)
2. Sen. Abshiro Halake, MP
3. Sen. Judith Pareno, MP
4. Sen. Mary Seneta, MP

##### **STANDING COMMITTEE ON AGRICULTURE, LIVESTOCK AND FISHERIES**

1. Sen. Enock Wambua, MP - Vice- Chairperson
2. Sen. (Canon) Naomi Waqo, MP
3. Sen. Issa Juma Boy, MP
4. Sen. Justice (Rtd.) Stewart Madzayo, MP

##### **ABSENT WITH APOLOGIES**

1. Sen. Njeru Ndwiga, EGH, MP - Chairperson
2. Sen. Boniface Kabaka, MP - Vice- Chairperson
3. Sen. Samuel Poghisiso, EGH, MP
4. Sen. Kipchumba Murkomen, EGH, MP
5. Sen. (Dr.) Michael Mbito, MP
6. Sen. Anuar Loitip, MP
7. Sen. (Eng.) Ephraim Maina, EBS, MP
8. Sen. (Prof.) Imana Malachy Ekal, MP



## **SECRETARIAT**

- |                       |  |
|-----------------------|--|
| 1. Ms. Carol Kirorei  | - Clerk Assistant                            |
| 2. Ms. Clare Kidombo  | - Research Officer ( <i>Taking Minutes</i> ) |
| 3. Mr. Mitchell Otoro | - Legal Counsel                              |
| 4. Ms. Caroline Njue  | - Research Officer                           |
| 5. Ms. Njeri Manga    | - Media Relations Officer                    |
| 6. Ms. Mary Nyawira   | - Legal Counsel                              |

## **MIN. NO. SEN/207/2020      PRELIMINARIES**

Sen. Mohamed Faki, MP called the meeting to order at 10.10 a.m. followed by a word of prayer by Sen. Abshiro Halake, MP.

## **MIN. NO. SEN/208/2020      ADOPTION OF THE AGENDA**

The Committee adopted the agenda of the Sitting, as set out below, having been proposed by Sen. Abshiro Halake, MP, and seconded by Sen. (Canon) Naomi Waqo, MP -

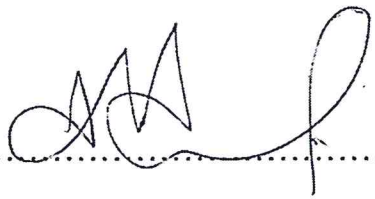
1. Preliminaries
  - a) *Prayer*
  - b) *Adoption of the Agenda*
2. Consideration of the Draft Report on the Crops (Tea Industry) Regulations, 2020.
4. Date of Next Meeting
5. Adjournment

## **MIN. NO. SEN/209/2020:      CONSIDERATION OF THE REPORT ON THE CROPS (TEA INDUSTRY) REGULATIONS**

The Committees considered the Crops (Tea Industry) Regulations, 2020 and noted that it captured the observations of the Committees during the deliberations of the Regulations. The Committees agreed on the findings and recommendations of the Report and resolved not to accede to the Crops (Tea Industry) Regulations, 2020.

## **MIN. NO. SEN/210/2020:      ADJOURNMENT**

There being no other business the meeting was adjourned at 11.15 a.m. The next meeting would be on Wednesday, 4<sup>th</sup> November, 2020 at 10.00am.

Signed.....

Date..... 4<sup>th</sup> Nov. 2020

**SEN. MOHAMED FAKI, MP**

**CHAIRPERSON**

**SESSIONAL COMMITTEE ON  
DELEGATED LEGISLATION**

Signed.....

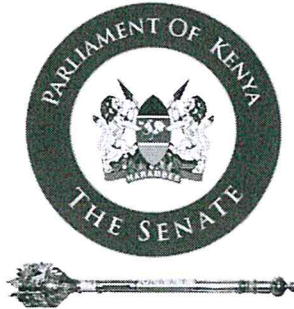
Date 4<sup>th</sup> November, 2020

**SEN. NJERU NDWIGA, MGH, MP**

**CHAIRPERSON**

**STANDING COMMITTEE ON  
AGRICULTURE, LIVESTOCK AND  
FISHERIES**





**TWELFTH PARLIAMENT |FOURTH SESSION**

**MINUTES OF THE TWENTY- SECOND JOINT MEETING OF THE SESSIONAL COMMITTEE ON DELEGATED LEGISLATION AND THE STANDING COMMITTEE ON AGRICULTURE, LIVESTOCK AND FISHERIES HELD ON WEDNESDAY, 4<sup>TH</sup> NOVEMBER, 2020 ON THE ZOOM ONLINE MEETING PLATFORM FROM 10.00 A.M.**

**PRESENT**

**SESSIONAL COMMITTEE ON DELEGATED LEGISLATION**

1. Sen. Mohammed Faki, MP - Chairperson (*Co-Chairing*)
2. Sen. Boniface Kabaka, MP - Vice- Chairperson
3. Sen. Samuel Poghisiso, EGH, MP
4. Sen. Abshiro Halake, MP
5. Sen. Judith Pareno, MP
6. Sen. Mary Seneta, MP

**STANDING COMMITTEE ON AGRICULTURE, LIVESTOCK AND FISHERIES**

1. Sen. Njeru Ndwiga, EGH, MP - Chairperson (*Co-Chairing*)
2. Sen. Enock Wambua, MP - Vice- Chairperson
3. Sen. (Canon) Naomi Waqo, MP
4. Sen. Issa Juma Boy, MP
5. Sen. Justice (Rtd.) Stewart Madzayo, MP

**ABSENT WITH APOLOGIES**

1. Sen. Kipchumba Murkomen, EGH, MP
2. Sen. (Dr.) Michael Mbiti, MP
3. Sen. Anuar Loitiptip, MP
4. Sen. (Eng.) Ephraim Maina, EBS, MP
5. Sen. (Prof.) Imana Malachy Ekal, MP

**IN ATTENDANCE**

**SENATE**

1. Sen. Cleophas Malala, MP - Deputy Minority Whip

**IN ATTENDANCE**

1. Hon. Peter Munya, M.G.H.,  
2. Ms. Rosemary Owino  
3. Mr. Shem Odhola

**MINISTRY OF AGRICULTURE, LIVESTOCK,  
FISHERIES & COOPERATIVES**

- Cabinet Secretary,  
- Interim Head, Sugar Directorate, AFA  
- Sugar Directorate, AFA

**SECRETARIAT**

1. Ms. Josephine Kusinyi - Principal Legal Counsel  
2. Ms. Carol Kirorei - Clerk Assistant  
3. Ms. Clare Kidombo - Research Officer (*Taking Minutes*)  
4. Ms. Caroline Njue - Research Officer  
5. Ms. Regina Munyao - Legal Counsel  
6. Ms. Njeri Manga - Media Relations Officer  
7. Ms. Mary Nyawira - Legal Counsel

**MIN. NO. SEN/211/2020 PRELIMINARIES**

Sen. Mohamed Faki, MP called the meeting to order at 10.15 a.m. followed by a word of prayer by Sen. Enock Wambua, MP. He then led in a self-introductory session of Members present.

**MIN. NO. SEN/212/2020 ADOPTION OF THE AGENDA**

The Committee adopted the agenda of the Sitting, as set out below, having been proposed by Sen. Mary Seneta, MP, and seconded by Sen. Issa Juma Boy, MP-

3. Preliminaries  
    a) *Prayer*  
    b) *Adoption of the Agenda*  
4. Meeting with the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives  
4. Date of Next Meeting  
5. Adjournment

**MIN. NO. SEN/213/2020: MEETING WITH THE CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK, FISHERIES & COOPERATIVES**

The Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives presented his responses to the queries raised by the Committee as follows-

ISSUE RAISED	RELEVANT REGULATION
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1	Why the role of the county governments has not been captured in the Regulations yet agriculture is a devolved function under the Constitution;	<p>8(3) – submission of register of smallholder growers</p> <p>9(4) – Consultation with County government on basis of registration of umbrella out-growers’ institution</p> <p>11. – submission of returns by millers and out-growers’ institutions to the County government</p> <p>18(1) (2) – submission of sugarcane development plans by millers and out-growers’ institutions to County governments</p> <p>23(2)(f) – Nomination of three persons by the County governments to the Sugarcane Pricing Committee</p>
2	Whether public participation was undertaken on the published Regulations;	<p>Yes – Refer to Appendix 1</p> <p>Views were received from:</p> <ul style="list-style-type: none"> <li>✓ Sony Sugarcane Farmers</li> <li>✓ Kakamega County Sugarcane Farmers</li> <li>✓ Busia Sugarcane Farmers Caucus</li> <li>✓ Bungoma Trans Nzoia Sugarcane Farmers</li> <li>✓ Nzoia Zone Farmers Petition</li> <li>✓ Awendo, Uriri and Ndhiwa Sub Counties Sugarcane Farmers</li> <li>✓ Muhoroni Multipurpose Cooperative Union</li> <li>✓ Kenya National Federation of Sugarcane Farmers</li> <li>✓ West Kenya Sugar Company Limited</li> <li>✓ Kenya Sugar Manufacturers Association</li> <li>✓ Kenya Association of Manufacturers’</li> <li>✓ Fred Oketch Jonam, James Adagi and Lazaro Atieno</li> <li>✓ Mumias Sugar Company</li> <li>✓ County Government of Kakamega</li> <li>✓ Office of The Attorney General</li> </ul>
3	Whether the Regulations as published are similar in terms of content in the Regulations submitted to the Cabinet Secretary by the Sugar Industry Stakeholders Taskforce;	The Sugar Industry Stakeholders Taskforce views were considered alongside other stakeholders in the published regulations.
4	Whether the Cabinet Secretary held a meeting with various stakeholders on 11 <sup>th</sup> June, 2020 as requested by the Lake Region	The meeting held on 11 <sup>th</sup> June, 2020 resolved that with the enactment of the anticipated Sugar Act, a fresh set of regulations would then be derived. The meeting also resolved to review the Sugar Bill to come up with

	Economic Bloc in a letter dated 8 <sup>th</sup> June, 2020 and whether it was resolved that the Regulations would be de-gazetted;	common position between the National and County Government. This was done and submitted to the Clerks of both Houses.
5	Whether the establishment of the Sugarcane Pricing Committee is in line with the provisions of the Competition Act;	Section 40(s) of the Crops Act, 2013, provides for the formula for pricing of scheduled crops  23(8) - The Sugarcane Pricing Committee role is to determine the Sugarcane Pricing Formula and therefore not in conflict with the provisions of the Competition Act.
6	The regulations contain a number of forms prescribing the contracts to be entered into by various parties while seeking various services? What is the rationale of this prescription? Is this overregulation?	Section 40(2)(r)(t) of the Crops Act 2013 provides for the relationships between farmers and other dealers in crops and for the regulation of standard industry agreements  Further the Sugar Industry Stakeholders Taskforce Report, 2019 highlighted the plights of farmers with respect to perceived exploitation by millers. Millers also got frustration by farmers diverting cane, thus formal agreements with legal framework were necessary.
7	Whether Marketing, Research and Licensing which have been ailing the sugar industry have been dealt with in the Regulations; and	23, Part III - Marketing issues are provided for through the establishment of the Sugarcane Pricing Committee and registration of agreements between value chain players by the Authority  Forms 5, 6, 7, 8 and 9 - The role of research has been provided for in the agreements (agreement for harvesting and transportation of sugarcane, farming and supply of sugarcane)  Licensing of manufacturers has been provided for in Section 18(2) of the Crops Act, 2013
8	Why the Regulations have omitted the following recommendations as has been captured in the Draft Regulations by the Sugar Stakeholders Taskforce –  • Establishment of an Executive Committee as	There is no such recommendation in the Sugar Industry Stakeholders Report



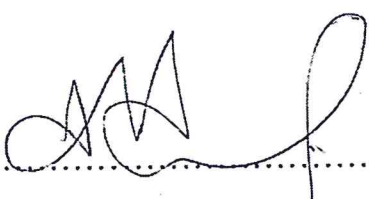
	<p>an apex body representing various stakeholders to oversee implementation of sugar industry regulations;</p>	
9	<p>Why the Regulations have omitted the following recommendations as has been captured in the Draft Regulations by the Sugar Stakeholders Taskforce –</p> <ul style="list-style-type: none"> <li>❖ Licensing of sugar refineries and sugar manufacturers;</li> </ul>	<p>Licensing of manufacturers has been provided for in Section 18(2) of the Crops Act</p>
10	<p>Why the Regulations have omitted the following recommendations as has been captured in the Draft Regulations by the Sugar Stakeholders Taskforce –</p> <ul style="list-style-type: none"> <li>• Delineation of Regions for the development and procurement of sugarcane;</li> </ul>	<p>There were divergent opinions on delineation of regions through zoning; some wanted demarcation of zones to define their catchment areas while others farmers were vouching for “my cane my choice”</p> <p>The Ministry further noted that those who were most vocal on zoning were basically millers near State owned mills, thus the Ministry weighed the options and considered that the interest of the farmers could be protected through solid contracts</p>
11	<p>Why the Regulations have omitted the following recommendations as has been captured in the Draft Regulations by the Sugar Stakeholders Taskforce –</p> <ul style="list-style-type: none"> <li>• Establishment of the Sugar Development Levy</li> </ul>	<p>Establishment of the Sugar Development Levy has been captured in the proposed Sugar Bill</p>

Having heard from the Cabinet Secretary the Committees resolved to accede to the Crops (Sugar) (General) Regulations, 2020 as proposed by Sen. Enoch Wambua, MP and seconded by Sen. Samuel Poghio, EGH, MP.

The Committees further resolved not to accede to the Crops (Tea Industry) Regulations, 2020 and resolved not to accede to the Regulations as proposed by Sen. Mary Seneta, MP and seconded by Sen. Enoch Wambua, MP.

**MIN. NO. SEN/214/2020: ADJOURNMENT**

There being no other business the meeting was adjourned at 12.30 p.m. The next meeting would be by notice.

Signed.....

Date.....*4th Nov 2020*

**SEN. MOHAMED FAKI, MP**

**CHAIRPERSON**

**SESSIONAL COMMITTEE ON  
DELEGATED LEGISLATION**

Signed.....

Date *4<sup>th</sup> November, 2020*

**SEN. NJERU NDWIGA, MGH, MP**

**CHAIRPERSON**

**STANDING COMMITTEE ON  
AGRICULTURE, LIVESTOCK AND  
FISHERIES**



