



Agriculture, Aquaculture & Fishing Sector ALERT

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Agriculture, food security, and the regulation of GMOs in Kenya

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Through a Cabinet decision dated 3 October 2022, Kenya's Government lifted the ban on the importation and planting of genetically modified crops and animal feeds, allowing the open cultivation and importation of genetically modified food crops and animal feeds in Kenya. According to Cabinet, the move aimed to boost food security and tackle the current drought in various parts of the country. The allowed use and importation of GMO foods is anticipated to reduce Kenya's reliance on rain-dependent agriculture and food aid.

Prior to this decision, the ban on GMOs in Kenya had been in effect since 8 November 2012, on the back of insufficient scientific evidence on GMO safety. Following the ban, a taskforce to review matters relating to genetically modified foods and food safety was appointed through a gazette notice on 11 October 2013. In its report, the taskforce emphasised on the need to prioritise human health and safety by developing national guidelines and adequate infrastructure for testing GMOs before the ban is lifted.

Over the past years, only genetically modified maize testing has been ongoing in Kenya, with scientists allowed to grow this variety of maize in confined fields. In 2019, Government moved a step further by approving the commercialisation of GMO cotton for use in the textile industry.

The lifting of the ban to allow the open cultivation and importation of genetically modified food crops and animal feeds in Kenya, has brought to the fore public debates on the benefits, shortcomings and risks of GMOs, and resulted in petitions being filed in court to challenge Cabinet's decision.

The court challenge to GMOs

Two court cases have been launched following the lifting of the ban. One by a concerned citizen and another by a social movement of Kenyan peasant farmers, fishers, pastoralists, and consumers whose work promotes peasant agroecology for food sovereignty. The petitions in both cases hinged on the court issuing conservatory orders



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prohibiting the Government from gazetting or acting upon the content of Cabinet's dispatch on GMOs, and from permitting the importation or distribution of GMO crops and food in the country until the matter was heard in court.

In its ruling, the High Court declined to grant the individual petitioner's requests because he raised substantive scientific issues that needed to be determined in the main suit. However, the court granted conservatory orders to the social movement, as its case was primarily based on the fact that fundamental constitutional dictates, such as the right to information and public participation, had not been considered prior to the lifting of the ban. Both petitions have since been consolidated.

The Government, through the Attorney General, sought to reverse the High Court orders via an appeal in the Court of Appeal. The appellate court upheld the orders, citing that the matter is not only of public interest but also touches on global

uncertainties surrounding GMOs, and as such it is in the country's best interest to adopt the precautionary principle and uphold the orders pending the hearing of evidence from an expert witness on the effect of the consumption and growth of GMO products on human health and the environment in Kenya. Due to this, the ban on GMOs remains in place until the case is fully heard and determined by the High Court.

The regulatory framework for GMOs

While the case challenging the lifting of the ban is yet to be fully determined by the courts, it is important to review Kenya's regulatory framework on GMOs to understand what regulatory protections exist for both consumers and the environment.

The Biosafety Act, 2009 (Act) is the principal law. It restricts the sale, importation and exportation of GMOs, and requires persons intending to sell, import or export GMOs into the country to seek written approval from the Biosafety Authority established

under the Act. Failure to seek such approval under the Act is an offence punishable by a fine not exceeding KES 20 million, or to imprisonment for a term not exceeding 10 years, or both. The approval process enables the Biosafety Authority to co-ordinate, monitor and assess activities relating to the safe transfer, handling and use of GMOs in order to ensure that such activities do not have adverse effects or risks on human health and the environment. The process also avails the Authority opportunities to mitigate risks emanating from the handling, transfer and use of GMOs.

In addition, the Biosafety (Import, Export and Transit) Regulations, 2011 (Regulations) give effect to the provisions of the Act and were formulated to ensure safe movement of genetically modified organisms into and out of Kenya while protecting human health and the environment. These Regulations prescribe, among other things, the manner of seeking the approval from the Biosafety Authority for the importation, exportation and transit of GMOs and

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the steps to be taken in the event of unauthorised importation or unintentional release of GMOs whilst in transit in order to minimise risk to human health and the environment.

Persons wishing to import GMOs are to apply for and obtain written approval from the Biosafety Authority. Such applications are to be accompanied by an application fee of KES 25,000, and should specify: the species, amount, and identity of the GMO to be imported; the proposed port of entry; the intended purpose for the GMO; and a risk assessment report. Approvals are subject to review where additional relevant scientific or technical information has become available or where a change in circumstances has occurred, and it has an influence on either the approval itself or the conditions under which the approval was issued. Once reviewed, the approval may be upheld or revoked.

There are also Biosafety (Labeling) Regulations 2012, in place. These exist to protect consumers by making them aware of foods, feeds and

products that are genetically modified so that they can make informed choices. The Regulations' labeling requirements include the insertion of the words "*genetically modified*" before the name of the ingredient or food in prepackaged products, and "GMOs" before the name of the organism in non-pre-packaged products. Penalties under the Regulations include a fine not exceeding KES 20 million, imprisonment for a term not exceeding 10 years or both. The Biodiversity Authority is required to promote public awareness and education of the public concerning biosafety matters, through the publication of guidance documents and other materials aimed at improving the understanding of biosafety.

An appeals board has been set up under the Biosafety Act to hear grievances from persons aggrieved by a refusal to grant an approval; the imposition of any conditions on an approval; the revocation suspension or variation of an approval; the refusal to treat an application as confidential;

and any other decision made by the Biodiversity Authority. Persons aggrieved by any of the authority's decisions have 30 days to lodge an appeal to the appeal board, which will hear and determine the appeal. Where a person is still unsatisfied with the appeal board's decision, they may lodge an appeal against the board's decision at the High Court. Decisions made by the High Court on such appeal are final.

Kenya is at a crossroad as far as GMOs are concerned. While there exists a framework for their regulation, this framework is largely untested with regards to the open cultivation and importation of food crops and animal feeds. GMOs have been and continue to be largely contested, and there is a national divide on the application of this technology in the country. Determination of the pending court case will be important in providing guidance on how Kenya proceeds with regards to GMOs, which for now remain banned.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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