Economic development through the dairy sector: analyzing the legal protection frameworks

By Hannah WAMUYU*

A. Abstract

The paper discusses the important role played by the dairy sector in Kenya with respect to economic development from which the economic and social rights can be realised. In doing so the paper defines an elaborate structural framework within which the sector is managed from the level of production of milk to marketing and sale of dairy products. Various laws and policies that govern the sector are highlighted most of which have interventions to the existing challenges that affect the sector. The paper highlights a number of threats to the sector which if not addressed within the given protection frameworks can lead to collapse of the industry. One of the major threats identified is the low price at which milk is sold by the farmer despite there being high consumer prices. Such low returns to the farmer adversely affect the welfare of the affected communities. The paper attributed the problem of low prices to the oligopolistic tendencies in the sector that have resulted in monopolization of prices. Dumping of milk products was also identified as a major threat which has also contributed to low prices of milk to the farmer. The paper recognizes that the elaborate legal protection frameworks in place can be utilized to regulate such restrictive trade practices and further protect the dairy sector which is still developing.

B. Introduction

The United Nations Declaration on the Right to Development[1] recognises development as a right. The declaration states that "everyone is entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[2] This implies that allowing people to participate in economic development activities helps in their protection of human rights. that by itself. According to Amartya Sen, development is a comprehensive process aiming to improve the well-being of the entire population and individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the resulting

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1 4 December 1986, UN Doc. A/RES/41/128, Art 1(1).

2 United Nations, Development as a Human Right < https://www.un.org/en/events/righttodevelopment/> accessed 23 October 2020.

https://doi.org/10.5771/2363-6262-2020-3-463 - am 30.01.2026, 22:20:04. https://www.inlibra.com/de/agb - Open Access -

benefits.[3] Development has been regarded as the process of expanding human freedom.[4] Some of the human rights and freedoms that can be enjoyed are the economic and social rights which are viewed as benefits that emanate from participation from development. Some of the economic activities are mining, forestry, agriculture, manufacturing, fishing, quarrying and delivery of services in hospitality, information technology, finance and other sectors.

Agriculture is one of the main contributors to economic growth as it contributes 25 % to the GDP of the country from which it contributes 65 % of the exports earnings and provides 18 % to employment of the country.[5] It is also the main means of livelihoods to the citizens.[6] Therefore, support to agriculture sector will empower the citizens economically to an extent that they can be able to realise the economic and social rights.

The social economic rights in Kenya are provided for under section 43 of the Constitution of Kenya. This is the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.[7] A person further provides for the right to emergency medical treatment.[8] Other rights are: the right to accessible and adequate housing, and to reasonable standards of sanitation; right to be free from hunger, and to have adequate food of acceptable quality; the right to clean and safe water in adequate quantities; right to social security; and education. One empowered by an agricultural activity has resources secure such socio-economic rights as they can be able access good education, food and adequate health care as it all requires resources.

Development of the dairy sector, has been regarded as a driver for supporting the achievement of sustainable development goal 1[9] which is to end poverty[10] which encapsulates protection of economic and social rights. According to Obadan the poor are those who are unable to obtain an adequate income, find a stable job, own property or maintain healthy living conditions.[11] Social economic rights help address poor living healthy conditions. Olayemi described the poor as those who had no access to the basic necessities of life

3 Asian Century Institute, Amartya Sen on Development as Freedom <https://www.asiancenturyinstitute.com/development/333-amartya-sen-on-developmentas-freedom> accessed 24 October 2020.

4 Asian Century Institute, 'Amartya Sen on Development as Freedom'<https://www.asiancenturyinstitute.com/development/333-amartya-sen-on-developmentas-freedom>.

5 http://www.kenyarep-jp.com/business/key_sectors_e.html.

6 Embassy of the Republic of Kenya in Japan, Key Sectors, http://www.kenyarep-jp.com/business/key_sectors_e.html accessed 23 October, 2020.

7 Article 43 (1) (a), Constitution of Kenya (CoK).

8 Article 43 (2), CoK.

9 In 2015 the 193 Member States of the United Nations adopted the Sustainable Development Goals (SDGs).

10 *FAO, GDP and IFCN*, Dairy Development's Impact on Poverty Reduction 2018, USA 6.

11 *Obadan, M.I.* (1996): "Analytical Framework for Poverty Reduction: Issues of Economic Growth Versus other Strategies". Nigerian Economic Society (NES) Annual Conference in Mwatsuma Kitti Mwamuye, "Poverty definition and its Contribution to Project Failure in Kilifi County' Global Journal of Politics and Law Research (2)2 2014 28.

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such as food, clothing and decent shelter; are unable to meet social, economic, political obligations.[12] Poverty is linked to low levels of health and education, poor access to clean water and sanitation, inadequate physical security, lack of voice, and insufficient capacity and opportunity to better one's life.[13] Therefore, enabling the enjoyment of economic and social rights would only be made possible by engagement in various development activities that would help end poverty therefore help in the improvement of living conditions of the people.

Dairy development makes a significant contribution to poverty reduction, both at household and community level.[14]There is a need to examine the efficacy of the legal protection frameworks in addressing the challenges and threats to the sector considering the major role the sector plays in securing the enjoyment of the economic and social rights. The paper focuses on the dairy sector as an enabler for the enjoyment of the economic and social rights and the challenges it faces while evaluating the legal protection in place for the sector.

C. Status of Dairy sector

Kenya has a vibrant dairy industry with an estimated value of 4 % of gross domestic product (GDP).[15] This vibrancy is anchored on the increasing domestic milk production averaging 5.3 % per year) while the country has a growing demand for milk and dairy products driven by expanding urbanization and a rising middle class.[16] The sector is characterized by chain actors, made up of producers who are small to large scale farmers, the majority consisting of about 1.8 million households who own one to three cows.[17] Smallholder dairy farmers dominate the industry at the production level contributing more than 70 percent of gross marketed production from farms.[18] Small-scale milk producers usually organize themselves into dairy cooperatives in order to supply their raw milk to processors and the other market outlets in the high-potential milk-producing areas of Kenya.[19] Such farmers'

12 *Olayemi, J.K.* A Survey of Approaches to Poverty Alleviation. (1995) A paper presented at (NCEMA) National Workshop on Integration of Poverty Alleviation Strategies into Plans and Programmes in Nigeria, Ibadan Nov. 27-Dec 1 in *Mwatsuma Kitti* 28.

13 Mwatsuma Kitti Mwamuye, "Poverty definition and its Contribution to Project Failure in Kilifi County' 2014 (2)2 28.

14 *FAO, GDP and IFCN*. Dairy Development's Impact on Poverty Reduction. Chicago, Illinois,USA 2018, 6

15 *Corné J. Rademaker, et al.* Sustainable growth of the Kenyan dairy sector; A quick scan of robustness, reliability and resilience 2016 (Report 3R Kenya/WLR 979)7.

16 *Corné J. Rademaker et al*. 7.

17 *Corné J. Rademaker, et al*. (note 15) 7.

18 *HG Muriuki,* Dairy development in Kenya (Food and Agriculture Organisation of the United Nations) 2.

19 *Patrick Chege et al,* Effects of Mergers on processed milk market in Kenya, Journal of Agribusiness in developing and emerging economics 8 (3) (2018) 483.

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organizations like the dairy farmer co-operative societies and self-help groups constitute an alternative model in the formal market which is a key strength to the sector.[20]

The farmers are served by diverse agro-input suppliers and service providers who perform the functions of milk bulking and chilling while the scale of retail operations varies from small shops to large supermarkets.[21] There are about 30 licensed milk processors, two of which process more than 60 percent of the total processed milk.[22] Most milk about than 75 percent is marketed through informal (unlicensed) channels.[23]

Notably, the sector has a number of strengths that are the main drivers of the growth in the sector. Some of them are:[24]

i. On-going investments in value added products including long-life milk and milk powder.
ii. High demand for processed milk and milk products due to a growing urban (lower-) middle class and an emerging dairy export sector.
iii. Consistent round milk collection by traders, dairy societies and processors in all main dairy production areas from 100-thousands of small scale farms.
iv. Improved capacity in investment and innovation by a segment of commercial dairy farmers
v. Conducive government policies such as import duties on dairy products
vi. Availability of basic dairy genetics which can be improved through proper breeding policies.

These are the key areas that need to be emboldened in order to spur growth in the sector which will benefit the citizens by improving their welfare. It is important to have a sound legal protection framework that is capable of securing growth of the sector.

D. The Legal Protection framework for the Dairy sector

The main legislation that regulates the dairy sector is the Dairy Industrial Act[25] which provides for the improvement and control of the dairy industry and its products. The Kenya Dairy Board is the institution established under the act to regulate the dairy sector industry. Some of the functions of the board are to:[26]

i) organise,regulateanddeveloptheefficientproduction,marketing, distribution and supply of dairy produce,
(ii) improve the quality of dairy produce

20 *Patrick Chege et al*. (note 19) 483.
21 *Corné J. Rademaker, et al*.(note 15) 7.
22 *HG Muriuki* (note 18).
23 *HG Muriuki* (note 18) iv.
24 *Frans Ettema*, Dairy development in Kenya 2013 (KMDP) 1.
25 Chapter 336, Laws of Kenya.
26 Section 17, Dairy Industry Act.

https://doi.org/10.5771/2363-6262-2020-3-466 - am 30.01.2026, 22:20:04. https://www.inlibra.com/de/agb - Open Access -

(iii) secureareasonableandstablepricestoproducersofdairyproduce;
(iv) promote market research in relation to dairy produce;
(v) permit the greatest possible degree of private enterprise in the production, processing and sale of dairy produce, consistent with the efficiency of the producer and the interests of other producers and of consumers.
(vi) To advise the government on dairy industry policy requirements

The Public Health Act is also applicable in terms of providing rules for protection of milk in cases of consumption thus securing public health.[27] The National Development Dairy Policy[28] (NDDP) is another major part of the regulatory framework that important for the support of the dairy sector. The policy helps point out areas of action by the government and other stakeholders for the purposes of driving growth and protecting the sector. The objectives of the policy are to:[29]

(i) Improve the productivity and competitiveness of Kenya's dairy and dairy products
(ii) Positively contribute to the livelihoods of milk producing households
(iii) Increase domestic consumption of milk and milk products.
(iv) Contribute to national food security.
(v) Transform the industry into an exporter of dairy animals and products.
(vi) Maximize dairy exports in the regional and global markets.
(vii) Re-orient milk processing towards long life dairy products.

The policy covers issues of production, marketing quality control, standard, consumer safety, consumption, promotion of Kenyan dairy products export among other.[30] Achieving the objectives of the policy depend on factors such as formulation, review and implementation of related policies on breeding, supply of animal feeds, livestock disease management effectiveness of the cooperative sector, public health, extension, research services, and milk processing among others.[31] This policy examines how the dairy value chain can deliver affordable prices for sale of dairy products while ensuring that there are acceptable returns to the farmers and other actors in the value chain.[32]

There is also the Dairy Industry Regulations of 2018 that address a number of issues such as registration, inspection licensing, carriage, pricing of dairy produce, imports and exports. The constitution also has provisions that are relevant to agriculture development. In article 174 of the Constitution of Kenya, one of the objectives of devolution is to recognize the right of communities to manage their own affairs and to further development and to promote social and economic development and the provision of services at the devolved

27 Section 134, Public Health Act, Chapter 242, Laws of Kenya.
28 Sessional Paper 5 of 2013.
29 NDDP 6.
30 NDDP v.
31 NDDP, v.
32 NDDP, 6.

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units. This would entail support of the dairy sector in the respective counties in terms of functions of animal husbandry and animal disease control function as mandated by the constitution.[33] In the functions of trade development and regulation the county is mandated to deal with cooperative development which is a critical player in the dairy value chain.[34] The national government deals with agriculture policy making and its implementation.[35]

Other relevant legislation that helps in the regulation of the dairy industry are:[36] Food, Drugs and Chemical Substances Act,[37] Standards Act,[38] Environmental Management and Coordination Act,[39] Pest Control Products Act,[40] Cattle Cleansing Act,[41] Crop & Livestock Protection Act,[42] Cap 321Fertilizer & Animal Foodstuffs Act[43] Veterinary Surgeon and Veterinary Para professionals Act,[44] Animal Diseases Act,[45] Weights and Measures Act.[46] Other policies that are important for the sector are: National Dairy Master Plan, National Livestock Policy, Vision 2030; Agricultural Sector Development Strategy (2009–2020) and the UN Sustainable Development Goals.[47]

The dairy sector is also regulated in the East Africa Community (EAC) region by way of the Treaty of the EAC[48] (Art 105–110), EAC Common Market Protocol, EAC Customs Union Protocol,[49] EAC Competition Act 2006 and the EAC Customs Management Act 2004. The treaty and protocols encourage trade free from tariff barriers and non tariff barriers. Some of the achievements of the Custom Union Protocol are: removal of internal taxes on intra-EAC trade; the removal of non-tariff barriers on intra-EAC trade; the introduction of common external trade policy through the Common External Tariff; the introduction of a list of sensitive products that were to be provided with additional protection; and the legal and institutional mechanisms which have been developed to govern free movement of

33 Second schedule, Part Two (1) Constitution of Kenya.
34 Second Schedule, Part Two (7), Constitution of Kenya.
35 First Schedule, Part One (29), Constitution of Kenya.
36 Kenya Dairy Board, KDB Strategic Plan (2018–2022).
37 Chapter 254 Laws of Kenya.
38 Chapter 496 Laws of Kenya.
39 Act No.8 of 1999, Laws of Kenya.
40 Chapter 35, Laws of Kenya.
41 Chapter 358, Laws of Kenya.
42 Chapter 321, Laws of Kenya.
43 Chapter 34, Laws of Kenya.
44 Act No.29 of 2011, Laws of Kenya.
45 Chapter 364, Laws of Kenya.
46 Chapter 513,Laws of Kenya.
47 < https:// unstats.un.org/sdgs/report/2017>.
48 Article 105–110, Signed on the 30 November 1999, entered into force 7th July 2000.
49 Signed in March 2004.

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goods within EAC.[50]Milk is one of the products listed as a sensitive good that is accorded more protection in trade. A common external tariff of higher than 25 % is chargeable to such dairy milk imports from a third country.[51] This is for the purpose of protecting the key vulnerable economic sectors of the member countries of the EAC.

The East African Community Competition Act is critical in regulating anti-competitive practices. Some of the objectives of the Act are to;

i) protect all market participants' freedom to compete by prohibiting anti-competitive practices;
ii) protect the opening of Partner States' markets against the creationofbarrierstointer-statetradeandeconomic transactions by market participants;
iii) guarantee equal opportunities in the Community to all market participants in the Community, and especially to small and medium-sized enterprises;
iv) guarantee a level playing field for all market participants in the Community by eliminating any discrimination by Partner States on the basis of nationality or residence.

E. Challenges affecting the Dairy Sector

The success of the dairy sector is dependent on the ability to deal with various challenges of the dairy sector that are highlighted in the dairy policy. One of the major setbacks that affect the sector is the low farm milk production and poor marketing.[52] This has been attributed to a number of challenges that are highlighted in the policy as follows:[53]

i. low quality of animal genetic source;
ii. under developed extension and advisory infrastructure,
iii. lack of capacity to invest in modern technologies;
iv. ineffective pest and disease control;
v. inadequate feeding due to high cost of feeds and fluctuation of feed,
vi. unreliable milk collection attributable to poor road infrastructure
vii. milk spoilage due to lack of preservation facilities and especially electricity
viii. consumer health risks due to sale of substandard milk.

The policy has proposed measures which if implemented would address the challenges that are affecting the sector. Some of the proposed interventions are:[54]

50 *Leonard Obura*, Free movement of goods in the EAC in *John Ruhangisa et al* (.Eds) East Africa Community Law Brill 309.

51 EAC Custom Union Protocol, Article 12(3).

52 NDDP 1.

53 NDDP 23–28.

54 NDDP 23–24.

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i) establishment and maintenance of gene banks;
ii) development of the legal framework for restructuring extension and advisory services and enable extension and advisory services to be provided by private agents, cooperatives and processor controlled extension systems and
iii) privatization of animal health services and reform the regulatory framework and attendant institutions for efficient delivery of animal health services.
iv) increased investment of dry seasonal feed preservation; promotion of alternative food formulation; revive cooperatives and motivate dairy farmer formation to address the feeds challenge
v) restore and strengthen dairy research to address issues of responsiveness and efficient technology development and transfer in the priority research areas such as dairy product development, milk packaging and dairy standards;
vi) revive milk marketing cooperative societies and motivate dairy farmer groups formation; facilitate marketing cooperative societies and dairy farmer groups to set up rural milk collection centres; regular feeder roads maintenance in order to address the milk collection challenge;
vii) speed up rural electrification programs and promote use of alternative sources of energy; investment in cold milk infrastructure.
viii) tax incentives to cooperatives and private sector on new investments; zero rating of taxes on inputs in liquid milk processing with regard to value added tax; support investment in long-life milk products in order to support the processing level of production.
ix) Promotion of export of dairy products in the regional and international markets; involve the dairy industry in regional and international trade negotiations

The government has made continuous efforts in implementing these interventions but not all have been achieved.

F. Threats to the Dairy Sector

Despite sound laws and policies for the sector and a commitment by the government to strengthen the milk sector, there are still glaring weaknesses that threaten sustainability of the sector. The sector is already weak with a lot of inefficiencies affecting all levels of dairy sector value chain right from production. Any threat that is not addressed can easily kill the sector and in essence affect millions of livelihood that depend on the sector. Some of the persistent and glaring weaknesses affecting the sector are:

i. High cost and seasonality of milk production due to low ability/skills to produce and preserve quality fodder
ii. Inefficient and high cost of milk collection and cold chain development leading to high cost and low quality of milk at factory gate.
iii. Large informal milk market and lack of level playing field for the formal sector.

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iv. Oligopolistic nature of the processing industry
v. Ineffective sector regulation as most policies have not been enforced.

Of concern is the oligopolistic nature of lead milk processor; Brookside Limited which has made several acquisitions.[55] The consumer prices in Kenya have been very high to an extent that the market started experiencing an influx of milk products from Uganda to have a share of the Kenyan market. A half liter packet in Uganda retails at Kshs 40 for the same packet that retails at kshs 50–60 in Kenya. Taking all production factors and inflation rate into consideration a litre is supposed to retail at kshs 70- kshs75 yet it retails at kshs100–150.[56] The influx of products from Uganda adversely affected the milk prices in Kenya. This caused trade war between Uganda and Kenya as Kenyan authorities seized a number of milk shipments from Uganda.[57] It is expected that the East Africa legal framework which includes the EAC treaty and the EAC Custom Protocol and the relevant regulations will be applied to settle any dispute that either of the countries may have.

Coming back to the local market the farmers who sell their milk to cooperative societies sell as low as Kshs 27 per litre. Brookside buys milk from the farmers at Kshs 36 from a low of Kshs 30 yet to the consumers the milk retails triple as much as it is bought from the farmers. According to a Kenyan lead economist, David Ndii, the problem of the milk industry is neither an agricultural policy one nor a trade policy one but one of a problem of competition policy.[58]According to the economist, high consumer prices are as a result of market power regulated by Brookside Limited. The lead processor is owned by the top most leader in the government and according to the economist, reforms are difficult to implement due to conflict of interest between business interests and public interest.[59] The low price at which milk is bought has been a disincentive to farmers to improve on production. This has in effect to the poverty levels in terms of their ability to enjoy the economic and social rights.

Another major threat to the dairy sector, the influx of cheap milk imports from Europe. This has been cited by the Kenya Dairy Board as a major problem.[60] European dairy processors like Nestlé and Danone already have a presence in East Africa and this is likely to distort the markets which will impacts the region's producers and processors.[61] Some of the

55 *Frans Ettema*, Dairy development in Kenya KMDP, 2013)2.

56 *David Ndii,* The economic cost of the conflict of interest : the Kenyatta dairy industry case, January 2020,the Elephant < https://www.theelephant.info/op-eds/2020/01/30/the-economic-cost-of-conflict-of-interest-the-kenyatta-dairy-industry-case/>.

57 The dairy industry in kenya : production capabilities, investments, innovations, trends, March 2020< https://www.foodbusinessafrica.com/the-dairy-industry-in-kenya-production-capabilities-investments-innovations-and-trends/ >accessed October 31, 2020.

58 David Ndii, (note 51).

59 David Ndii, (note 15).

60 Kenya Dairy Board, KDB Strategic Plan (2017–2022) 6.

61 *Njiraini Muchira,* East Africa dairy sector at stake as Europe floods market with cheap powder milk Tuesday May 01 2018 <https://www.theeastafrican.co.ke/business/East-Africa-dairy-sector-at-stake-Europe-cheap-powder-milk/2560-4538874-t4xrl1/index.html>.

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companies like Danone recently acquired 40 % of Brookside which is the largest processor in the Eastern and Central Africa region. This is likely to provide a bigger avenue for influx of dairy products from more developed countries. Nixon Sigey from, Kenya Dairy Processors Association chairman fears views the influx as dumping of cheap imports has a potential of killing the sector.[62] In 2017, a Dutch family fund, DOB Equity (DOB) invested an undisclosed sum in Countryside Dairy that was said would enable them access to the world-renowned dairy processing technical capabilities in the Netherlands. The dairy receive raw milk from more than 20,000 farmers drawn from Nyandarua and Laikipia Counties and plans are in place to cover more area.[63] It is only hoped that the foreign inclusion in the running of these dairies will not create an avenue for dumping of cheap milk products from their host countries.

G. Recommendations

Kenya sets to gain economically with the development and protection of the dairy sector. Any oligopolistic tendencies need to be addressed so as to protect the vulnerable dairy sector. Any person or institution driven out of the market can seek protection under the Competition Act[64] and the EAC Competition Act. The EAC Competition Act regulates mergers and acquisitions formed within the region that are potentially anticompetitive.[65] This would in effect protect the market and the farmers dealing with lesser competitive processors.

Further any trade wars within East Africa touching the dairy sector should be addressed within the EAC protection frameworks without delay as such wars can adversely affect trade for partner states. Further protection can also be sought under the aegis of EAC to curb any unfair competition and dumping which would distort milk prices in the country to the disadvantage of the farmers. There is also a need to fully implement EAC Customs Union and EAC Common Market Protocols and attendant regulations which would protect trade within the EAC at large. This would be enabled by harmonization of the EAC protection frameworks with the respective national law of partner states of the EAC.

62 Njiraini Muchira (note 56).

63 "The dairy industry in kenya : production capabilities, investments, innovations, trends, March 2020< https://www.foodbusinessafrica.com/the-dairy-industry-in-kenya-production-capabilities-investments-innovations-and-trends/> accessed 31 October, 2020.

64 Act Number 12 of 2010.

65 Section 11–13, EAC Competition Act.

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