



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. E002 OF 2021

MUNGANIA TEA FACTORY COMPANY LTD

& 50 OTHERS.....PETITIONERS

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

RULING

1. The proposed respondent/applicant moved this court vide an application dated 27.01.2021 filed under certificate of urgency and wherein the applicant sought for orders; -

1)spent

2) **THAT this Honourable court be pleased to order that the applicant be joined as a respondent in this petition.**

3) **THAT this Honourable court be pleased to order that the petitioners and the respondent do serve on the proposed respondent all the pleadings to date touching on the petition**

4) **THAT costs of this application be provided for**

2. The application is premised on the grounds on its face and further on the supporting affidavit sworn by Antony Muriithi, the Acting Director of the proposed respondent. In a nutshell, the applicant's case is that it is a necessary and proper party in the instant petition in adjudicating and settling of issues raised in the instant petition. Further that the Tea Act 2020 and whose provisions are being challenged mandated the applicant to implement the reforms in the tea sector and thus the applicant as the regulator in the tea industry also has sufficient interest in the petition and issues raised in the petition cannot be effectively and completely adjudicated without the enjoinder sought and the ultimate order or decree cannot be enforced without the presence of the proposed respondent in the petition. Further that the ex-parte suspension of the impugned sections of the Act have affected stakeholders in the tea value chain and have severely interfered, hampered and/or crippled the applicant's statutory functions and further all the benefits due to over 680,000 small scale tea growers have been denied or postponed and the sector is devoid of a regulator.

3. The application is opposed by way of a replying affidavit sworn by Julius Nyaga M'Nthungu the Chairman of the 1st petitioner's Board of Directors and wherein he raised four issues in opposition of the application. Of relevance to this ruling are the issues that the law firm of Patricks Law Associates is on record in two petitions by Small Scale Tea growers through their tea factory companies (that is **Nairobi High Court Petition No. E234 of 2020 and Mombasa High Court Petition No. 87 of 2020**) challenging Crops (Tea Industry) Regulations 2020 (Tea Regulation cases). That the said law firm filed an application seeking joinder of 22 persons described as tea growers and whose certificates of urgency were certified by Mr. Patrick Ngunjiri- advocate and it has never been disclosed that the firm of Patricks Law Advocates and/or Patrick Ngunjiri is also retained as advocate in applicant's panel of advocates and upon request for information as to how the firm was retained by the applicant, the same was never supplied.

4. As such, the procurement of Patricks Law Associates as the applicant's advocates was unprocedural and in breach of procurement laws and thus the said firm of advocates or Patrick Ngunjiri himself cannot validly file and/or represent the applicant before any lawful judicial organ including this court and therefore, the instant application ought to be dismissed on this ground. Further that the applicant being a public body is funded by public funds and prudent and lawful use of such funds is paramount consideration and as such, the activities of seeking enjoinder and participation in the petition herein since the same will spend public funds needs to be sanctioned by the management and the appointment of advocates for purposes of litigation be undertaken by a competent authorized organ being the Board. That however, the petitioners despite requesting for minutes and resolutions sanctioning the appointment of Patricks law Associates to represent the applicant as well as resolutions for enjoinder, the same have not been provided and as such, in the absence of the said minutes and resolutions, the applicant cannot be before this court and any pleadings filed in its behalf is for striking out for being incompetent.

5. Further that the applicant is not a necessary party to the instant proceedings as the Tea Act does not mandate it to enforce the Act nor to be a regulator (of the sector); the petitioners do not have any claim against the applicant and neither does the petitioners require the applicant for the enforcement of any decree which may issue. As such, it was deposed, that the instant application is intended to introduce a new cause of action which has no relevance to the proceedings before this court, and the same is misconceived, incurably defective and devoid of any merits and is filed with the view of derailing and clogging the wheels of justice so as to shift the attention from the main issues before the court being the legality and the constitutionality of the impugned provisions of the Tea Act 2020. The deponent prayed that the instant application be dismissed with costs.

6. The application was canvassed orally wherein each of the parties reiterated the contents of their pleadings. Mr. Ngunjiri Learned Counsel for the proposed respondent/applicant submitted that the intended respondent has met the criteria to be enjoined as a respondent and that they are a necessary and proper party and the petition cannot be disposed off without their joinder. Relying on the supporting affidavit filed together with the application, he submitted that under section 78 of the Tea Act, any reference to the applicant in any written law or document of any nature will be construed to mean Tea Board of Kenya. Further that under section 5 of the Act, the Tea Board of Kenya is the body mandated to regulate and oversee all the aspects of the implementation of the Act but the same has been hampered by the suspension of Act. Reliance was placed on paragraph 7 of the supporting affidavit (on record). As such, there is no other party that can respond to the orders that have been sought except the applicant by dint of the Act and thus a necessary party. That the applicant is the entity mandated with regulation of the sector under section 78 of the Act. On the issue as to procurement of legal services raised by the petitioners, it was submitted that the same is within the jurisdiction of Public Procurement Review Board.

7. Mrs. Njoroge Learned Counsel for the respondent submitted that she was supporting the applicant's position and in so doing made reference to Rule 3 of Mutunga Rules on the overriding objectives which are aimed at achieving just determination of proceedings and Rule 5(d)(ii) that allows the court to make orders to join any party either on its own motion or on application by a party. She further submitted that the proposed respondent's rights have been affected and thus the right to be enjoined. That the applicant has been a party in other proceedings touching on the tea industry and thus they are entitled to be parties to the petition and that under rule 4 of the Mutunga Rules, a person can appear in a petition either himself or on behalf of another and thus there is no reason why counsel cannot represent the applicant. She further submitted that under section 78 of the Tea Act, the Tea Board has taken over the tea sector but since it's not operational, the applicant has been regulating the tea industry and thus the necessary party in the petition and as such when the Act is being impugned, the applicant being the body that has the authority to implement the Act has the right to defend the constitutional issues raised therein.

8. Mr. Milimo the Learned Counsel for the petitioners in his submissions in response to the application raised a preliminary issue on the submissions made by Mrs. Njoroge for the Attorney General (respondent) on the grounds that the respondent having failed to file a response to the application, the response made orally in court was an ambush and against the dictates of fair hearing. As such, the proceedings by Mrs Njoroge for the respondent ought to expunge from the court record. Mrs. Njoroge for the respondent opposed the objection on the basis that they were served late and thus they had no time to respond. Mr. Ngunjiri for the applicant submitted that the respondent (Attorney General) was perfectly in order to support the application orally as the same is allowed pursuant to rule 10 of Mutunga Rules. In a rejoinder, Mr. Milimo submitted that a party cannot address court where there are no pleadings to rely on without the leave of the court notwithstanding the constraints of time. Further that a party cannot be allowed to proceed without prior disclosure of its case to the other party. The ruling on the said preliminary issue was reserved to be delivered together with the ruling herein.

9. In further response to the instant application and in opposition to the same, Mr. Milimo raised another preliminary issue as to the competency of the motion on the ground that the jurat of the supporting affidavit is on a different page not connected to the body of the said affidavit and thus the same is defective. Reliance was made on the case of **Ex-parte John Githinji Wang'ond**. A further preliminary issue was raised to the effect that the Agriculture and Food Authority's Board is yet to be constituted since the commencement of the Act (on 17.01.2014) and as thus the acting Director General does not have powers to commence proceedings in defence or support of court proceedings and neither could he act without instructions of the Board. That there being no evidence as to who authorized the joinder of the applicant in the proceedings herein, the only conclusion from the foregoing is that the proceedings were commenced without a valid sanction by the applicant to be enjoined and the consequences of which is that the applicant is not properly before the court and the same ought to be struck out. Reliance was made on the case of **Affordable Homes Africa Ltd –vs- Henderson & 2 others [2004] eKLR**.

10. The Learned Counsel raised yet another preliminary issue to the effect that the law firm of Patricks Law Associates was not properly on record for the reason that it was never pre-qualified and/or that there were no proper instructions from a competent organ of the applicant being the Board authorizing the firm to appear on its behalf and no evidence was tendered as to the pre-qualification of the said firm of advocates despite requests to have the same provided and/ or any information as to their appointment to represent the applicant. This, it was submitted, is despite the applicant being a public body which is accountable to the people as it spends public money. As such, on the basis of the said preliminary issues, it was submitted that the application should be dismissed.

11. On the substance of the application, it was submitted that the respondent was not fit to be enjoined as a respondent within the meaning of "respondent" as defined in Black Law Dictionary; that the petitioners did not have any claim against the applicant as they are seeking for the determination of legality of some provisions of the law and not as to failures and omissions by the applicant; that the tea sector regulation is under the Tea Board and not the applicant and thus seeking applicant's joinder is tantamount to acting *ultra vires* the Act and would be asking the court to act contrary to the law because it will amount to sanctioning them as regulators (of the tea sector) whereas the law does not provide for them to be regulators. Further that what is before court is on legality or constitutionality of the Act and not implementation of the Act and that they don't have any claim against the applicant and enjoining it would be imposing a respondent on the petitioners whom they have no cause of action against.

12. Further that the applicants have not satisfied the conditions for joinder as respondents and are not necessary parties to the instant proceedings and that enjoining them would lead to introduction of a new cause of action as the court will be required to invoke section 4 of Crops Act yet tea is regulated by an independent Act. Reliance was made on the case of **Hunters Brubl Limited –vs- Nyambura Musyimi & 2 Others 2017 eKLR**. That under section 78 of the Tea Act, the right regulator of the sector is the Tea Board and not the applicant and that the Act did not convert the applicant to the Tea Board and the two entities are distinct.

13. Mr. Ngunjiri in a rejoinder submitted that the Act was under transition and as a result of the fact that the Tea Board has not been

established reference to the applicant will be reference to the Tea Board and that the applicant herein is the proper party to be enjoined as a respondent. As for the procurement of the Law firm of Patrick Law Associates, it was submitted that the issue ought to be raised with the Public Procurement Board but no complaint has been raised. Further that section 71 of the Public Procurement and Assets Disposal Act allows procurement entities to continuously procure and update the list of registered suppliers. That under section 171(2) any party can apply to be a supplier and that despite there being submissions that the law firm representing the applicant is not qualified, no list has been provided as to the law firms which are qualified. The Learned Counsel further submitted that the issue as to the jurat in the supporting affidavit being on a different page, the same is curable pursuant to the provisions of Article 159(2)(b) of the Constitution and that it does not matter where one places the jurat and that the case cited by the petitioner was not a constitutional petition but dealt with Civil Procedure Act which was decided long before the new constitution came to force.

14. Mrs. Njoroge for the respondent and with leave of the court (to address the court on matters of law) submitted that the applicant has a right to be represented in the proceedings and that section 10 of Mutunga Rules allows a party to submit orally. Further that section 74 of Public Procurement Act allows a body to make direct procurement in times of crisis or emergency and the application having been brought under certificate of urgency, the procurement was justified. That the Tea Act under Section 76 to 80 contains transition clauses and further that under the rules of statutory interpretation, it was clear that the country is transiting from Agriculture and Food Authority to the Tea Board and due to the many suits filed, the Tea Board has not been constituted and the applicant continues to regulate the tea sector and it is the applicant which would implement the orders which will be made by this court.

15. I have considered the application herein, the replying affidavit by the petitioners and rival oral submissions by the Learned Counsel and it is clear that the ultimate question which needs to be answered is whether the instant application ought to be allowed. However, to arrive to that question, there are preliminary issues raised by the petitioners herein and which touches on the *locus standi* of the applicant and which in my view ought to be answered at the onset.

16. As I have noted above, Mr. Milimo for the petitioners raised preliminary issues as to the law firm of Patricks Law Associates not being pre-qualified and thus not fit to file the instant application; that there were no resolutions and minutes sanctioning the enjoiner of the applicant in these proceedings since the Tea Board has not been constituted, the acting Director General does not have powers to commence proceedings in defence or support of court proceedings and he cannot act without instructions from the Board; and finally that the application is defective for the reason that the jurat is on a separate page. On these preliminary issues alone, it was submitted that the instant application ought to fail. The said preliminary issues were responded to by both the applicant and the respondent herein. As such, the question which needs to be answered is whether the above preliminary issues are merited and if so, whether the application should fail on that account.

17. In relation to the jurat being on a separate page, I note that the instant application seeks enjoiner of the applicant as a respondent in the petition. Petitions such as the one pending before this court are governed by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which were made pursuant to the provisions of Article 22(3)(d) of the Constitution of Kenya 2010 which article gives the Chief Justice powers to make rules providing for the court proceedings in matters dealing with enforcement of fundamental rights and freedoms. Under Rule 5(i) and (ii) of the said Rules this court has discretionary powers, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just to order that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added. Such is the nature of the application before this court. Under rule 19, a formal application under the rules should be by Notice of Motion set out in Form D in the schedule and may be supported by an affidavit.

18. Generally, drawing of affidavits is governed by the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya. The relevant provisions of the said Act are sections 5 and 8 which are to the effect that the affidavit should indicate in the jurat or attestation at what place and on what date the oath or affidavit is taken or made. Section 8 on the other hand requires that the same must be made before a magistrate or commissioner for oaths. (See Gideon Sitelu Konchellah –vs- Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR).

19. However, in the instant case, the issue is not that the supporting affidavit does not indicate the place where it is made or the date when it was made and or the same not having been made before a magistrate or commissioner for oaths. The issue is that the jurat appears on a separate page. Does this make the said affidavit defective? My answer is no. In Jimoko Enterprises Ltd v Deposit Protection Fund Board & 2 others [2006] eKLR Fred A. Ochieng J in a persuasive decision held that; -

“.....Although the said section requires the Commissioner for Oaths to state the place and date where the oath or affidavit is taken or made, it does not demand that the jurat be on the same page where the text of the oath or affidavit ends. Therefore, for anybody to introduce into the section, a requirement to that effect, would not be right. On the other hand, I do appreciate that it is good practice to have the jurat on the same page whereat the text of an affidavit ends. By so doing, the jurat would definitely be linked to the affidavit, so that even if the last page were to become disconnected from the rest of the affidavit, the court, or anybody else handling the matter would be able to easily connect the two pieces.....”

.....I am in complete agreement with the Hon. Ringera J. Therefore, the fact that the jurat is not on the same page as the text of the affidavit is, strictly, not an irregularity, as there is no legal requirement that it be so. However, even if it were an irregularity, for the reason that good practice is to have the jurat on the same page as the text of the affidavit, the said irregularity would not render the affidavit fatally defective. Such a defect, if it existed, could not bar the court from receiving an affidavit, pursuant to Order 18 rule 7 of the Civil Procedure Rules. Accordingly, the objection founded on the defendant's perception of a defective affidavit is hereby overruled.”

20. In Burnaby Properties Limited –vs-Suntra Stocks Limited [2015] eKLR, F.G Gikonyo J observed that; -

“.....The Defendant contended that this was a fundamental defect in the affidavit, as it was not discernible whether the jurat was in relation to the affidavit or not. The Defendant has not demonstrated how the jurat being on a separate page in the affidavit violates the provisions of Section 5 of the Oaths and Statutory Declarations Act, or how such arrangement becomes incurable under Article 159(2)(d) of the Constitution. The word “shall” used in section 5 of the Oaths and Statutory

Declarations Act should never confuse a litigant in the hope that a mere irregularity or defect in form would make an affidavit fatally defective. The word "shall" used in section 5 of the said Act has been interpreted by courts to be directory rather than mandatory....."

21. Further, it is clearly stated under Article 159(2) (d) of the Constitution of Kenya 2010 that the courts in dispensing justice should not pay undue regard to procedural technicality. In my view and just as Gikonyo J observed in **Burnaby Properties Limited –vs-Suntra Stocks Limited (supra)**, article 159(2) (d) of the Constitution expressly depreciates such technicalities in favour of substantive justice. It is my considered view that the supporting affidavit by the applicants herein is proper for all purposes and intents as the defects in the jurat being on a separate page with the rest of the affidavit is curable under article 159 of the constitution.

22. As for the preliminary issue on there being no resolutions and minutes sanctioning the enjoinder of the applicant in these proceedings, it was submitted by the counsel for the petitioners that the decision to enjoin the applicant needs to be sanctioned by the Board and that the acting Director General does not have powers to commence proceedings in defence or support of court proceedings and neither could he act without instructions from the Board. What I understand with these submissions is that the applicant's Board ought to have authorized the enjoinder in the proceedings herein and without such a sanction, the applicant is not properly before the court and the same ought to be struck out. The petitioners relied on **Affordable Homes Africa Ltd –vs- Henderson & 2 others [2004] eKLR**. In that case, L. Njagi J held that; -

"As an artificial person, however, a company can only take decisions through the agency of its organs, which are primarily the board of directors or the general meeting of its shareholders. One of these should therefore authorize the use of the company's name in litigation so that the company can properly come to court and enforce a breach of a director's duty...."

23. I however note that the above case was decided in a civil suit as opposed to a constitutional petition and wherein the Civil Procedure Rules 2010 expressly provides for requirement of authority to file a civil suit to be attached to the pleadings (Order 4 Rule 1(4) of the Civil Procedure Rules). From a perusal of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which govern constitutional petitions, it is clear that the rules have no similar provision in relation to petitions that requires authority from the Board. However, Civil Procedure Rules have been held to be applicable in constitutional petitions so as to fill any lacuna in ***the Mutunga Rules*** and where such provisions give Court inherent power to make such orders as may be necessary for ends of justice. (See **Kitty Njiru –vs- Nature & Style Fun Day Events & another; Rebecca Muriuki t/a Kahaari (Proposed third Party) [2020] eKLR**).

24. As such, applying the Civil Procedure Rules 2010 *mutatis mutandis*, it is clear that for a corporation or artificial person to institute a suit in a Constitutional Court, the corporation needs to give authority in that regards. In the instant case, the applicant despite the counsel for the petitioners having raised the issue in his submissions, did not bother to provide such an authority by way of further affidavit.

25. I am alive to the decisions by this court and also the Court of Appeal to the effect that an action commenced without authority is capable of being ratified and it would not be in the interests of justice to dismiss this suit on the ground merely that there was no authority filed to institute the suit as the defect does not go to the jurisdiction of this court. (See for instance **Peeraj General Trading & Contracting Company Limited, Kenya & another –vs- Mumias Sugar Company Limited [2016] eKLR**).

26. However, in the instant case, it was admitted by the applicant that the applicant's Board has not yet been constituted. It is my considered view that even if this court had to give a blind eye to the issue and leave it to the applicant to ratify, it would not be possible as no one knows when the Board will be constituted. In the circumstances it is my finding that the pleadings before me are incurably defective for want of authority from the applicant's Board.

27. As to the preliminary issue of the law firm of Patricks Law Associates not being pre-qualified and thus not fit to file the instant application, as I have already noted, the rival position is that the said law firm ought to have been pre-qualified and the procedure under the procurement laws complied with. It is not in dispute that the applicant is a public entity within the meaning of Public Procurement and Assets Disposal Act No. 33 of 2015. Under Article 227 (1) of the Constitution, when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Further in so contracting, it should observe the values and principles as provided for under section 3 of Public Procurement and Assets Disposal Act. A public organ has a duty to ensure compliance with the said legal requirements.

28. However, in the instant case, no attempts were made by the said law firm and/ or Mr. Ngunjiri as to the said provisions having been complied with. Despite the petitioners having instructed their advocates on record to seek information in relation to the same, none of such information was presented before this court. I am alive to the fact that the process of procurement by the applicant cannot be interrogated by this court as constituted. However, by the petitioners having raised the issue as to the suitability to appear in court on the grounds of irregular procurement, the said firm had a duty to prove that they were rightfully procured may it be by way of open tendering or otherwise. Failure by the said firm to present such information to the court leaves more questions than answers as to how they were procured.

29. In **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, in the Court of Appeal held that: -

"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

30. It is my considered view that the evidential burden shifted to the applicants to prove that the procurement process leading to them coming on record was proper and procedural. I note that the applicant is a public body and that being the case, it has a higher duty to comply with the legal procedures as provided by various legislations. Failure to prove compliance with the said legal requirements cannot be ratified by this court by way of letting such unprocedural acts to stand. It is my view that on the ground that the law firm of Patrick Law Associates was not

qualified any document filed herein is a nullity in law.

31. As I had noted earlier, Mr. Milimo raised another issue as to whether Mrs. Njoroge counsel for the respondent had a right to address the court in submissions when she had not filed a response to the application by Mr. Njunjiri advocate. This preliminary issue was opposed by Mrs. Njoroge on the basis that they were served late and thus they had no time to respond. Mr. Ngunjiri on his part submitted that the Attorney General was perfectly in order to support the application orally as it was allowed pursuant to rule 10 of Mutunga Rules. A ruling on the said issue was reserved to be delivered together with this ruling. The question therefore is whether the submissions by Mrs. Njoroge for the Attorney General in relation to the response to the application herein ought to be expunged from the court record? In other words, did the counsel have the right to address the court bearing in mind that no response had been filed by the respondent.

32. The instant application is seeking to enjoin the applicant as a respondent and it's brought under Article 159(2) of the Constitution and Rule 5(d)(ii) of the **Mutunga Rules 2013**. Under the said rule, this court has discretion to enjoin a party with or without application by either party. However, where a formal application is made, it should be by Notice of Motion set out in Form D in the schedule and may be supported by an affidavit (rule 19). I have perused the said **Mutunga Rules 2013** and it is clear that the same does not provide for the procedure of hearing of such applications but nonetheless as I have already noted elsewhere, Civil Procedure Rules apply in constitutional petitions so as to fill any lacuna in the **Mutunga Rules**.

33. Order 51 of the Civil Procedure Rules 2010 deals with hearing of applications. Order 51, rule 14 provides that any respondent who wishes to oppose any application may file any one or a combination of the following documents - (a) a notice preliminary objection; and/or; (b) replying affidavit; and/or (c) a statement of grounds of opposition. Sub-rule 2 provides that the said documents in sub-rule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing. Rule 6 of the Mutunga Rules obligates a party to proceedings commenced under the rules, or an advocate for such party to assist the Court to further the overriding objective of these rules and in that regard to— (a) participate in the processes of the Court; and (b) comply with the directions and orders of the Court.

34. It is my considered view that the respondent herein having not filed any response to the application had no right of audience before this court. As it is the procedure in civil proceedings, where a respondent does not file any response to an application, it does not have any right of audience in proceedings touching on such an application. However, such a party can be heard on matters of law. Mrs. Njoroge ought to have sought more time to file her response to the application and in any event she had stated that she was not opposing the application. As such, the applicants could not anticipate any submissions on the part of the respondent as the presumption was that the said respondent was not opposed to the said application.

35. As such, the submissions by Mrs. Njoroge in relation to the application were akin to trial by ambush and which is frowned against by the rules of Civil Procedure. That is why the rules provides that any response to an application must be served upon the applicant three days before the hearing thereof. As such, it is my view that the submissions by Mrs. Njoroge on the facts of the case ought to be expunged from the records. Otherwise, the same will be tantamount to infringing on the rights to fair hearing on the part of the petitioners.

36. On the substance of the application, did the applicant make a case for joinder. In support of the prayer for joinder, the applicant's case is that they are the necessary party to the petition herein by virtue of being the regulatory authority for tea. This assertion was strongly refuted by the petitioners who deposed to the effect that that under the Tea Act of 2020, the applicant is no longer mandated to regulate tea and that the Act creates the Tea Board.

37. As I have already noted, joinder of parties in constitutional petitions is provided for under Rule 5 of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Rule 5(d) provides that; -

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

i. order that the name of any party improperly joined, be struck out; and

ii. that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added...emphasis mine”

38. What this means is that the court has discretion to order striking out of any party improperly joined and the name of any person who ought to have been joined or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter be added. The conditions under which a party can be enjoined and or struck out are therefore that; -

i. The party whose name is being struck out must have been improperly joined.

ii. The party whose name is to be added should be the one who ought to have been joined or whose presence is necessary in order for the court to adjudicate upon and settle the matter.

39. The applicant wants to be enjoined as a respondent in the petition. Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 defines **“respondent”** as a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom.

40. As such, the question which begs for answer is whether the applicant herein has met the above conditions?

41. I have perused the orders sought in the petition and basically, it seeks nullification of some provisions of the Tea Act and an order of

certiorari to remove into this court and quash the said provisions amongst other prayers. It is my view that the right party who ought to enforce the decree issued by this court pursuant to the petition herein is the Attorney General being the chief government legal advisor.

42. Pages 29-55 of the petition includes the particulars of the illegalities, breach and likely breach of fundamental constitutional rights of the petitioners. There is no paragraph which indicates in any way as to the applicant having violated the petitioners' rights and freedoms. As rightly submitted by Mr. Milimo, the petitioners do not have any claim against the applicant. The court is being asked to determine the legality and constitutionality of some sections of the Tea Act and not the implementation thereof. The issue of implementation does not arise. The applicant has not done and/ or failed to do anything to necessitate a cause of from the petitioners in respect of the Tea Act.

43. As it was rightfully submitted and so admitted, the Tea Act 2020 establishes Tea Board of Kenya (see section 3). The said Act commenced on 11.01.2021. Section 5 thereof provides for the functions of the Board and a reading of the said section clearly indicates that all matters to do with regulation of tea industry has been bestowed on the Tea Board. Section 76-81 further provides for transitional clauses and from a reading of the said sections, all the assets, liabilities and staff initially under the Tea Directorate of the Agriculture and Food Authority were transferred to the Board. The two entities are very separate and distinct and have been established under two different Acts of parliament and their functions are totally different. I am persuaded by Mr. Milimo's submissions that a joinder will impose a respondent on the petitioners whom they have no cause of action against yet for a party to be a respondent, there has to be a cause of action against that person. Section 75 amends the Crops Act of 2013 and whose effect is to remove tea from the schedule of the Scheduled crops.

44. It is my view therefore that from the reading of the Tea Act, it is clear that tea was delinked from the Crops Act and thus Agriculture and Food Authority does not have any responsibility in relation to its management. As such, even if this court were to enjoin another party to the petition as the respondent under rule 7 of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the right party ought to be the Tea Board and not the applicant herein. It is the Board whose presence might have been necessary and not the applicant. In my view, there is no necessity of the applicant's presence in order for the court to adjudicate upon and settle the matters before it or even for the petitioners to be able to enforce any decree that may be given in their favour.

45. In the circumstances of the above, the application herein is misconceived and the same is hereby dismissed.

46. As for the costs of the application, it is trite that costs follow events. As such, the intended interested party, being the losing party is hereby condemned to bear the costs of the instant application.

47. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF FEBRUARY, 2021.

CORRECTED AND DELIVERED ON 22ND DAY OF MARCH, 2021.

L. NJUGUNA

JUDGE

.....**for the Petitioners**

.....**for the Respondent**

.....**for the Applicant**