



Rugut & 2 others v National Environment Management Authority & 4 others (Constitutional Petition 3 of 2019) [2023] KEELC 20912 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20912 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
CONSTITUTIONAL PETITION 3 OF 2019**

MC OUNDO, J

OCTOBER 19, 2023

IN THE MATER OF ARTICLES 1,2,3, 19(2), 20(5), 21, 22, 23, 26, 27, 28, 29, 40, 42, 70, 159, 258, AND 259 OF THE CONSTITUTION OF KENYA 2010 IN THE MATTER OF THE ALLEGED CONTRAVENTION OR VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENSHRINED IN ARTICLES 1, 2(1) (2) AND (3), 3(1), 4(20, 10(2), 69, 70, 71, 73, 232(1) (D), (E) (F) AND 259(1) AND (3) OF THE CONSTITUTION OF KENYA, 2010 IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 3, 4, AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT AND SECTION 6 OF THE STATUTORY INSTRUMENTS ACT IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF ENVIRONMENTAL IMPACT ASSESSMENT REPORT ISSUED WITH RESPECT TO THE PROPOSED CONSTRUCTION OF THE KIPSIGIS HIGHLANDS TEA FACTORY BY KIPSIGIS HIGHLANDS MULTI-PURPOSE CO-OPERATIVE SOCIETY AND THE VARIOUS LICENCES AND/OR APPROVALS ISSUED THERE UNDER AND IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 1, 2, 3, 19(2), 20(5), 21, 22, 23, 26, 27, 28, 29, 35, 40, 42 AND 70 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

**PHILIP KIPTANUI RUGUT 1ST PETITIONER
PETER KIPKEMOI CHERUIYOT 2ND PETITIONER
JOSEPH KIPSANG A. CHEROP 3RD PETITIONER**

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST
RESPONDENT
COUNTY GOVERNMENT OF BOMET 2ND RESPONDENT
KIPSIGIS HIGHLANDS MULTI-PURPOSE SOCIETY 3RD RESPONDENT
KIPSIGIS HIGHLANDS TEA FACTORY 4TH RESPONDENT
WATER RESOURCES AUTHORITY 5TH RESPONDENT**



JUDGMENT

1. Vide their Petition dated the 13th May 2019, the Petitioners herein sought for the following reliefs;
 - i. A Declaration that their Constitutional rights of access to information as enshrined under Article 35 of *the Constitution* was violated by the 1st and the 2nd Respondents.
 - ii. A Declaration that the 1st and 2nd Respondents abdicated their roles in ensuring that the citizens enjoy a clean and healthy environment by approving plans for construction of Kipsigis Highlands Tea Factory on the parcel of land registered as 7779/3 in Chemamul without following the due process of the law.
 - iii. A Declaration that the Petitioners' right to a clean and healthy environment and the rights of the people living around Kipsigis Highlands Tea Factory on the parcel of land registered as 7779/3 in Chemamul was violated by the 3rd and 4th Respondents who did not follow the due process of the law prior to the construction of Kipsigis Highlands tea factory.
 - iv. That this Honourable court be pleased to cancel the Environmental Impact Assessment License issued by the National Environment Management Authority and approvals issued by the County Government of Bomet to the 3rd Respondent prior to the Construction of Kipsigis Highlands Tea Factory on the parcel of land registered as 7779/3.
 - v. A Declaration that the 2nd Respondent did not follow the right procedure when issuing out approvals for the construction of Kipsigis Highlands Tea Factory on the parcel of land registered as 7779/3 in Chemamul and for that reason the same be cancelled.
 - vi. A Declaration that there was no public participation carried out during the preparation of the Environmental Impact Assessment (EIA) report prior to the Construction of Kipsigis Highlands Tea Factory on the parcel of land registered as 7779/3 in Chemamul.
 - vii. An Order directing the 3rd Respondent to conduct a fresh Environmental Impact Assessment, and if found unsafe, Kipsigis Highlands Tea Factory on the parcel of land registered as 7779/3 in Chemamul be destroyed and the environment be restored to the manner in which it was before the illegal factory was put up and an environmental restoration order be issued.
 - viii. An Order for Judicial Review to quash any decision of the 1st and 2nd Respondents made pursuant to the flawed, biased and unreasonable Environmental Impact Assessment report and /or recommendations for the construction of Kipsigis Highlands Tea Factory on the parcel of land registered as 7779/3 in Chemamul
 - ix. An award of general damages for pain and suffering, humiliation and distress visited upon the Petitioners.
 - x. Cost of the Petition
 - xi. Any other or further reliefs that the court considers appropriate and just to grant.
2. Contemporaneously with the Petition, the Petitioners filed a Notice of Motion dated 13th May, 2019 seeking orders compelling the 2nd and the 3rd Respondents to supply them with the Environmental Impact Assessment report, approved structural and building plans submitted by the 3rd Respondent with respect to Kipsigis Highlands Tea Factory on the Parcel of land registered as 7779/3 in Chemamul area. The Petitioners/Applicants also sought that the court issue a temporary injunction order



- stopping the commissioning and operation of Kipsigis Highlands Tea Factory on parcel No. 7779/3 in Chemamul area, pending the hearing and determination of the Petition and further, that Court makes a site visit to Kipsigis Highlands Tea Factory on parcel No. 7779/3 in Chemamul area and its surroundings before the hearing and determination of the Petition.
3. Consequently, after they were served with the Petition, and the aforementioned Application, the 2nd Respondent filed a Notice of Preliminary Objection to the effect that the court was deprived of jurisdiction to entertain the Petition, that the Petitioners/Applicants had not exhausted the mechanisms, processes and remedies provided for under the Environmental Management and Coordination Act, No. 8 of 1999, that the Petitioners did not issue a Notice to institute proceedings against the 2nd Respondent as required by the law and that the Petition does not disclose any cause of action against the Respondents. The said Notice of Preliminary Objection was dismissed for lack of merit vide a ruling dated 12th July, 2019.
 4. The Court then visited the site where the factory had been constructed in the presence of experts in order to ascertain the situation on the ground after which the experts filed their reports.
 5. The Petitioner's Petition, was supported by the Affidavit dated 13th May, 2019 sworn by Philip Kiptanui Rugut.
 6. The 1st Respondent through its Replying Affidavit dated 7th June, 2019 stated that the core object and purpose for which the 1st Respondent was established was to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment hence the said 1st Respondent was tasked with issuing Environmental Impact Assessment licenses as provided for under the *Environmental Management and Co-ordination Act* (EMCA) in consultation with other lead government agencies.
 7. It was further stated by the 1st Respondent that on or about 3rd June, 2016, they had been furnished with an Environmental Impact Assessment Project Report by the 3rd Respondent for purposes of consideration for issuance of Environmental Impact Assessment License and that the said Environmental Impact Assessment was a critical examination of the effects of a project that identified both negative and positive impacts of any development activity or project, how it affects people, their property and the environment and also identified measures to mitigate the negative impacts while maximizing on the positive ones.
 8. That the 1st Respondent conducted a site visit and prepared a report detailing the review of the proposed Kipsigis Highlands Tea Factory on plot No. 7779/3-Kericho County on 16th June, 2016.
 9. The 1st Respondent further stated that upon interrogating the project report and conducting a site visit and in the spirit of collaboration with Lead agencies and undertaking due diligence, vide its letter dated 9th June, 2016 it wrote to the said lead agencies seeking their views on the proposed project.
 10. That vide a letter dated 4th July, 2016, the Water Resource Management Authority, the 5th Respondent herein, wrote to the 1st Respondent citing no objection to the project and recommended that the water permit should be obtained before withdrawal of water from Koruma river and consequently, the 1st Respondent wrote to the 3rd Respondent vide its letter dated 19th July, 2016 directing the said 3rd Respondent to provide a clear and legible architectural drawings for the proposed factory and designs of the proposed waste water treatment systems before it could proceed to further review its application.
 11. Consequently, the 3rd Respondent vide its letter dated 9th March, 2017 furnished the 1st Respondent with the said documents and which documents were received on 14th March, 2017.



12. That the Environmental Management (Environmental Impact Assessment and Audit Regulations 2003) provided that the project proponent shall publicize the project and seek the views of persons who may be affected by the project and that to the project report submitted to the 1st Respondent was annexed duly filled questionnaires and proof of meetings held by the proponent with the public hence on review of the said project report and in line with its mandate and adherence of all laws and regulations, the 1st Respondent prepared the Licensing conditions to be adhered to through the project cycle of the proposed project.
13. That the 1st Respondent issued the 3rd Respondent with an Environmental Impact Assessment License dated 28th March, 2017 for the construction of a modern and efficient tea processing factory involving reception, withering, cutting, tearing and chopping, fermentation, drying, sorting and grading, storage, a waste water treatment plant, associated facilities and amenities located on plot No. 7779/3 in Chemamul area, Kericho County.
14. It was stated by the 1st Respondent that it availed all records submitted to it to any person who desired to access such records since the person who so desired would on application to the 1st Respondent, be granted access to the said records on payment of a minimal fee to make copies of the said records.
15. It was reiterated by the 1st Respondent that it had complied with all the relevant laws, regulations and proper rules of procedure in issuing Environmental Impact Assessment license and that it was satisfied that the project complied with the legal requirements and had followed the procedure as provided for in the Regulations.
16. That the 1st Respondent, at all times, had remained conscious of the Statute and Regulations in place and had made every step necessary in ensuring that they adhered to the correct procedure outlined in the law hence the Petitioners' Application and Petition ought to be dismissed with costs to the 1st Respondent.
17. The 2nd Respondent through their Replying Affidavit dated 22nd October, 2019 stated that pursuant to the 3rd Applicant's application for change of user submitted on 3rd March, 2017 for approval, on 16th January, 2018 the 2nd Respondent approved the same for part of LR No. 7797/3 Chemamul Estate from Agricultural use to Industrial use stating that it had taken a long time to approve the same as they had to verify all the documents that had been submitted by the 3rd Respondent and also undertake their own due diligence.
18. That pursuant to the 3rd Respondent's application to the 2nd Respondent for approval of development on L.R No. 7797/3 Chemamul Estate the 2nd Respondent had approved the said proposed development pursuant to the Physical Planning Act No. 6 of 1996 because nobody, including the Petitioners herein had raised an objection against the proposed development as provided for in the Act. That on 2nd January, 2019, the 2nd Respondent issued the 4th Respondent with a single business permit upon an application being made by the said 4th Respondent.
19. Consequently, the 2nd Respondent stated that in issuing license and permits to the 3rd and 4th Respondents, it was not only discharging its Constitutional and statutory mandate but also acted in the best interest of the people in Bomet County and that the Petitioners had neither stated the particular provisions of *the Constitution* or Statute that the 2nd Respondent had breached nor how it had been breached.
20. That none of the Petitioners sought information from the 2nd Respondent with respect to the process of licensing and issuing of permits with regards to the proposed construction of the 4th Respondent by the 3rd Respondent hence the Petitioners had failed to demonstrate how the 2nd Respondent's act and/



or omission had infringed upon their fundamental rights and freedoms as enshrined in *the Constitution* and therefore, they had failed to meet the threshold for the reliefs sought.

21. The 3rd and 4th Respondents in their Replying Affidavit dated 7th June, 2019 vehemently opposed the Petition herein and stated that they followed the due process of the law in ensuring that the environment was at all times preserved and protected and indeed did obtain the relevant approvals and licenses before the construction of the project.
22. The 3rd and 4th Respondent further stated that the 3rd Respondent applied and was issued with a certificate of approved change of use of land and did present the approved building designs to the National Construction Authority (NCA) and was issued with a construction permit and the NCA Certificate of compliance together with a copy of Geoplan consultants Ltd planning report on the project.
23. That the 3rd Respondent conducted an environmental Impact Assessment both on the construction of the 4th Respondent and the water supply project from River Koruma which reports were presented to the 1st Respondent who after being satisfied with the report issued licenses for the projects.
24. The 3rd and 4th Respondent further stated that the said project had since been completed and the factory was up and running having been issued with certificates of practical completion, single business permit to engage on the activity of black tea processing and the commissioning certificate.
25. That the 3rd Respondent held several meetings where the project was openly discussed and approved by both the delegates and those in attendance including members of the Chepchabas Co-operative Society hence the 3rd and the 4th Respondents ensured that the residents of the surrounding vicinity would have a clean and healthy environment and that there was no concealment of any material facts prior to the issuance of the license as adequate measures to preserve and protect the environment were put in place and there were no effluent discharged to the rivers.
26. That the Petitioners were out on a fishing expedition with a hope that they would unearth anything unfavourable to assist them to further their allegations and that all the Petitioners had done was to restate the provisions of *the Constitution*, international treaties and the environmental laws, the rules and regulations made thereunder but they had lacked material particularity of their allegations.
27. They stated that there was no threatened and or actual infringement of any of the Petitioners' fundamental rights and freedoms as alleged in the instant Petition save that the Petitioners' intent was to be frivolous or vexatious with no really tangible cause.
28. That the Petitioners' Petition together with the Notice of Motion filled in the instant Petition was incompetent, bad in law, fundamentally defective, and that the same was filled without jurisdiction hence it ought to be dismissed and/or struck out or in the alternative and without prejudice to the foregoing, the 3rd Respondent stated that the Petitioners' had not met the threshold upon which the orders in the instant Petition were granted hence the Petition together with the Notice of Motion ought to be dismissed.
29. Vide an application dated the 2nd October, 2020, the 5th Respondent sought to have the Petition against it struck out for failure by the Petitioners to disclose reasonable cause of action against it.
30. Subsequently when the matter came up for mention on 3rd February, 2021 for purposes of taking a ruling date for the Notice of Motions dated 13th May, 2019 and 2nd October, 2020, the court was informed by the 2nd Respondent's advocate that he had received a Notice of withdrawal of the Petition against the 2nd Respondent. Consequently, the court ordered that the 2nd Respondent be discharged



from the proceedings pursuant to the Notice of Withdrawal dated 18th January, 2021 and filed on 3rd February 2021.

31. The court dealt simultaneously with the Notice of Motions dated 13th May, 2019 and 2nd October, 2020 whereby vide a ruling dated 4th March, 2021, in regard to the Notice of Motion dated 13th May 2019, the court found that the Petitioners had not established a prima facie case to warrant issuance of injunctive orders and that there was no violation of the right to information hence the said application was dismissed. The court also ordered the 5th Respondent be struck out from the Petition.
32. On 30th June, 2020, parties were directed to comply with pre-trial directions after which the matter was to proceed by way of viva voce evidence, however on 9th November, 2022 when the matter came up for hearing, by consent parties agreed that the Petition be disposed of by way of written submissions. Parties were directed to file and exchange their written submissions within 30 days.
33. Despite directions having been taken that the Petition be disposed of by way of written submissions, only the Petitioners, 3rd and 4th Respondents complied and filed their written submissions on the 23rd February, 2023 and 24th January, 2023 respectively, there were no written submissions from the 1st Respondents. I shall thus summarize the respective submissions received as herein under.

Petitioners' Submissions.

34. The Petitioners summed up the brief facts of the matter to the effect that they were citizens of the Republic of Kenya and had lived for more than 30 (thirty) years in the areas surrounding the Kipsigis Highlands tea factory, on the parcel of land registered as No. 7797/3 in Chemamul area thus they were well versed with its history.
35. That in the year 2016 or there about the 3rd Respondent started constructing the Kipsigis Highlands tea factory amidst resistance from members of the community due to its location and the impact it would have on the environment. That they together with the County Government of Bomet offices and elders from the said area had frequented the offices of the Respondents to raise this fear and concerns but had not been given a listening ear and no documents including an Environmental Impact Assessment Report had been supplied to them in support of the approval and construction of the factory.
36. That there had also not been any public participation done prior to the commencement of the construction of the Kipsigis Highlands Tea factory on the parcel of land No. 7797/3 in Chemamul area nor proof that the 3rd Respondent had followed the law prior to the construction.
37. That the 4th Respondent had been releasing its wastes into River Kaboisio yet people depended on the water of the said river for survival as evidenced by the expert report dated 22nd October 2019 annexed as PKR 1. No assurance had been given by the 3rd and 4th Respondents as to how they would ensure that the Petitioners' rights and those living in and around the said land to a clean and healthy environment would be protected.
38. That their right to access to public information was violated by the 1st and 2nd (sic) Respondents who had neglected and/or refused to furnish them with all the information requested inclusive the Environmental Impact Assessment Report and licenses issued, if any, in support of the construction of the tea factory. That if the same were issued, then they were in conflict with each other and did not serve their interest as a guide on the obligations of each party.
39. That the conduct of the Respondents grossly violated their rights under Articles 27, 28, 29(c) & (f), 40, 42, 69, 35, 70, 47, 48 and 159(2)(a) & (b) of *the Constitution* which violation was likely to continue unabated unless the court intervened.



40. The Petitioners framed their issues for determination as follows:
- i. Whether the Public Participation was conducted prior to the issuance of the Environmental Impact Assessment License.
 - ii. Whether the 1st Respondent should cancel the Environmental Impact Assessment License issued and conduct a fresh Environmental Impact Assessment.
 - iii. Whether the Petitioners' right to a clean and healthy environment had been violated.
 - iv. Whether the Petitioners' right of access to information was violated.
 - v. Whether an order of Judicial Review should issue to quash the decision of the 1st and 2nd Respondents made pursuant to the flawed Environmental Impact Assessment report.
 - vi. Whether the Petitioners are entitled to general damages for pain and suffering, humiliation and distress.
 - vii. Who should bear the costs of the Petition?
41. On the first issue for determination, the Petitioners submitted that no real public participation had been conducted by the Respondents before the issuance of the Environmental Impact Assessment License as no notice, minutes or correspondence of a public meeting had been attached to their response. That the 3rd and 4th Respondents had only attached a list of questionnaires which could have been filled anywhere and the minutes by the said 3rd and 4th Respondents only related to their own board meetings hence they were not minutes within the realm of public participation. That the local authorities who would have confirmed that the participants were from that locality had equally not been consulted therefore, the alleged public participation conducted had only been for cosmetic purposes and was not real.
42. The Petitioners placed reliance on Articles 10(2)(a) and 69(d) of *the Constitution*, Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003, Principle 10 of the Rio Declaration on Environment and Development (1992) and the decided cases of Ken Kasing'a vs. Daniel Kiplagat Kirui & 5 others [2015] eKLR and John Kabukuru Kibicho & another vs. County Government of Nakuru & 2 others [2016] eKLR before submitting that public participation was provided for as a Constitutional threshold and national value principle. That public participation for purposes of Environmental Impact Assessment ought to be real and actual and that the Respondents undertook public participation very casually and failed to consult stakeholders like the local administration, County Government, the Ministry of Agriculture and the Water Resource Authority.
43. The Petitioners further relied on the decided cases of Abdikhaim Mohamed Osman vs. Coast Development Authority; Yusuf Omar Abdi & 7 others (Interested Parties) [2020] eKLR and Communist Party of Kenya vs. Nairobi Metropolitan Services & 3 others; National Environment Management Authority (Interested party) [2021] eKLR in submitting that owing to the lack of notice, minutes and any correspondences of the meeting, and also the exclusion of local administrators, there was no public participation conducted.
44. On the second issue for determination, the Petitioners relied on the provisions of Section 67 of the Environment Management and Co-ordination Act and the decided case of Ken Kasing'a (supra) to submit that the Environmental Impact Assessment License issued should be cancelled and a fresh environmental impact assessment conducted, there having not been public participation undertaken and in violation of Petitioners' right to clean and healthy environment.



45. On the third issue for determination as to whether the Petitioners' right to a clean and healthy environment had been violated, the Petitioners' response was in the affirmative, stating that Articles 42, 69 and 70 of *the Constitution* guaranteed them a right to clean and healthy environment and an enforcement of environmental rights through making an application to court for redress. Reliance was placed on the expert report dated 22nd October 2019 to submit that the same had set out the key flaws in the environmental impact assessment report because the 4th Respondent had released effluent to Kaboisio River which is used by the Petitioners and that there was no waste water treatment plant proving that the Petitioners' right to clean and healthy environment had been violated.
46. The Petitioners further relied on the decided case of *Odando & another (Suing on their Own Behalf and as the Registered Officials of Ufanisi Centre) vs. National Environmental Management Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties) (Constitutional Petition 43 of 2019) [2021] KEELC 2235 (KLR) (15 July 2021) (Judgment)* and Section 3 of the Environment Management and Coordination Act to submit that the discharge of effluents and pollution of rivers amounted to a violation of the right to clean and healthy environment where the Environment and Lands Court was mandated to make orders it deemed appropriate to prevent, stop or discontinue any act deleterious to the environment.
47. On whether the Petitioners' right to access of information was violated, the Petitioners responded in the affirmative for the reason that their request for documents including the environmental impact assessment report was never considered. Reliance was placed on Article 35 of *the Constitution* and the decided case of *Philip Kiptanui Rugut & 2 others vs. National Environment Management Authority & 4 others [2021] eKLR* in urging the court to make a determination that their right to access of information had been violated.
48. On the fifth issue for determination as to whether a Judicial Review should issue to quash the decision of the 1st Respondent made pursuant to the flawed environmental Impact Assessment report, the Petitioners' submission was in the affirmative for reason that they had established that the Environmental Impact Assessment issued was flawed and irregular since there was no proper public participation done. That the same was done contrary to the provisions of Article 42 of *the Constitution*. Reliance was placed on the provisions of Article 23(3) (f) of *the Constitution* and the decided cases of *Pastoli vs. District Local Government Council & others [2008] 2 EA 300* where the court had cited with approval the case of *Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2*, *Bukoba Gymkhana Club [1963] EA 478 at 479*, and *Republic vs. Kenya National Commission on Human Rights ex-parte Uhuru Muigai Kenyatta [2010] eKLR*, to submit that the decision by the 1st Respondent to issue the said Environmental Impact Assessment Licence was illegal, irrational, improper and un-procedural hence the order of Judicial Review should issue.
49. On the issue as to whether the Petitioners were entitled to general damages for pain, suffering, humiliation and distress, the response was in the affirmative for the reason that they had confirmed that their right to clean and healthy environment and access to information had been violated. Reliance was placed on the provisions of Article 23 of *the Constitution* and *Ken Kasing'a's case supra* to submit that an order of compensation was one of the remedies provided for violation of a right and that an amount of Kshs. 200,000/= would be sufficient compensation.
50. On the last issue with regard to costs, the Petitioners opined that costs generally follow the event. That the court do exercise its judicial discretion as set out under Section 27(1) of the *Civil Procedure Act* to award costs to them since it had been the Respondents who had necessitated the current Petition and therefore, they should bear the costs.



3rd and 4th Respondents' submissions

51. In response to and in opposition to the Petitioners' Petition, the 3rd and 4th Respondents framed their issues for determination as follows:
- i. Whether the Petitioners' Petition was pleaded with reasonable precision as per the required standard in Constitutional Petitions.
 - ii. Whether the Petition as presented offends the principles of justiciability on account of want of ripeness.
 - iii. Whether public participation was carried out during the preparation of the environmental impact assessment report prior to the construction of Kipsigis Highlands Tea Factory.
 - iv. Whether the 3rd and 4th Respondents followed the due process of the law prior to the construction of Kipsigis Highlands Tea Factory.
 - v. Whether the Petitioners' Right to Clean and Healthy Environment is under Threat.
 - vi. Whether an order for Judicial Review to quash any decision of the 1st and 2nd Respondent can lie in the circumstances.
 - vii. Whether the Petitioners are entitled to the reliefs sought.
52. On the first issue for determination, the 3rd and 4th Respondents relied on the decided case of Anarita Karimi Njeru vs. Republic [1979] eKLR and Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR to submit that in Constitutional Petitions, the Petitioners were required to provide well elaborated particulars to their allegations and the manner of such alleged violations or infringement. That the Petitioners in their Petition had not provided any elaborate particulars as to the alleged violations and the manner of the violations and/or infringement. That all the Petitioners had provided the court with was a reproduction of the provisions of the Constitution and Environmental laws without demonstrating how their individual rights and those of the residents of Chemamul were violated, infringed or threatened by the 3rd and 4th Respondents.
53. That the law placed an obligation upon the Petitioners to demonstrate with some degree of precision the right, fundamental freedom or the part of the Constitution they had alleged to have been violated or threatened with violation, the manner or evidence of violation or threatened violation and the relief they sought for that violation or threat of violation.
54. That the Petitioners had not pleaded the manner in which the 4th Respondent posed a danger to environment neither had they adduced any evidence to support their allegations that their rights to clean and healthy environment had been violated and or threatened. That the court should hold that the Petition herein had not been pleaded with precision, that the alleged violation had not been proved since when the court visited the 4th Respondent it noted that there was no discharge to River Kaboisio as alleged by the Petitioners hence the Petitioners Petition did not meet the threshold and fell short of the substantive test,
55. To buttress the foregoing assertions, the 3rd and 4th Respondents placed reliance on a combination of the decided cases of Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others [2014] eKLR, and David Ndi & 4 others vs. Attorney General & 3 others; Kenya Human Rights Commission & 2 others (Intended AmicusCuriae) [2020] eKLR



56. On the second issue for determination as to whether the Petition as presented offended the principles of justiciability on account of ripeness, the 3rd and 4th Respondents submitted that a party lodging a dispute must present a live controversy which must be concretely presented and not being speculative of future contingencies. That courts were not supposed to arbitrate on hypothetical matters neither were courts supposed to decide on what the future held by either invoking the doctrine of ripeness or avoidance. Reliance was placed upon the decided cases of Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 others [2015] eKLR and James Rotich & 4 Others vs. David Kangongo & 5 Others [2017] eKLR.
57. Referring to paragraph “h” of the Petitioners’ Petition, it was the Respondents’ submission that it was clear that Petitioners’ fear was that Kipsigis Highlands Tea Factory, which was on the parcel of land registered as 7797/3 in Chemamul area will be releasing its waste into Koruma, Chepchabas/Kaboisio rivers, whose water was utilized by people for survival. That this assumption seemed to be a fishing expedition as the Petitioners were inviting the court to decide on a matter that was not ripe for determination. That the Petition as presented did not disclose any dispute for adjudication as it was speculative thereby offending the principles of justiciability hence the said Petition was premature. The 3rd and 4th Respondents invited the court to exercise its jurisdiction in holding that the court was not an academic forum and did not act in vain.
58. On the third issue for determination, the 3rd and 4th Respondents submitted that there was no one mechanism that could be conclusively applied to in all situations in conducting public participation, for it all depended on the circumstances of each case. That a party could use meetings, briefing of the members of the public, sensitization of the issue at hand and use of questionnaires, which method ought to be well documented and clear records kept. That the obligation to facilitate public involvement maybe fulfilled in different ways and was open to innovation. This was the case in the instant Petition. The 3rd and 4th Respondents relied on the decisions in the decided cases of Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) vs. Permanent Secretary Ministry of Energy & 14 Others [2014] eKLR, Legal Advice Centre & 2 Others vs. County Government of Mombasa & 4 others [2018] eKLR and John Muraya Mwangi & 501 Others vs. Minister for State for Provincial Administration & Internal Security & 4 others [2014] eKLR
59. The 3rd and 4th Respondents submitted that the 3rd Respondent had held several meetings with the local where the project of developing the 4th Respondent had been openly discussed and approved by the delegates and local members of Chemamul village and the project had been initiated.
60. That a consultative meeting was held on 18th May 2016 where the members of the community had been taken through the entire project and its impact. A copy of the names of those who attended the said has been annexed as annex 2 in the Environmental Impact Assessment (EIA) dated May 2016 annexure AJT3 (c). A bundle of questionnaires that had been used had also been attached to the EIA report wherein the views of the locals had been collected and considered. On page 49 of the said report showed pictorial evidence of a public consultation meeting that was held to sensitize the people on the project.
61. Page 15 of the EIA report marked as annexure AJT 3d also contained pictorial evidence of a consultation and public participation process conducted in Kipsigis Highlands Multipurpose Cooperative society hall in the local community where the project was to be initiated. Questionnaires had also been supplied and responses noted wherein views were incorporated into the planning process. That a majority of the locals had vouched for the project which they deemed would be a cure to the problem of unemployment in the area.



62. The EIA was done and a report of the same compiled by Mr. Reuben Kiprono Langat a lead expert registration number 1880 who at the time of undertaking the task had a valid practicing license No. NEMA/EIA/ERPL/2616, a copy thereto attached and annexed as AJT 3c.
63. That the 3rd Respondent had also sought views from the locals in terms of the water supply project from river Koruma where the bundle of questionnaires and views had also been attached to the Environment Impact Assessment project report as annexure AJT3 (d). Majority of them had supported the project.
64. That in yet another meeting of 19th December 2015, the project of constructing the 4th Respondent was discussed in a meeting attended to by delegates of various SACCOS and directors from Cooperative societies like Sinendet, Mau Tea, Fintea and even Chepchabas where the Petitioners herein are shareholders attended and approved the said factory to be built. The minutes of the said meeting were annexed as AJT 5a.
65. On 29th April 2016, another meeting had been held wherein delegates and members from various SACCOS were sensitized and brought to speed on matters among others pertaining the project of putting up the factory. The minutes of the said meeting are marked as annexure AJT 5b.
66. In further reliance on the authorities herein before alluded to, the 3rd and 4th Respondents submitted that the 3rd Respondent had employed a concoction of mechanisms including but not limited to meetings, briefing of the members of the public, questionnaires and sensitizing locals vide hall meetings which were conducted in Chemamul therefore these methods had met the threshold for public participation.
67. It was the 3rd and 4th Respondent's submissions that a reasonable opportunity had been offered to the members of the public, all interested parties and locals of Chemamul to know about the issue of the factory and to have an adequate say through consultative forums, community meetings and the distribution and filling of questionnaires hence the Public participation conducted by the Respondent was fully compliant with the practical principles. Adequate public participation had thus been conducted before the 3rd Respondent was allowed to operate. That it was not a must that all views tendered must be considered. That the mere fact that some particular views had not been incorporated in a report did not justify the court invalidating its outcome. That the burden of proving lack of public participation lay with the Petitioners who alleged the same and who had not put forth any evidence to substantiate their allegations. The 3rd and 4th Respondents thus submitted that the public participation conducted by the 3rd Respondent met the threshold and urged the court to hold as such. Reliance was placed on the decisions in Nairobi Metropolitan PSV Saccos Union Limited & 25 others vs. County of Nairobi Government & 3 others [2013] eKLR and Law Society of Kenya vs. Attorney General & 2 others [2019] eKLR.
68. On whether the 3rd and 4th Respondents followed the due process of the law prior to the construction of Kipsigis Highlands Tea Factory, the 3rd and 4th Respondents responded in the affirmative and stated that pursuant to the *Co-Operative Societies Act*, the 4th Respondent was registered and issued with a valid certificate of registration No. CS/125677 as well as a Kenya Revenue Authority PIN Number.
69. The 3rd and 4th Respondents reiterated that the 3rd Respondent conducted extensive public participation and collected views from the public and more especially from the locals of Chemamul village which was incorporated in Environmental Impact Assessment Report in line with the provisions of Section 58 of the *Environmental Management and Co-ordination Act*. That upon the 1st Respondent visiting the site and consulting with the lead agencies in which it had received no objection, the said 1st Respondent issued the 3rd Respondent with the Environmental Impact Assessment License dated 28th March, 2017 for the construction of the 4th Respondent. That the 3rd Respondent complied



- with all the relevant laws, regulations and proper rules of procedure in obtaining to the Environmental Impact Assessment License hence the prayer to cancel the said license cannot lie.
70. That the 3rd Respondent sought change of user of plot No. 7797/3 from agricultural to industrial use in order to put up the 4th Respondent. That pursuant to the Physical Planning Act Cap 286 and the Urban and Cities Act, the County Secretary of Bomet County Government had caused to be published, a public notice on the Standard Newspaper on Wednesday 8th February, 2017 inviting any person with an objection to raise the same within 14 days from the date of the publication of the said notice. That since there had been no objections, the application had been approved on the 16th January 2018 after a long period so that verification and due diligence could be conducted.
 71. That the 3rd Respondent had made an application to the County Government of Bomet for approval of development on L.R No. 7797/3 Chemamul Estate wherein the said proposed development had been approved pursuant to the Physical Planning Act No. 6 of 1996 as no person including the Petitioners herein had raised objections against the proposed development as provided for in the Act. That the 3rd Respondent presented the approved building designs to the National Construction Authority wherein it had been issued with the National Construction Authority Certificate of Compliance in accordance to the provisions of Section 31(1) and (2) of the National Construction Authority Act No. 41 of 2013 and Regulation 25 of the National Construction Authority Regulations 2014. That the construction was then completed and the 3rd Respondent was issued with certificate of practical completion from the Architectural Association of Kenya whereby CTC Tea Processing Machineries were installed.
 72. Still on compliance with the due process of the law, the 3rd and 4th Respondents submitted that the 4th Respondent applied for a single business permit which application was granted by the County Government of Bomet and a single business permit issued. That the 4th Respondent before embarking on any business then applied for tea manufacturing license from the Agriculture and Food Authority and pursuant to Section 20(6), (7) and (8) of the Crops Act, the Agriculture and Food Authority caused a Kenya Gazette Notice No 789 to be published on 27th January, 2017 inviting objections within 14 days of the publication of the said notice. That since no objection was lodged, the Agriculture and Food Authority Tea Directorate under Crops Act issued the 4th Respondent with a tea manufacturing license.
 73. The 3rd and 4th Respondents thus submitted that the 3rd Respondent followed due process of the law prior to the construction of the 4th Respondent and were issued with valid licenses, permits and approvals that allowed the implementation of the project.
 74. On the fifth issue for determination as to whether the Petitioners' rights to clean and healthy environment was under threat, the 3rd and 4th Respondents submitted that they had ensured that the residents of Chemamul village would have a clean and healthy environment and that adequate measures to preserve and protect the environment had been put in place hence there were no effluents discharged to the river as evidenced with the issuance of certificate of compliance to the 3rd Respondent by an International Organization for Standardization (ISO).
 75. That the court visited the 4th Respondent on 13th February, 2020 in the presence of experts among them Lucy Igoki Murira a constructed wetlands specialist and Solomon Kimeto, NEMA lead expert who filed their reports. That Lucy Igoki Murira in her report had explicitly stated that the 4th Respondent had 4 water collection channels which were connected and collected the foul water in huge manholes outside the rolling section of the 4th Respondent. That the foul water was finally discharged into the treatment system called the constructed wetlands. That the constructed wetlands was a biological wastewater treatment system that was inexpensive and ecologically friendly on wastewater



- management, that the water was drained back into the channel and particulates were collected by a licensed person hence the environment is kept clean. The 3rd and 4th Respondents thus submitted that there were no effluent discharges to the rivers as alleged by the Petitioners and that water pH of 5.5 from the Kaboisio river was as a result of volcanic soils.
76. On the other hand, Solomon Kimeto in his report noted that the production of the black tea by the 4th Respondent was a ‘dry’ process with no water used at any of the production process steps and that the wastewater that came out from the cleaning process was discharged into the septic tank and the onsite effluent treatment plant for primary treatment before being discharged to the environment. That during the site visit there were no spillages observed, the storm water channels had been constructed directing the water to the onsite poles and that the water in the tributary of Kaboisio was clean with no sign of contamination.
77. The 3rd and 4th Respondents in acknowledging the right to clean and healthy environment as guaranteed under Article 42 of *the Constitution* of Kenya 2010 submitted that there was need to utilize natural resources sustainably so that they spur economic development while controlling and managing the use of these environmental resources so that they do not generate unsustainable levels of pollution or waste or unjustified adverse effects on the health of humans. In support of this assertion, reliance was placed on the decided case of Mui Coal Basin Local Community & 15 others vs. Permanent Secretary Ministry of Energy & 17 others [2015] eKLR.
78. It was the 3rd and 4th Respondents’ further submissions that the 3rd Respondent had no effluent discharges to any river hence there had been no need of obtaining the Effluent Discharge Control Permit. That indeed the 4th Respondent had a surface floor constructed wetland which was about 250m from Kaboisio stream.
79. On whether an order for Judicial Review to quash the decision of the 1st and 2nd Respondent could lie in the circumstances, the 3rd and 4th Respondents submitted that the Petitioners had not moved the court with reasonable precision on which order they wanted quashed, but had just given a general term ‘any’ indicating that they did not even know which decision they wanted to be quashed which then violated the provisions of Order 53 Rule 7(1)(sic). That without an identified decision that could be challenged by way of judicial review proceedings, the court would be acting in vain to quash decisions which had not been identified with a reasonable degree of precision by the Petitioners. The 3rd and 4th Respondents relied on the holdings in the decided cases of Republic vs. Professor Mwangi S. Kaimenyi ex parte KIPPR, NBI Civil Appeal No. 160 of 2008 and Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others [2017] eKLR.
80. Referring to Order 53 Rule 2 of the Civil Procedure Rules and Section 9(3) of the *Law Reform Act*, the 3rd and 4th Respondents submitted that leave to apply for an order of certiorari cannot be granted unless the said application had been made not later than 6 months after the date of the proceedings or such shorter periods. Reliance was placed on the decided case of Raila Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC No. 899 of 1993; [1990-1994] EA 482 to submit that where Parliament had provided for a period within which judicial review proceedings may be commenced, the court could not by innovation go around such a legislative edict. The Petitioners had not attached the decisions to be quashed and bearing in mind that majority of the said decisions were given during the construction of the 4th Respondent that started around the year 2016 to the year 2017, the Petition herein having been filed in the year 2019, the application for judicial review was clearly outside the mandatory 6 months period hence the order of certiorari could not lie in the circumstances.
81. On the last issue as to whether the Petitioners were entitled to the reliefs sought, the 3rd and 4th Respondents while relying on the provisions of Section 107 of the *Evidence Act* submitted that the



Petitioners had not discharged their burden of proof as they had failed to produce substantial evidence in support of every claim within the Petition and that the entire case had merely been an academic exercise of restating environmental law provisions. That there were no grounds to grant the Petitioners the prayers as sought and thus the Petition should be dismissed for lack of merit with costs.

82. On 23rd February, 2023 the parties highlighted on their submissions wherein Counsel for the Petitioners submitted that the 1st Respondent had filed a Replying Affidavit dated 7th June 2019 whereas the 2nd and 3rd Respondents had filed their Replying Affidavit of an even date. That the Petitioners had filed an expert report dated 27th October 2019 from which facts they had framed six issues. On public participation, he urged the court to be guided by Article 10 of *the Constitution* and the authorities on Petition No. 3/2020 where there had been no public participation, no notice or minutes of the meeting attached.
83. On the second issue for determination, he urged the court to consider Nakuru Petition 50/2013, wherein it had been held that were there failure to conduct a proper public participation and a breach of the Petitioners' right to a clean environment, the court should cancel the license.
84. On the third issue for determination, the learned Counsel urged the court to consider the report dated 22nd October 2019 which captioned the defect in the Environmental Impact Assessment Report. He also urged the court to consider the decided case No. Nairobi 43/2019 on this issue.
85. On the fourth issue, he urged the court to consider the letter dated 25th April, 2019 marked as 'PKR 3', Article 35 of *the Constitution* and Ruling in Kericho Petition 3/2019.
86. On the fifth issue, the learned counsel urged the court to consider Article 23 of *the Constitution*. As to whether Petitioner was entitled to general damages, the learned Counsel urged the court to consider Article 23 of *the Constitution* and Nakuru Petition 50 of 2013 and urged the court to make a determination in favour of the Petitioners.
87. Counsel for the 3rd and the 4th Respondents submitted that they had highlighted 7 issues in their submissions and that a casual look of the Petition showed that the same was a reproduction of the Environmental Laws and Constitutional provisions and that they sighted several authorities to that effect. That the Petitioners Petition under the facts contained in paragraph 'h' was talking about a future thing and therefore, the Petitioners were out on a fishing expedition. That the Court had visited the site and there was a report to that fact to which the court should consider the observation from NEMA experts.
88. On the third issue on Public Participation, the learned counsel for the 3rd and 4th Respondent submitted that there were annexed questionnaires and meetings/minutes of the same as well as pictures and that it was not a must that all views expressed by members of the public should be taken into consideration. His submission was that there was enough public participation undertaken.
89. On the 4th issue for determination, he submitted in the affirmative and stated that all permits were included as having been issued to the 4th Respondent. On the fifth issues for determination, the learned counsel submitted that the Petitioners were talking in anticipatory, in the future and that the court visited the site and observed that there was no discharge in the rivers hence the rights of the Petitioners were not under any threat.
90. On the 6th issue for determination, he submitted that the orders sought by the Petitioners could not lie as a party had to state specifically the orders sought to be quashed in accordance with the provisions of Order 57 Rule 1 of the Civil Procedure Rules. On the seventh issue while relying on Section 107 of the *Evidence Act*, the learned counsel submitted that it was clear that the Petitioners did not discharge



their burden of proof and being that costs follow the events, the Petitioners should meet the costs of the Petition.

Determination.

91. I have considered both the contents of the Petitioner's Petition and the 3rd and 4th Respondents' responses thereto as well as the annexures, arguments in the submissions and the authorities herein cited.
92. I find the issues that stand out for determination are being:
- i. Whether the Petitioners' Petition was pleaded with reasonable precision as per the required standard in Constitutional Petitions.
 - ii. Whether the Public Participation had been conducted prior to the issuance of the Environmental Impact Assessment License.
 - iii. Whether the Petitioners' right to a clean and healthy environment had been violated.
 - iv. Whether the Petitioners' right of access to information was violated.
 - v. Whether an order of Judicial Review should issue to quash the decision of the 1st and 2nd Respondents made pursuant to the flawed Environmental Impact Assessment report.
 - vi. Whether the Petitioners should be awarded general damages for pain and suffering, humiliation and distress visited upon them.
93. On the first issue for determination, as to whether the Petitioners' Petition was pleaded with reasonable precision as per the required standard in Constitutional Petitions. It is trite that fundamental rights and freedoms are specifically set out in Chapter Four of *the Constitution* which rights and freedoms are individually identifiable and defined from Article 26 to 51 of *the Constitution*. It follows therefore, that a breach of any of the rights and freedoms must be specifically pleaded, particulars thereof set out and facts in respect thereof indicated in the Affidavit of a Petitioner.
94. In the decided cases of Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR and Stephen Njuguna & others –vs- Hon. Lewis Nguyai & Others, H.C Petition No. 118 of 2011 (UR) where it was held that:
- “The jurisdiction of the court under Article 22 and 23 of *the Constitution* is one for enforcement of fundamental rights and freedoms guaranteed under the Bill of Rights. Each right under *the Constitution* is specifically defined and has specific contents. It therefore follows that a party who invokes these provisions must set out clearly the sections or provisions he claims have been infringed or violated and show how these sections are infringed in relation to him. The principle has been established in a long line of cases dating from Anarita K. Njeru v Republic [1979] eKLR. I also agree with the Respondent that the petitioner's complaints are of a general nature and relate to dissatisfaction in the manner the ESP has been implemented. If this is the case, then, unless there are specific provisions of the Bill of Rights that have been infringed, I consider that the petition is lacking in merit.”
95. The wordings of Trevelyan J and Hancox J (as he then was) were clear, in the case of Anarita Karimi Njeru (supra), where they stated as follows:

“We would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to *the Constitution*, it is important (if only to ensure that



justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed”.

96. Whereas the Petitioners have alleged that their Constitutional rights envisaged under Articles 1, 2, 3, 19(2), 20(5), 21, 22, 23, 26, 27, 28, 29, 35, 40, 42 and 70 of *the Constitution* had been violated by the Respondents herein when they (Respondents) constructed the Kipsigis Highlands Tea Factory on the parcel of land registered as 7779/3 in Chemamul without following the due process of the law, I find that the relevant Articles in the circumstance and following the above captioned authorizes would be Articles 26, 27, 28, 29, 35, 40, 42 of *the Constitution*.
97. Article 26 of *the Constitution* speaks to the Right to life in that;
- (1) Every person has the right to life.
 - (2) The life of a person begins at conception.
 - (3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.
 - (4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.
98. On the other hand, Article 27 is in relation to Equality and freedom from discrimination to the effect that;
- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
 - (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
 - (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
 - (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
 - (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
 - (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
 - (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
 - (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender



99. Still moving on the provisions of Article 29 are self-explanatory in that they provide for the freedom and security of the person in that;

Every person has the right to freedom and security of the person, which includes the right not to be—

- (a) deprived of freedom arbitrarily or without just cause;
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner, whether physical or psychological;
- (e) subjected to corporal punishment; or
- (f) treated or punished in a cruel, inhuman or degrading manner.

100. A reading of the said provisions of *the Constitution* in comparison to the allegations made by the Petitioners and the submissions, it can easily be agreed with the stand taken by the Respondents that the Petitioners did not provide any elaborate particulars as to how the Respondents had violated these rights or the manner of the violations and/or infringement thereto but had only reproduced the provisions of *the Constitution* without demonstrating how their individual rights and those of the residents of Chemamul had been violated, infringed or threatened.

101. Article 35 of *the Constitution* in regard to Access to information provides that:

- (1) Every citizen has the right of access to—
 - (a) information held by the State; and
 - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
- (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
- (3) The State shall publish and publicise any important information affecting the nation.

102. In this regard, the Petitioners had contended that an their right to access to public information had been violated by the 1st Respondent who had neglected and/or refused to furnish them with all the information requested inclusive of the Environmental Impact Assessment Report and licenses issued, if any, in support of the construction of the tea factory. That if the same were issued, then they were in conflict with each other and did not serve their interest as a guide on the obligations of each party.

103. Vide a ruling dated 4th March, 2021, in regard to the Notice of Motion dated 13th May 2019, the court had found as follows:

By the above provisions of the law, *the Constitution* grants the citizens the right to access information held by the state or information held by some other person but is required for purposes of exercising or protecting a right and fundamental freedoms. However there must be a request for information before a party entitled to that information can allege violation. A citizen is therefore entitled to seek information under Article 35(1) and is under an obligation to request for it. Only when this information is denied after such a request



can a party approach the Court for relief. See *Kituo Cha Sheria & Another v Central Bank of Kenya & 8 Others* [2014] eKLR

In the case of *John Kamau Kenneth Mpapau –vs- City Council of Nairobi & 7 Others*(2014) eKLR the Court held as follows:-

“.....a reading of Article 35 shows that the right of access contains three key elements. Article 35(1)(entitles one) to information from the State or to information held by another person required for(the) exercise of Protection of a fundamental right and freedom. The Petitioners in moving the Court to enforce rights under Article 35(1) must set out what information was sought but not given.”

As it were, there was nothing placed before me to indicate that the Petitioners requested for information in respect to Kipsigis Highlands Tea Factory on the parcel of land registered as 7797/3 in Chemamul area which request had been denied by the 3rd Respondent. In the circumstance therefore, I find that there was no violation of the right to information.

104. The court still stands by its decision.

105. The Petitioners have also alleged violation of Article 40 of *the Constitution* which provides as follows:

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-
 - (a) of any description; and
 - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person-
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
 - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-
 - (i) requires prompt payment in full or just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a Court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.



- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired
106. Article 40(1) sets out the general right of every Kenyan to acquire and own property. There is no allegation in the pleadings that the Petitioners had been denied the right, either individually or in association with others to acquire or own property of any description in Kenya. Indeed the Petitioners have not adduced evidence that they were the registered proprietors of land registered as 7779/3 in Chemamul for which the impugned activities of the tea factory had denied them a right to acquisition of the said parcel of land.
107. Article 40(2) limits the authority of Parliament to pass certain types of legislation affecting property. First, legislation that deprives a person of property arbitrarily and second, legislation that restricts enjoyment of any right to property in a manner that is discriminatory in terms of Article 27(4) of *the Constitution*. The Petitioner did not complain of any such breach.
108. Article 40(3) and (4) deal with the deprivation of property by the state on terms specified, that is, for a public purpose or in the public interest and upon payment of compensation. There is no complaint in this matter to trigger the application based on Article 40(3) to entitle the Petitioners to compensation.
109. In the case of *R vs Chief Immigration Officer (1976) 3 AER 843* Lord Denning stated this regarding the Universal Declaration of Human Rights;
- “... Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognized in the Universal Declaration of Human Rights (1948). Article 17(1) which states that everyone has the right own property and Article 17(2) guarantees that "no one shall be deprived of his property" The contention of the State Counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the Court will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly...”
110. The thrust of Article 40 is to protect proprietary rights under the law which rights are governed by statutes, for example, the *Land Registration Act* and *Land Act* which statutes are clear that that once a title is issued under the Act, the holder thereof acquires an indefeasible title which cannot be taken away except in accordance with *the Constitution* and the law as was held in the case of *Wreck Motors Enterprises v The Commissioner of Lands and Others [1997] eKLR*.
111. In view of the above authority and the Petition and submissions thereto I find that there has been no evidence that discloses an arbitrarily deprivation of land registered as 7779/3 in Chemamul. It must be kept in mind that the Bill of Rights are sacrosanct and should be safeguarded to be invoked only when it is extremely necessary to do so.
112. The Petitioners have also cited infringement of the provisions of Articles 42 of *the Constitution* which provides as herein under;
- “Every person has the right to a clean and healthy environment, which includes the right—
- (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and



(b) to have obligations relating to the environment fulfilled under Article 70.”

113. The Petitioners lamentation on this limb of *the Constitution* was to the effect that in the year 2016 or there about the 3rd Respondent started constructing the Kipsigis Highlands tea factory (4th respondent) amidst resistance from members of the community due to its location and the impact it would have on the environment. That upon its completion and when the 4th Respondent started operation, it had been releasing its wastes into River Kaboisio yet people depended on the water of the said river for survival. No assurance had been given by the 3rd and 4th Respondents as to how they would ensure that the Petitioners’ rights and those living in and around the said land to a clean and healthy environment would be protected. They relied on the provisions of Section 3 of the Environment Management and Coordination Act to submit that the discharge of effluents and pollution of rivers amounted to a violation of their right to clean and healthy environment. They also had relied on report dated 22nd October 2019 herein annexed as PKR 1 to buttress their allegation.
114. The 1st Respondent’s position on the other hand was that they had been furnished with an Environmental Impact Assessment Project Report by the 3rd Respondent for purposes of consideration for issuance of Environmental Impact Assessment License. That the said Environmental Impact Assessment was a critical examination of the effects of a project that identified both negative and positive impacts of any development activity or project, how it affects people, their property and the environment and also identified measures to mitigate the negative impacts while maximizing on the positive ones.
115. The 3rd and 4th Respondents’ position was that they had ensured that the residents of Chemamul village would have a clean and healthy environment and that adequate measures to preserve and protect the environment had been put in place hence there were no effluents discharged to the river as evidenced with the issuance of certificate of compliance to the 3rd Respondent by an International Organization for Standardization (ISO) and therefore there had been no need of obtaining the Effluent Discharge Control Permit. That indeed the 4th Respondent had a surface floor constructed wetland which was about 250m from Kaboisio stream.
116. Article 70 of *the Constitution* on the Enforcement of environmental rights then provides that:
- “1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
- (2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—
- (a) to prevent, stop or discontinue any act or omission that is harmful to the environment;
- (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
- (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.
- (3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”



117. Section 3 of the *Environmental Management and Co-ordination Act*, 1999 in relation to entitlement to a clean and healthy environment further provides as follows:

- “(1) Every person in Kenya is entitled to a clean and healthy environment in accordance with *the Constitution* and relevant laws and has the duty to safeguard and enhance the environment.
- (2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.
- (2A) Every person shall cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.
- (3) If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to—
- (a) prevent, stop or discontinue any act or omission deleterious to the environment;
 - (b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
 - (c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;
 - (d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and
 - (e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.
- (4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the Respondent’s act or omission has caused or is likely to cause him any personal loss or injury provided that such action—
- (a) is not frivolous or vexatious; or
 - (b) is not an abuse of the court process.
- (5) In exercising the jurisdiction conferred upon it under subsection (3), the Environment and Land Court shall be guided by the following principles of sustainable development—



- (a) the principle of public participation in the development of policies, plans and processes for the management of the environment;
 - (b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;
 - (c) the principle of international co-operation in the management of environmental resources shared by two or more states;
 - (d) the principles of intergenerational and intragenerational equity;
 - (e) the polluter-pays principle; and
 - (f) the pre-cautionary principle.”
118. From the above captioned provisions of the law, every person in Kenya is entitled to a clean and healthy environment and further that the Petitioners did not need to show that they had personally suffered or that the discharge of the waste by the tea factory into the rivers directly caused them any harm. What was required was for the Petitioners to point out, that there was an ongoing, or imminent threat of harm, to the environment.
119. I have considered the sentiments of a report by the Paul K Maritim a NEMA registered lead expert No 2405 dated the 22nd October 2019 herein annexed as PKR 1 who after visiting the site and upon reviewing the Environmental Impact Assessment report, observed as follows in relation to environmental issues and potential impacts(potential negative impacts).

“That in reference to Regulation 18(2), that the report did not identify water pollution as a possible impact. That the report did not capture the possible in-situ pollution of the nearby source of Kaboisio River (approx. 200 meters) from the factory site as a potential impact. That the report identified Koroma River (700 meters away) but the natural geomorphology of the factory did not allow effluent from the factory to flow to it. That the spring was depended upon by the community as a source of water for domestic and livestock uses. There had been no mention of construction of a waste water treatment plant.

That the report had failed to review the Environmental Management and Coordination (Water Quality) Regulations, 2006 which specifies waste water treatment standards. That water pollution as an impact was not identified to enable mitigation.”

120. He further stated that:

“There is evidence of waste water being discharged to the source of Kaboisio river. There is no Effluent Discharge License from NEMA as for provided for under regulation 6(a) of the Environmental Management and Coordination (Water Quality) Regulations, 2006. Pollution of Kaboisio river was not identified as a potential impact.”

121. In conclusion he had found that

“The findings of the report are not in sync with the actual facts on the ground. First and foremost, the report talks about a project in Kericho County meaning that it might not be the correct one for the project or the expert probably did not visit the site. The report totally ignored the possibility of water pollution as an impact specifically on the source of Kaboisio



river hence the community's concerns on pollution of the river are valid. Apparently, the factory started operations without a licensed waste treatment plant place and without an Effluent Discharge License (EDL) from NEMA.

122. The report was accompanied by pictorial evidence of waste water as it left the factory, passed through the wetlands and emptied into a section of river Kaboisio.
123. On the 13th February 2020 the court, in the company of two experts visited the site wherein the court directed the experts to make their findings in their respective reports which were then filed in court.
124. The report by Lucy Murira, a constructed wetlands specialist was to the effect that the;

“factory had an effluent treatment system to treat its water. That foul water was collected in a manhole outside the rolling section of the factory. That no particulates were spilled onto the environment. That the factory had a functional biological waste water treatment system (constructed wetlands.) The embankment was 2 meters high to prevent any water from spilling into the environment on the final treatment point. That the system was surrounded by terraces to divert storm water from entering and the factory had envisaged the practise of 3Rs (reduce, reuse and recycle) in its waste management system therefore on waste water reaching final stage it would be used to irrigate the lawn. That the system was constructed away from any water body and met the legal requirement of 15 m away from the water bodies as per *Environmental Management and Co-ordination Act* (EMCA) 2006.”

125. The 2nd expert Paul K Maritim whose report was more elaborate however had a different opinion on the operation of the factory on whether or not it posed an environmental the rights to the society. Briefly part of his finding that captured my eye was that the;

“System was constructed away from any water body and met the legal requirement of 50m away from any water body as per EMCA 2006. That there were traces of waste water in the storm water drainage channels with the surfaces of the drains exhibiting the colour of the waste water hence confirming the claims which the community members had been making that the factory was discharging raw waste water into the environment which found its way to Kabotsio River. That even with the prior knowledge and preparation of the court visit including the thorough cleaning witnessed, the factory had been unable to conceal evidence of discharging waste water to the storm water channels which are drained directly to the river which clearly indicated the highest level of impunity that was happening behind the scenes. That the NEM Sampling points marked The A sampling points A, B, C was a ploy meant to hoodwink that NEMA has played a role which is not true since NEMA has not licensed the treatment facility in the first place. We were not shown the approved plan, EIA report for the facility, license from NEMA to construct the facility and EDL license allowing the facility to discharge treated effluent into the environment”

126. This indeed was very disturbing revelation and I find that that indeed the Petitioners and the community surrounding the Kipsigis Highlands tea factory in Chemamul area had been deprived of the right to a clean and healthy environment.
127. On the issue of whether or not there had been public participation prior to the construction of the factory, the Petitioners' argument had been that no real public participation had been conducted by the Respondents as the 3rd and 4th Respondents had only attached a list of questionnaires which could have been filled anywhere. That their minutes only related to their own board meetings hence they were not minutes within the realm of public participation. That the local authorities who would have



- confirmed that the participants were from that locality had equally not been consulted therefore, the alleged public participation conducted had only been for cosmetic purposes and was not real.
128. The Respondents have argued that indeed there had been public participation in that they had held several meetings where the project was openly discussed and approved by both the delegates and those in attendance including members of the Chepchas Co-operative Society hence the 3rd and the 4th Respondents ensured that the residents of the surrounding vicinity would have a clean and healthy environment and that there was no concealment of any material facts. That no one mechanism could be conclusively applied to in all situations in conducting public participation, for it all depended on the circumstances of each case.
129. I have considered the bundle of annexures marked as AJT 3 (a-d) herein annexed, I have noted that indeed there had been consultation and Public Participation had been conducted by administering questionnaire forms to members of the local community in the project area inside the 3rd Respondent's hall. There had been opinions of the leaders and the public institutions in the area, where consultative meetings had been held with members of the community to discuss the project implementation plans and to get their opinion on the project. That the public participation response to the questionnaires was over 90% wherein the results had been incorporated into the planning process to screen design options to minimize social and environmental impacts.
130. I also note that the stakeholders who had participated in consultative public participation process were positive towards the proposed 3rd Respondent's water project as it was noted that the said water project would improve access to potable water to the residents thus improving the health of the community in the target area as the residents would save on time that would otherwise be used to collect water. That the improved health and more time would have the net effect of enhancing economic productivity in the area and that the community pointed out that the construction activities would require casual or temporary laborers which would lead to job creation to the youth in the area.
131. Indeed I find that the 3rd Respondent had held several meetings with the local community where the project of developing the 4th Respondent had been openly discussed and approved by the delegates and local members of Chemamul village before the project had been initiated. The Petitioners' argument on this point fails.
132. As to whether an order of Judicial Review should issue to quash the decision of the 1st and 2nd Respondents made pursuant to the flawed Environmental Impact Assessment report, it had been the Petitioners' submission that the decision by the 1st Respondent to issue the said Environmental Impact Assessment Licence was illegal, irrational, improper and un-procedural hence the order of Judicial Review should issue.
133. The law under Order 53, rule 2. of the Civil Procedure Rules provide as follows:
- “Leave shall not be granted to apply for an order of Certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”
134. I find as submitted by the Respondents that the Petitioners have not attached the decisions to be quashed and bearing in mind that majority of the said decisions were given during the construction of the 4th Respondent that started around the year 2016 to the year 2017, the Petition herein having been



filed in the year 2019, the application for judicial review was clearly outside the mandatory 6 months period hence the order of certiorari cannot lie in the circumstances.

135. In the case in Republic -vs- Kenya National Highways Authority & 2 others ex-parte Amica Business Solutions Limited [2016] eKLR the Court of Appeal observed as follows:

“The decision complained of is unique in the sense that the decision of the 1st Respondent arose out of the request by the 3rd Respondent. At no time were there formal proceedings leading to the decision. The decision was in a letter responding to 3rd Respondent’s request for permission to erect and maintain billboards and gantries. The elephant in the room here is whether that communication qualifies as one of the acts contemplated under Section 9 (3) of the *Law Reform Act* and Order 53 Rule 2 of the Civil Procedure Rules.

There has been debate as to whether the six months limitation envisaged in order 53 Rule 2 of the Civil Procedure Rules applies strictly to “any judgment, order, decree, or conviction, or other proceedings’ or whether this also includes decisions of other kinds, or letters such as the one that is the subject of this case.

In our considered view, Order 53 Rule (2) was meant to cover both judicial and quasi-judicial proceedings, where there was a hearing; all affected parties were informed; or were aware of the proceedings and where there was a judgment or decision capable of being disseminated and accessed by all affected parties. This could not in our considered view have been meant to cover letters which were sent to specific persons in response to theirs which were not even copied to other ostensibly interested parties, like in the case here.”

136. In the instant case, I find that a decision to establish the factory did not qualify as one of the acts contemplated under Section 9 (3) of the *Law Reform Act* and Order 53 Rule 2 of the Civil Procedure Rules. Secondly this decision had been informed through the involvement of public participation as herein above established. This limb of prayer thus fails.

137. Lastly under Article 70 of *the Constitution*, it is trite that an Applicant seeking redress for breach or threat of breach of the right to a clean and healthy environment does not have to demonstrate that any person has incurred loss or suffered injury. The Petitioners have sought for award of general damages in the sum of Ksh. 200,000/= for pain and suffering, humiliation and distress visited upon them. The court having found that indeed their right to a clean and healthy environment had been violated, this prayer is herein allowed and the court commends them for presenting materials and documents regarding the subject matter of this petition.

138. I thus find partly in favour of the of the Petitioners but ordering the tea factory to be closed forthwith will not be helping matters but making matters worse, instead it is ordered as follows:

- i. A declaration is hereby made that the 4th Respondent violated the Petitioners’ right to a clean and healthy environment as envisaged under Article 42 of *the Constitution* of Kenya, 2010 in regard to the manner in which they have discharged their waste in the cause of operating the factory.
- ii. The 4th Respondent shall pay a total of Ksh. 200,000/= as general damages to the Petitioners for violation of their right to a clean and healthy environment.
- iii. The 4th Respondent shall with immediate effect, if it intends to continue operating the Tea factory obtain an operating license, including an Effluent Discharge License (EDL) from NEMA within 30 days from the delivery of this judgment.



- iv. NEMA shall within 45 days of this judgment file an elaborate, Environmental Impact Assessment report of the tea factory capturing the possible in-situ pollution of the nearby Rivers Kaboisio and Koroma, whether there is a licensed waste treatment plant in place, whether or not the 4th Respondent is discharging effluent, treated or otherwise into the environment and results of samples on the water quality taken from Kaboisio and Koroma Rivers.
- v. Depending on the report, this court reserves the discretion to issue any further orders that may be deemed necessary in order to properly safeguard the Petitioners' rights to a clean and healthy environment.
- vi. I therefore order that this judgment be served upon NEMA within 7 days, so that they can proceed to ensure compliance with the orders issued herein, and to report to this court as earlier directed.
- vii. This being a suit brought in public interest, each party shall bear their own costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 19TH DAY OF OCTOBER 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

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