REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

CONSTITUTIONAL PETITION NO. 3 OF 2019

PHILIP KIPTANUI RUGUT.....1st PETITIONER

PETER KIPKEMOI CHERUIYOT.....2nd PETITIONER

JOSEPH KIPSANG A. CHEROP.....3rd PETITIONER

VERSUS

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1st RESPONDENT

COUNTY GOVERNMENT OF BOMET.....2nd RESPONDENT

KIPSIGIS HIGHLANDS

MULTIPURPOSE SOCIETY.....3rd RESPONDENT

KIPSIGIS HIGHLANDS TEA FACTORY.....4th RESPONDENT

WATER RESOURCES

MANAGEMENT AUTHORITY.....5th RESPONDENT

RULING

1. Before me for determination are the Applications via a Notice of Motion dated the 13th May 2019 brought under the provisions of Articles 1, 2, 3, 19(2), 20(5) 21, 22, 23, 26, 27, 28, 29, 40, 35, 42, 70, and 71 of the Constitution of Kenya and all other enabling provisions of the law. The second Application is dated the 2nd October 2020 brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules respectively.

2. In reference to the first Application dated the 13th May 2019, the Applicant therein seeks for orders:

i. Spent

ii. That this Honourable court be pleased to make an order compelling the 2nd and 3rd Respondents herein to supply the Petitioners/Applicants 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 7797/3 in Chemamul area

iii. Spent

iv. That this Honorable court be pleased to issue a temporary injunction stopping the commissioning and operations of Kipsigis Highlands Tea Factory on parcel number 7797/3 in Chemamul area pending the hearing and determination of this Petition.

v. Spent

vi. Any other orders that this Honorable court may deem fit.

vii. The Petitioners be paid the costs of this Petition

3. The Application is supported by the grounds set on its face as well as on the sworn affidavit of Philip Kiptanui Rugut the 1st Applicant herein on behalf of the 2nd and 3rd Applicants, dated the 13th May 2019.

4. The Application was opposed by the 2nd Respondent through a Notice of Preliminary Objection dated 11th June 2019 which Preliminary objection was a subject of the ruling dated the 12th July, 2019 dismissing the same. On 22nd October 2019 the 2nd Respondent through its Replying affidavit deponed that the 2nd Respondent, pursuant to an application by the 3rd Respondent for approval of development on parcel No. 7797/3 in Chemamul Estate, issued the licenses and permits to the 3rd and 4th Respondents while acting in the best interest of the people of Bomet County and in the discharge of its Constitutional and Statutory mandate. That the Petitioners had failed to show or demonstrate by way of an expert report how the construction of Kipsigis Highlands Tea Factory and the presence of the 2nd Respondent on the parcel of land No. 7797/3 in Chemamul Estate had contributed to unclean and unhealthy environment.

5. The Application was also opposed by the 1st Respondent through their replying affidavit dated the 7th June 2019 in which they deponed that they had complied with all the relevant laws and regulations and proper rules of procedure in the issuing the EIA license. That the project had been publicized, questionnaires executed and a meeting with the public held on the 18th May 2016. That it was satisfied that the project had complied with the requirements as stated in law and had followed the procedure as provided for in the regulations. That it had remained conscious of the statutes and regulations in place wherein it had made every step necessary in ensuring that they adhered to the correct procedure outlined in the law. To this effect the 1st Respondent had sought that the Petitioners' application be dismissed with costs to them.

6. The 3rd and 4th Respondents through their Replying affidavit of 7th June 2019 deponed that they had obtained the relevant approvals and licenses before the construction of the project, namely the certificate of registration, the Kenya Gazette and tea manufacturing license. That in addition, the 3rd Respondent had applied for and was issued with the National Construction Authority (NCA) certificate of compliance wherein after they had 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, issued them with a license for the project. That the project has since been completed and the factory is up and running wherein they have since been issued with a certificate of practical completion and a single business permit to engage with the activity of black tea processing.

7. The second application is dated 2nd October 2020 in which the 5th Respondent herein seeks that Petitioners' Petition against them be struck out with costs for having not disclosed any reasonable cause of action against them and as it were, stood no chance of success. The said application was supported by the grounds on its face as well as the supporting affidavit sworn by Solomon Kipngetich, Counsel for the 5th Respondent herein, sworn on the 2nd October 2020.

8. The application was opposed by the Petitioners' in their grounds of opposition dated 18th October 2020 to the effect that the same was misconceived, incompetent, fatally defective, premature, and frivolous, a clear abuse of the court process and in contravention of the provisions of Sections 7 and 8 of the Water Act Cap 372 puting into consideration the orders as sought by the Petitioner in the Petition. That the 5th party's participation in the instant Petition would assist the court to reach a logical conclusion.

9. There was no response by the 1st, 2nd, 3rd and 4th Respondents.

10. During the pendency of the disposal of the above captioned Application, the Petitioners herein filed A Notice of Withdrawal of the Petition against the 2nd Respondent dated 18th January 2021 and filed on 3rd February 2021 wherein the 2nd Respondent was discharged from the proceedings.

Analysis and determination

11. I have considered all the material facts placed before me. The Petitioners bring this Petition on their behalf as well as on behalf of residents living in the surroundings of Kipsigis Highlands Tea Factory on the parcel of land registered as 7797/3 in Chemamul area.

12. Today, by dint of *Articles 22* and *258* of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest.

13. Pursuant to *Article 22 (3) of the Constitution,* the Chief Justice made rules vide Legal Notice No. 117 of the 28th June 2013 referred to as (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 whose overriding objective is to facilitate access to justice for all persons.

14. Where a legal wrong or injury is caused or threatened to a person or class of persons by reason of violation of any Constitutional or legal right, and such person or group of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution.

15. In so filing the application dated the 13th May 2019, the Petitioners seek for temporary injunctive orders stopping the commissioning and operations of Kipsigis Highlands Tea Factory on parcel number 7797/3 in Chemamul area pending the hearing and determination of this

Petition and for orders compelling the 2nd and 3rd Respondents herein 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 7797/3 in Chemamul area.

16. I have considered the Petitioners' application together with replying affidavits that have been filed by the Respondents in opposition thereto. Article 42 of the Constitution of Kenya guarantees every person a right to a clean and healthy environment. Article 70 (1) of the Constitution gives a person who alleges that a right to a clean and healthy environment recognized and protected under Article 42 of the Constitution has been or is likely to be denied, violated, infringed or threatened, a right to apply to Court for redress.

17. The Petitioners herein have contended that their right to clean and healthy environment has been violated and/or infringed by the Respondents.

18. I find the issues for determination by this court as follows:

i. Whether the Petitioner/Applicants have established a prima facie case to enable the court grant the interlocutory injunction sought.

ii. Whether the 2nd and 3rd Respondents herein should be compelled to supply the Petitioners with information pertaining the project.

19. On the first issue for determination, it is trite law that the principles to be considered by the court in determining whether or not to grant the interlocutory injunction sought are well settled in the **Giella vs Cassman Brown [1973] EA 358** where the court therein held that:

*The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicants must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicants might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (**E.A. Industries v. Trufoods, [1972] E.A. 420**)."*

20. Have the Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

"a prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

21. Looking at the facts of this case, the court has been moved under a certificate of urgency, by the Applicant, to issue temporary injunctive orders against the Respondents. At this stage, the Court is only required to determine whether the Applicant is deserving of the Orders sought. The Court is not required to determine the merit of the case.

22. The first issue that I need to consider for determination is whether the Petitioner/Applicants have established a prima facie case as is required in the **Giella vs. Cassman Brown** herein supra.

23. I have considered all the material facts placed before me. The Applicants herein submitted that they were residents living in the surroundings of Kipsigis Highlands Tea Factory which is on the parcel of land registered as 7797/3 in Chemamul area. That in the year 2016 or thereabout, the 3rd Respondent herein started constructing the Kipsigis Highlands Tea Factory amidst resistance from the neighboring community due to its location and the impact it would have on the environment.

24. That the Respondents had neglected and/or refused to engage the Petitioners through public participation and the issuance of an Environmental Impact Assessment before construction of the factory which they feared was a big threat to the people living in that area as the factory would be releasing its waste into Rivers Koruma and Chepchabas/Kobosio which rivers the Petitioners and other people living in the surrounding area depended on for their livelihood.

25. The Respondents' response on the other hand was that the Applicants' application was based on allegations that had not been substantiated by expert evidence, reports and research. That indeed the project was undertaken by the Respondents after they had obtained all the necessary and relevant licenses from the relevant government bodies which licenses also included the well-researched environmental impact reports. That the project has since been completed and the factory is up and running wherein they have since been issued with a certificate of practical completion and a single business permit to engage with the activity of black tea processing.

26. Section 3 of the Environmental Management and Co-ordination Act, (EMCA), Cap 387 Laws of Kenya stipulates as follows;

(1) *Every person in Kenya is entitled to a clean and healthy environment 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.

(3) If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply

to the High Court for redress and the High 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 defendant'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 High 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.

27. While Section 58 of the EMCA states that

(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

(2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.

(3) The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee

(4) The Minister may, on the advice of the Authority given after consultation with the relevant lead agencies, amend the Second Schedule to this Act by notice in the Gazette.

(5) Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorised in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee.

(6) The Director-General may, in consultation with the Standards Enforcement and Review Committee, approve any application by an expert wishing to be authorised to undertake environmental impact assessment. Such application shall be made in the prescribed manner and accompanied by any fees that may be required.

(7) Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.

(8) The Director-General shall respond to the applications for environmental impact assessment license within three months.

(9)Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking.

28. Section 59 of EMCA states as follows;

(*1) Upon receipt of an environmental impact assessment study report from any proponent under section 58(2), the Authority shall cause to be published for two successive weeks in the Gazette and in a newspaper circulating in the area or proposed area of the project a notice which shall state—*

(a) a summary description of the project;

(b) the place where the project is to be carried out;

(c) the place where the environmental impact assessment study, evaluation or review report may be inspected; and

(d) a time limit of not exceeding sixty days for the submission of oral or written comments environmental impact assessment study, evaluation or review report.

(2) The Authority may, on application by any person extend the period stipulated in sub-paragraph (d) so as to afford reasonable opportunity for such person to submit oral or written comments on the environmental impact assessment report.

29. And section 60 of the EMCA stipulates as follows;

A lead agency shall, upon the written request of the Director-General, submit written comments on an environmental impact assessment study, evaluation and review report within thirty days from the date of the written request.

30. In the case of **Nguruman Ltd vs Jan Bonde Nielsen & Others C.A civil Appeal No. 77 of 2012,** the Court of Appeal while addressing the issue of a prima facie case stated thus:

"*The Applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance of, or as otherwise put, on a preponderance of probabilities. This means no more than the Court takes the view that on the face of it, the Applicant's case is more likely than not to ultimately succeed"*.

The Court then went to state as follows*:*

"*We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. <u>All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation</u>"*.

31. A close look at the Respondent's annexures and in consideration of their responses , and further, in pursuant of the fact that at this juncture the court is not obliged to examine the merits of the case closely but to consider whether the material presented is enough to conclude that there exists a right which has been apparently infringed by the Respondents, I find that there is sufficient evidence herein produced to show that the project herein had been cleared by the relevant authority, including National Environment Management Authority (NEMA), there was an Environment Impact Assessment done. Further there was also public participation on the 18th May 2016. Having found as above, I find that the Applicants have not established a prima facie case.

32. In the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** where the court observed as follows:-

"*The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied"*.

33. On the second issue wherein the Applicants sought orders compelling the 2nd and 3rd Respondents herein 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 7797/3 in Chemamul area, I note that since the proceedings against the 2nd Respondent have been withdrawn the orders ought to be directed only to the 3rd Respondents herein.

34. I have considered the Applicant's allegation at paragraph 13 of their supporting Affidavit on the issue of violation of their right of access to information.

35. Article 35 of the Constitution provides as follows:

"(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."

36. 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 that 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**

37. 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."

38. 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.

39. Having found as above stated, I consequently dismiss the application dated 13th May 2019. The costs to await the outcome of the Petition.

40. I now turn to the 5th Respondent's Application dated the 2nd October 2020 in which the it seeks that Petitioners' Petition against them to be struck out with costs for non-disclosure of any reasonable cause of action against them.

41. In their submissions, the 5th Respondent's contention was that the Petitioners' in their Petition were seeking declaratory orders, judicial review orders and damages against the 1st, 2nd, 3rd and 4th Respondents.

42. That their application was premised on the provisions of Order 2 Rule 15 of the Civil Procedure Rules and Rule 5(d) *of the Constitution* (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013.

43. That for party to be enjoined in a suit, its presence must be necessary for the factual and complete settlement of all questions of the suit. That the relevant tests for determination of whether or not to join a party to proceedings was stated in the case of **Laisa Mpoye & 2 Others v Kajiado Central Milk Project "The Board" & 5 Others [2012] eKLR** in which case the Petitioners herein had not met the above tests. That there was no relief flowing from the 5th Respondent/Applicant in the Petition and therefore the final Decree could be enforced without its presence in the matter.

44. The said application was opposed to by the Petitioners' in their grounds of opposition dated the 18th October 2020 to the effect that the same was misplaced by dint of the provisions of Rule 5 *of the Constitution* (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013. That the said application was misconceived, incompetent, fatally defective, premature, and frivolous and a clear abuse of the court process having been brought under the wrong provision of the law.

45. That the application was also contrary to the provisions of Sections 7 and 8 of the Water Act putting into consideration the orders sought by the Petitioners in their Petition. That the participation of the 5th Respondent was vital considering all the relevant issues in question and noting that they had at all times been aware of the instant Petition.

46. The Petitioners further deponed that the 5th Respondent's participation would assist the court to reach a logical conclusion. That the said application was therefore incompetent and frivolous and intended to propagate a mischief and delay the final conclusion of the matter.

Determination.

47. I have considered the arguments both for and against the 5th Respondent/Applicants' application dated the 2nd October 2020 in light of the Petitioner's Petition wherein they had sought for the following reliefs:

a) A Declaration that the constitutional right of access to information as enshrined under Article 35 of the Constitution was violated by the 1st and 2nd Respondents.

b) 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 the Kipsigis Highlands Tea Factory on the parcel of land registered as 7779/3 in Chemamul without following the due process of the law.

c) 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 construction of Kipsigis Highlands tea factory.

d) That this Honourable court be pleased to cancel the Environmental Impact Assessment license issued by the National Environment Management Authority and the licences 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.

e) A Declaration that the 1st and 2nd Respondent did not follow the right procedure when issuing approvals for 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.

f) A Declaration that there was no public participation carried out prior 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.

g) An Order directing that the 3rd Respondents 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 in before the illegal factory was put up and an environmental restoration order be issued.

h) An order for Judicial Review to quash any decision of the 1st and 2nd Respondents made pursuant to 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.

i) An award of general damages for pain and suffering, humiliation and distress visited upon the Petitioners.

j) Costs of this Petition.

k) Any other or further relief that this Honourable Court considers appropriate and just to grant

48. I have also considered the provisions of Order 2 Rule 15 of the Civil Procedure Rules under which the Application is brought and I tend to agree with the Petitioners that the said provisions is erroneous the correct provision being Order 1 rule 10 (2) of the Civil Procedure Rules which provide as follows;

(2) 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 to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

49. Rule 5(d) *of the Constitution* (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 which provide as follows;

(d) 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.

50. The Petitioners 'Notice of Motion dated 13th May 2019 under Certificate of urgency sought the following orders:

a) Spent

b) That this Honourable court be pleased to make an order compelling the 2nd and 3rd Respondents herein to supply the Petitioners/Applicants 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 7797/3 in Chemamul area

c) Spent

d) That this honourable court be pleased to issue a temporary injunction stopping the commissioning and operations of Kipsigis Highlands Tea Factory on parcel number 7797/3 in Chemamul area pending the hearing and determination of this Petition.

e) spent.

f) Any other orders that this Honourable court may deem fit.

g) The Petitioners be paid the costs of this Petition

51. I have considered the foregoing. The principles guiding the court's exercise of discretion are well known. Under Order 1 rule 10(2) of the Civil Procedure Rules, It is clear from the said provisions that for the Court to join a party to the proceedings, his presence must be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions in the suit.

52. In **Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd [1999] 1 EA 55** it was held as follows:

> ***"A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter…For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person."***

53. In this case the Petitioners' Petition is that the 1st, 3rd, and 4th Respondents have infringed on the Constitutional rights *to a clean and healthy environment for the people living around Kipsigis Highlands Tea Factory in Chemamul by not following the due process of the law prior to construction of Kipsigis Highlands tea factory. That further, the* 3rd Respondent denied them to information pertaining the construction of project of Kipsigis Highlands Tea Factory in Chemamul area

54. From the Petition herein it is clear that the Petitioners are seeking redress from the 1st, 3rd and 4th Respondents. It is clear therefor that the 5th Respondent's presence in the Petition **is not necessary to enable the court effectually, completely adjudicate upon and settle all questions involved therein.**

55. To this effect, I find in favour of the 5th Respondent/Applicant in their application dated the 2nd October 2020 and order that their name, which was improperly joined to the Petition, be and is hereby struck out from the Petition.

56. Costs of the Application dated 2nd October 2020 is granted to the 5th Respondent.

Orders accordingly.

Dated and delivered at Kericho this 4th day of March 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE