

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga, CJ & P; Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

APPLICATION NO. 12 OF 2019

– BETWEEN –

STEPHEN MAINA GITHIGA.....1ST APPLICANT
ESTON GAKUNGU GIKOREH.....2ND APPLICANT
PETER KINYUA.....3RD APPLICANT
FRANCIS MACHARIA MARK.....4TH APPLICANT
LERIONKA TIAMPATI.....5TH APPLICANT
JOHN F. KENNEDY OMANGA.....6TH APPLICANT

– AND –

KIRU TEA FACTORY COMPANY LTD.....RESPONDENT

*Being an application to strike out, the initial substantive **Application No.12**
of 2019.*

RULING OF THE COURT

A. BACKGROUND

[1] Because of the nature of the present application, it is important to set out, *in extenso*, the gist of the dispute now before us and thereafter determine each outstanding matter sequentially.

[2] The initial application was filed as a ***Notice of Motion dated 3rd April, 2019 and filed on even date.*** It sought the stay of contempt

proceedings against the Applicants then before the Court of Appeal. They, at the time were required to appear before the Appellate Court for mitigation and sentence.

[3] Subsequently, Kiru Tea Factory, the Respondent, filed ***a Notice of Motion dated 3rd May 2019*** seeking to strike out the above application.

[4] Meanwhile, when the said initial and substantive application was mentioned before the Deputy Registrar on ***6th May 2019***, an issue arose as regards the legal representation of the Respondent, Kiru Tea Factory. This was fuelled by the fact that on 4th April, 2019, the firm of M/s. Triple OK Law had filed a Notice of Appointment of Advocates as the duly appointed advocates for the Respondent by a resolution made by the Respondent on 1st April, 2019. The firm of M/s. Kithinji Marete & Co. Advocates had at all material times been appearing for the Respondent, hence the dispute on representation. Parties were directed to file submissions on that issue for the Court's determination.

[5] During the pendency of the above two applications, the Applicants (alleged contemnors) filed a ***Notice of Motion dated 2nd July 2019*** in which they sought *leave to amend their substantive application dated 3rd April, 2019* and stay of further proceedings in the Court of Appeal. By this time, the Court of Appeal had already found the Applicants guilty of contempt of Court and sentenced them to a fine of Kshs. 400, 000/- each, in default thereof, seven (7) months imprisonment. Consequently, the initial application had substantively been overtaken by events, hence the need to amend it. Secondly, there was a further contempt of Court application filed at the Court of Appeal which the Applicants were seeking to stay. For the record, the second contempt application at the Court of Appeal is dated 30th May 2019 and was filed on 31st May 2019.

[6] The second contempt application, for avoidance of doubt, seeks the following orders:

- a) *THAT the Court (COA) cite and hold ALL the Respondents jointly and severally in Contempt of its Orders issued on 20th December 2017 as read with those made on 22nd February, 2019.*
- b) *THAT a DISQUALIFICATION ORDER be and is hereby issued against LERIONKA TIAMPATI, JOHN F. KENNEDY OMANGA, STEPHEN MAINA GITHIGA, ESTON GAKUNGU GIKORREH, PETER KINYUA and FRANCIS MACHARIA MARK from holding the position of Director/Officer in Public Company for a maximum of 15 years from conviction on 22nd February, 2019.*
- c) *A DECLARATION that the actions carried out by the unlawful Board of Directors comprising of STEPHEN MAINA GITHIGA, ESTON GAKUNGU GIKORECH, PETER KINYUA, FRANCIS MACHARIA MARK, MICHAEL MUCHAI KAMOTHU, JOHN WAWERU WANDURUA, YVONNE NJOKI NDIRANGU and FRANCIS CHEGE KIMARA including:*
 - a) *The withdrawal of the Appellant/Applicant's Notice of Appeal dated 16th November, 2017;*
 - b) *The illegal and unlawful payments and benefits from the Appellant/Applicant to the 24th to 31st Respondents;*
 - c) *The amendment and extension of the Management Agreement dated 1st July, 2009 between the Appellant/Applicant and the 1st & 2nd Respondents; and*
 - d) *The invalid and illegal Board Resolutions signed and executed by the 24th to 31st Respondents are null and void.*
- d) *That upon citing and holding the Respondents in contempt [the] Court impose a monetary fine and in addition, a custodial*

sentence. And a DISQUALIFICATION ORDER be issued against all Contemnors from holding the position of Director/Officer in a Public Company for a maximum of 15 years.

- e) Order directed to the Officer-In-Charge, Kiria-ini Police Station, Mathioya Sub-County to provide security to the lawful Board of the Appellant/Applicant to hold its meeting within Kiru Tea Factory premises.*

[7] All the above matters were placed before this Court and **in a ruling delivered on 29th November 2019** the Court found that “... at this stage, only two applications fall due for disposal”. These were the application/issue of representation of the Respondent Company; and the application seeking leave to amend the original application.

[8] In that ruling, this Court settled the question of representation ordering thus: “*The firm of M/s. Kithinji Marete & Company Advocates is allowed to be on record for the Respondent, and not the firm of M/s. Triple OK Law*”. It also partially allowed the application for amendment, **granting the Applicants leave to amend their application** and the Respondent given leave to file a response to the amended application.

[9] With leave, the Applicants proceeded to file **their amended Notice of Motion dated 2nd December 2019** on 3rd December 2019.

[10] While the Respondent had been granted leave to file a response on the amended Notice of Motion, it nevertheless proceeded and **filed a separate Notice of Motion dated 20th December 2019** in which it seeks to expunge some portions of the amended application. The Applicants filed a response to that application vide their Replying Affidavit dated 27th February 2020 and filed 4th March 2020.

[11] In conclusion therefore, in **Supreme Court Application No.12 of 2019**, there are **3 live matters**:

- i) The substantive application which is now the **amended application dated 2nd December 2019** seeking stay of the **further contempt proceedings** at the Court of Appeal.
- ii) The **Notice of Motion dated 20th December 2019** seeking to expunge portions of the amended application.
- iii) The Notice of Motion **dated 3rd May 2019** that seeks to strike out the initial substantive Application No.12 of 2019 for want of jurisdiction.

Related to (iii) above is a Preliminary Objection dated 13th August 2019 filed by Kiru Tea Factory to strike out the Petition of appeal for want of jurisdiction.

[12] With the above background in mind, we propose, in this ruling, to deal with the Application dated 20th December 2019 by the Respondent to strike out the application dated 3rd May 2019 as later amended and in a separate ruling, we shall deal with the application dated 2nd December 2019 for stay of the pending contempt proceedings at the Court of Appeal as well as the application dated 20th December 2019 by the Respondent seeking expunging of parts of the application for stay orders aforesaid.

B. SUBMISSIONS OF PARTIES ON THE APPLICATION TO STRIKE OUT

- i) *The Respondent's/Applicant's Submissions*

[13] In submissions filed on 24th December 2019, the Respondent's case is straightforward and it is thus; that the allegations of breach of constitutional provisions in the Petition of Appeal is not enough to bring the whole matter within the purview of Article 163(4)(a) of the Constitution and the Petitioners ought to particularise and demonstrate the particular portions of the Court of Appeal Ruling that show the manner of the alleged violation of the Constitution. In arguing so, they rely on the decision of this Court in **Lawrence Nduttu &**

6000 others v. Kenya Breweries Ltd & another, Supreme Court Petition No.3 of 2012; [2012] eKLR.

[14] In addition, they submit that mere allegation that Articles 27(1), 50(1) and 159(2)(6) have been violated would not bring their Petition within the purview of Article 163(4)(a) and on that point, they rely on **Nasra Ibrahim Ibrin v IEBC & 2 others** SC Petition No. 19 of 2018; [2018] KLR as well as **Annarita Karimi Njeru v. Republic** [1976 – 1980] KLR 1272 as reaffirmed in **Mumo Matemu v. Trusted Society for Human Rights Alliance & 5 Others** Civil Application No. 29 of 2014; [2014] eKLR.

[15] On whether the Petition of Appeal raises a jurisprudential moment, it is the Respondent's submission that, following our decision in **Peter Odiwuor Ngoge v. Francis Ole Kaparo & 5 others** [2010] eKLR, no such moment is apparent and so the Petition is irredeemable and ought to be struck out with costs. And having done so, the initial Motion **dated 3rd May 2019** as later amended ought also to be struck out for the same reasons.

[16] All the above issues are replicated in the Preliminary Objection dated 13th August 2019.

ii) *The Petitioners'/Respondents' Submissions*

[17] In response, the Petitioners/ Respondents have submitted, firstly, that, applying the admissibility test in Article 163(4)(a) as settled in **Lemanken Aramat v. Harun Meitamei Lempaka & 2 others** Petition No. 5 of 2014; [2014] eKLR, the legal threshold has been met because the issues raised are based on a trajectory of constitutional interpretation and application. Furthermore, because there are serious allegations of grave injustice having been committed by the Court of Appeal, this Court has the jurisdiction to interrogate those allegations being also the custodian of constitutional integrity. They cite **Deynes Muriithi & 4 others v. Law Society of Kenya & another** Civil Application No. 12 of 2015; [2016] eKLR in support of that submission.

[18] Secondly, the Petitioners allege that their rights to fair hearing and access to justice under Articles 50 and 48 of the Constitution have been infringed and this Court ought to interrogate that allegation.

[19] Lastly, the Petitioners submit that their Petition is live as it is premised on real issues that can only be settled by this Court.

C. ANALYSIS AND DETERMINATION

[20] We must from the onset state that the Petitioner's appeal is a unique one. We say so because it is premised on both a concluded contempt application and ruling before the Court of Appeal as well as another pending and yet to be determined contempt application.

[21] In effect while there is no judgment on the substantive appeal before the Court of Appeal, one contempt application has been determined, conviction meted out, sentence imposed and the Petitioners are in the place of convicted contemnors. They are awaiting their fate in another contempt application.

[22] In that context, does the Petition of appeal raise constitutional issues requiring our attention under Article 163(4)(a) of the Constitution? Our jurisdiction under the said Article has been explained and settled in **Lawrence Nduttu**, as well **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others** SC Petition No. 2 "B" of 2014; [2014] eKLR among other authorities on the subject.

[23] We have often stated in that regard that a party invoking Article 163(4) must demonstrate that the issues raised on appeal must have been canvassed in the Superior Courts below, progressing through the normal appellate mechanism so as to reach this Court by way of an appeal. Alternatively, or in addition, the question of constitutional interpretation or application must have taken a constitutional trajectory in the Superior Courts' reasoning in their determination of a contested issue or question.

[24] In the present instance, we have stated that the issues before us arise from contempt applications and a ruling of the Court of Appeal in that regard. This is a unique appeal as we have stated because by the conviction and sentence, the matter started and ended at the Court of Appeal. One of the questions we must therefore address at the hearing of the appeal is whether there is a right of appeal to this Court, upon conviction for contempt at the Court of Appeal. The question whether the Petitioners were granted access to justice under Article 48 of the Constitution and whether they were granted a fair hearing under Article 50 of the Constitution are issues that we must interrogate at the same time.

[25] The Petitioners have also raised other specific issues which fall within the purview of their submission that their appeal arises from issues that have taken a constitutional trajectory. These issues would in the larger context require interrogation. They are;

- i) *Whether a Court presiding over contempt proceedings has a right to ignore deliberately the responses/defences placed before it by the cited contemnors.*
- ii) *Whether a Court hearing a contempt application can revive the original un-amended contempt of court application in chambers, prosecute and convict on the same upon striking out the amended contempt application.*
- iii) *Whether a Court in presiding over proceedings which have been heard fully on an amended pleading can upon striking out the amended pleading proceed suo moto to determine the original pleading without invitation and participation of either parties in the proceedings.*
- iv) *Whether a Court hearing a contempt of Court application can convict the alleged contemnors without affording them a hearing*
- v) *Whether a Court hearing a contempt of Court application can overlook a miscarriage of justice to convict for contempt.*

[26] In our view, all the above issues raise concern as to the right to a fair hearing if they are found to be true. Therefore, the Appeal before us requires that we must find in favour of the Petitioners and proceed to hear parties on merit and settle the issues we have raised above. The Motion before us is one for dismissal in that event. Similarly, the Preliminary Objection dated 13th August 2019 on jurisdiction must be overruled.

[27] On costs, we shall exercise discretion and order that each party should bear its costs of the present application and the Preliminary Objection.

D. DISPOSITION AND ORDERS

- i) The Notice of Motion dated 3rd May 2019 is hereby dismissed.***
- ii) The Applicant/Respondent's Preliminary Objection dated 13th August 2019 is hereby overruled.***
- iii) Each Party shall bear its costs.***

DATED and DELIVERED at NAIROBI this 4th day of September, 2020.

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D. K. MARAGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA

