

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, expunge and wholly obliterate from the record of the Supreme Court all the derogatory and odious pleadings, averments and submissions as drawn and filed by the Appellants' Advocates

AND

An application for stay of contempt proceedings against the Applicants pending before the Court of Appeal

RULING OF THE COURT

A. INTRODUCTION

[1] Before us are two applications; the first, filed by the Petitioners/Applicants, is dated 2nd December 2019. The specific prayers sought are that;

- i) *This Honourable Court grants stay of further proceedings in **Nyeri Court of Appeal Civil Application No.137 of 2017 (sitting at Nairobi) Kiru Tea Factory Company Limited v. Stephen Maina Gitonga & 13 Others** pending the hearing and final determination of the Applicants' appeal filed before this Court.*
- ii) *This Honourable Court grants stay of further proceedings, the hearing and prosecution of the Application dated **30th of May 2019 and as filed on the 31st May 2019 in Nyeri Court of Appeal Civil Application No.132 of 2017, Kiru Tea Factory Company Limited v. Stephen Maina Githiga & 32 Others** pending the inter-parties hearing and final determination of **Supreme Court Petition No.12 of 2019, Stephen Maina Githiga & Others v. Kiru Tea Factory Company Limited.***

[2] The second is dated 20th December 2019 and is filed by the Respondent. The prayers in it are as follows:

- i) The following excerpts and or averments be and are hereby struck out, expunged and wholly obliterated from the record of the Supreme Court:
 - (a) Ground (a) of the Amended Notice of Motion dated 3rd May 2019 and amended on the 2nd December, 2019, in particular

“Mr. Geoffery Chege Kirundi in the name of the Respondent herein”

- (b) Ground (s) of the Amended Motion, in particular *“Mr. Geoffery Chege Kirundi masquerading as Kiru Tea Factory Company Limited has commenced further contempt of Court proceedings against among others the applicants herein.”*
- (c) Paragraph 6 of the Further Supporting Affidavit of Mr. Stephen Maina Githiga sworn on the 2nd December, 2019 in particular *“Mr Geoffery Chege Kirundi masquerading as Kiru Tea Factory Company Limited has commenced further contempt of court proceeding against among others the applicants herein”*
- (d) Paragraph (7) of the Affidavit, in particular *“Mr. Geoffery Kirundi invokes as his principal grounds the alleged breach of the court orders of 6th December, 2017”*
- (e) Paragraph (11) of the Affidavit in particular *“the Applicants are also apprehensive that considering the litigious nature of Mr. Kirundi and his inclination in instituting by himself or through proxy various court proceedings relating to similar issue, Mr. Kirundi may commence further proceedings relating to the issues relating before this court.”*
- (f) Paragraph (6) of the Applicants submissions dated 5th December, 2019 (“the submissions”), in particular *“through this second contempt application, Mr. Geoffery Chege Kirundi in the name of the Respondent herein sought to cite for further contempt the Applicants herein.”*
- (g) Paragraph (19) of the Submission in particular *“Indeed, the allowing of further contempt proceedings to proceed would create anarchy as the substram of the appeal would not have*

been preserved as the appeal deals with the ruling of 22nd February 2019 on alleged contempt proceedings may be commenced afresh in different form as has already been done by Geoffery Chege Kirundi in the name of the Respondent”.

- (h) Paragraph 22 of the Submission in particular “the person behind the contempt proceedings as instituted in the name of the Respondent is Mr. Geoffery Chege Kirundi.”*
 - (i) Paragraph 23 of the Submission in particular “through this further contempt threat Mr. Kirundi is deliberately positioning himself to disrupt the livelihoods of over 8,000 small scale tea farmers. Under the utilitarian principle, this court has a duty to grant such orders that would in the meantime, pending the hearing of the appeal serve the greater number of persons, in this case the over 8,000 tea growers as opposed to one further contempt prosecutor, Mr. Kirundi”*
 - (j) Paragraph 25 of the submissions in particular “Mr. Geoffery Chege Kirundi, who retired from the Board of Directors of the Respondent on the 22nd of November, 2019 by virtue of the lapse of his three (3) year term, has continually held sword of Court of Appeal impugned orders to pursue further contempt proceedings against the Applicants but in the name of the Respondent. Mr Kirundi stands to suffer no prejudice if the stay orders herein are granted to preserve the substratum of the Appeal during the pendency of the appeal.”*
- ii) That an ancillary order be and is hereby issued permanently barring the Applicants, their Advocates or any other person from referring to proceedings by M/s Kiru Tea Factory Company Limited as proceedings by “Mr. Geoffery Chege Kirundi in the name of Kiru Tea Factory Limited.”*

- iii) This Honourable Court be pleased to make any other Orders it deems fit in the circumstances
- iv) Costs of and incidental to this Application be provided for.

[3] We deem it imperative, initially, to deal with the second application as its determination would certainly impact on the earlier one.

B. BACKGROUND

[4] The present two applications arise from contempt proceedings at the Court of Appeal filed by the Respondent, Kiru Tea Factory against all the Petitioners. In summary, the following is a chronology of events leading to the appeal before this Court:

- (a) Vide the application for contempt filed through the firm of M/s Kithinji Marete & Company Advocates, dated 13th December 2017, Kiru Tea Factory Company Limited commenced Nyeri Court of Appeal Civil Application No. 137 of 2017, **Kiru Tea Factory Company Limited v. Stephen Maina Gitonga & 13 others**, which application was amended vide a separate application dated 28th May 2018;
- (b) However, through the firm of M/s Njoroge Regeru & Company Advocates, Kiru Tea Factory filed an application dated 31st January 2018 seeking to withdraw the contempt proceedings for having been filed without the sanction of the Company. That application was dismissed by the Court of Appeal vide Ruling delivered on 11th May 2018. Consequently aggrieved, Kiru Tea Factory sought review vide **application dated 29th May 2018**;
- (c) The 2nd Applicant herein vide **application dated 3rd of August 2018** sought to strike out the amended contempt **application dated 28th May 2018** and all further affidavits that had been filed without

leave, being Further Affidavit sworn on the 21st December 2017, 1st Further Affidavit sworn on 22nd January 2018, 2nd affidavit sworn on the 16th April 2018, 3rd Further Affidavit sworn on 3rd August 2018 and the 5th Further Affidavit sworn on 5th November 2018;

- (d) On the 7th August 2018, the Court of Appeal, having heard Counsel for all the parties, ordered that the applications dated 28th May 2018, 29th May 2018 and 3rd August 2018 be listed for hearing. They were then listed to be heard on 19th September 2018 but were adjourned to 15th November 2018 when they were heard;
- (e) After the hearing, the Court of Appeal, on the 22nd of February 2019, delivered rulings in the applications as hereunder;
 - i) The application dated 29th of May 2018 was found partially meritorious and accordingly the Court reviewed the rulings and orders of the Court of Appeal made on 11th May 2018 making declarations and orders as appearing in the said ruling of 22nd February 2019;
 - ii) The application dated 3rd August 2018 was also found meritorious and accordingly the amended contempt application dated 28th May 2018 was struck out together with all the further affidavits filed without leave; and
 - iii) The Court of Appeal then made a determination on a third ruling in respect of a contempt application dated 13th December 2017, which application, it is claimed by the Petitioners, ceased to exist by virtue of the amended application on contempt dated 28th May 2018, and which application had not been heard on 7th August 2018 when the other three applications were heard. This position remains contested. By that ruling, the Court of Appeal found the Applicants herein in contempt of Court orders

calling them for sentencing and mitigation on the 22nd of March 2019.

- (f) The Appellate Court in the third Ruling found that the 6th Applicant was the only one who had responded to the application dated 13th December 2017 via an affidavit sworn on 25th April 2018. According to the Applicants, in fact that affidavit was in response to an application dated 31st January 2018. The Applicants further claim that, as per the Court's direction of 7th August 2019, they had responded to the amended application on contempt dated 28th May 2018;
- (g) The Applicants sought review of the decision vide an application dated 27th February 2019, canvassed on 7th March 2019, with a Ruling delivered on 28th March 2019. That Ruling dismissed the application for review on grounds that there was no new evidence that would be presented if the proceedings were to be re-opened;
- (h) In the ruling of 28th March 2019, the Court of Appeal, it is now claimed by the Petitioners, violated Articles 27(1), 50(1) and 159(2)(a) & (e) of the Constitution 2010 by hearing the Motion for contempt despite it not being in existence as it had been amended vide application dated 28th May 2018. The same had also not been, and had no responses on record thereby condemning the Petitioners unheard.

C. SUBMISSIONS ON THE APPLICATION DATED 20TH DECEMBER 2019 TO EXPUNGE PARTS OF THE AMENDED APPLICATION DATED 2ND DECEMBER 2019

i) The Respondent's Submissions

[5] In its submissions, the Respondent has argued that it is a limited liability company and its decisions are embodied in the resolutions of its Board of Directors. That therefore, by insinuating nay stating that Mr. Geoffery Chege Kirundi has been masquerading as Kiru Tea Factory, the Petitioners have personalised the dispute between the real parties herein. In addition, that the said action has visited grave injustice upon Mr. Kirundi and the pleadings filed are condescending, derogatory, insolent, impertinent and manifestly intended to side track the Court from the real matters before it.

ii) The Petitioners'/Respondents' Submissions

[6] In response to the Motion to strike out, the Petitioners have argued that, while Mr. Kirundi has been filing pleadings on behalf of the Respondent, in **Joseph Mwangi Mbote & others v. KTDA & others** Nairobi High Court Constitutional Petition No.442 of 2019, the High Court had declared him not to be a Director of the Kiru Tea Factory and therefore in subsequent proceedings, he could not purport to be such Director.

[7] Further, that in **Civil Application No.132 of 2017** at the Court of Appeal, the same position had been taken by the Petitioners and furthermore, that the Respondent had never instructed Mr. Kirundi to initiate proceedings nor did it instruct M/s Kithinji Marete & Co. Advocates to act for it in any Court proceedings related to the present dispute.

[8] While submitting that striking out of pleadings is discretionary and ought to be exercised sparingly, the Petitioners add that, one of the issues to be determined on appeal is whether in fact it was the Respondent or Mr. Kirundi that had

commenced the contested contempt proceedings. To strike out the impugned paragraphs in the Motion for stay orders will therefore compromise their appeal and drive them away from the seat of justice.

[9] Lastly, the Petitioners submit that the Motion to strike out was brought in bad faith, is an abuse of Court process and is merely calculated to delay the determination of the appeal on record.

D. ANALYSIS AND DETERMINATION OF THE MOTION TO STRIKE OUT

[10] Firstly, it is obvious to us that, reading the record before us, there is no love lost between Mr. Kirundi and the Petitioners. Furthermore, the Petitioners and the Respondent or some members or Directors of the Respondent, have become so engrossed in their bad blood that the substance of the Petition of Appeal has long been forgotten. This Court has now been forced to determine Motion after Motion without getting to the bottom of the appeal before it. We have in that regard had to determine a Preliminary Objection on jurisdiction; a Motion to strike out the Petition of appeal for the same reason; another Motion on which firm of advocates is properly on record for the Respondent; a Motion to amend the Motion on stay of proceedings before the Court of Appeal; the present Motion as well as the one below on stay of proceedings proper.

[11] While Parties are at liberty to duel on every issue under the earth, this Supreme Court has very limited jurisdiction and to spend time on all manner of applications is not the best way to determine appeals before it on their merits and expeditiously so.

[12] Reverting to the Motion now before us, we note that in his Affidavit sworn on 20th December 2019, Mr. Kirundi described himself as “*the Chairman of the Kiru Tea Factory Company Limited*”. He has maintained this position since the dispute relating to the control of the Kiru Tea Factory commenced. Mr. Stephen

Maina Githiga in his Replying Affidavit sworn on 27th February 2020 on behalf of the Petitioners, on his part, deponed that he knows of his “*own knowledge that there is exists no such position within Kiru Tea Factory Company Limited*”. And that the only position known to him in that context is that of “*Chairman of the Board of Directors of Kiru Tea Factory*” which he, Stephen Maina Githiga, continues to hold. Mr. Githiga further claims that Mr. Kirundi is not even a Director of Kiru Tea Factory as his term as such Director expired on 22nd November 2019, a fact confirmed, he depones, by *Korir J* in **High Court Petition No.442 of 2019**. Our perusal of the Judgment in that case would show that Mr. Kirundi was only mentioned once when the learned Judge at paragraph 118 stated thus;

“There is also the undisputed averment by the Respondents [KTDA & Kenya Tea Development Agency] that the three-year term of Geoffrey Chege Kirundi who swore the affidavit in support of KTFC’s [Kiru Tea Factory Company] application for joinder lapsed in November 2019. Without going into the ongoing disputes between KTFC and the Respondents [KTDA et al] pending before other Courts, it follows that there is no valid authority for dragging KTFC into these proceedings.”

[13] It has also been argued that Mr. Kirundi’s position as regards the contempt proceedings at the Court of Appeal is at the heart of the appeal before us and to strike out any parts of the Motion for Stay of proceedings will cripple the Petitioners case.

[14] On our part, having reflected on the matter, the present Motion must be looked at in its context and not in the context of other and unrelated proceedings. In the Motion for Stay of proceedings, the Petitioners have in a nutshell cast Mr. Kirundi as a masquerader, an unreasonably litigious person, and an anarchist but more importantly, that he has unreasonably used the sword of the contempt orders

obtained against the Petitioners and may use the same over and over again to punish them. But who are the parties before us?

[15] In all pleadings before this Court, there is no party named Geoffery Chege Kirundi. Save for the Petitioners, the only other party is Kiru Tea Factory Company Limited, a legal entity sued in its own name. It is indeed true as claimed by the Petitioners that the Directorship and Management of Kiru Tea Factory Company is heavily contested and like *Korir J* in **High Court Petition No.442 of 2019**, we are not seized of the specifics of that dispute. Indeed, *Korir J* addressed Mr. Kirundi's position in passing only and his finding is not before us in any substantive manner.

[16] Whether therefore Mr. Kirundi is using the name of the Respondent to further his own agenda, is a matter not presently before us but the Petitioners have nonetheless argued that the said issue is live and will form part of their case at the hearing of the appeal.

[17] Even if that were so, what we are confronted with, is a situation where one party, in seeking orders of stay of proceedings against a limited liability Company has, in over ten instances according to the Respondent, cast aspersions on an individual who is associated with it. The law on the subject is that following ***Salomon v. Salomon*** [1897] AC 78, our Courts have been consistent in holding that a limited liability company is separate from its members. Indeed, *Majanja J* in ***Valentine Opiyo and Anor v. Masline Odhiambo t/a Ellyams Enterprises*** High Court Civil Appeal No.2 of 2014, quoted with approval the holding that “[A Company] as a body corporate, is a persona juridica, with a separate identity in law, different from its shareholders, directors and agents unless there are factors warranting a lifting of the veil” (Quoting the Court of Appeal in ***Victor Mabachi and Anor v. Nurturn Bates Ltd*** [2013] eKLR).

[18] When can a Company's veil be lifted? Only when there is evidence of “*fraud or improper conduct but in all cases where the character of the company, or the*

*nature of the persons who control it, is a relevant feature. In such a case, the court will go behind the mere status of the Company as a separate legal entity disinter from its shareholders ...” – Halsbury’s Laws of England 4th Edition para.90 as quoted in **Valentine Opiyo** (supra).*

[19] The above being the law, what should we make of the impugned parts of the Motion for stay of proceedings? It is obvious to us that the references to Mr. Kirundi to the extent that they are not directed at the Respondent *per se* are misguided. We are certain that, by striking out those paragraphs, the Petitioners, in arguing their appeal which is limited to the propriety or otherwise of the contempt proceedings as a constitutional question will not have been driven away from the seat of justice. By personalising a purely constitutional issue, they steered their case away from the safety of the Constitution as its defender into Mr. Kirundi’s personal turf which is not an issue before us. Their Petition of Appeal, we are certain, can stand without submissions being directed at the person of Mr. Kirundi but at the faction of the Respondent (perhaps led by Mr. Kirundi) with which they have issues with. Having so stated, should we strike out the whole Motion for Stay of proceedings?

[20] We shall here below address that Motion on its merits, but for the above reasons, the Motion dated 20th December 2019 is allowed in terms of Prayers (i) (a) – (j). As regards prayer (ii) seeking orders to permanently bar the Petitioners from ever using the impugned statements, we see no reason to grant it and will instead dismiss it. We shall here below address costs at the end of this Ruling.

E. SUBMISSIONS ON THE MOTION FOR STAY OF PROCEEDINGS

[21] The above application is dated 2nd December 2019. The Petitioners/Applicants seek the following orders:

- i) ... (*spent*)

- ii) ... (spent)
- iii) *This Honourable Court grants stay of further proceeding in **Nyeri Court of Appeal Civil Application No.137 of 2017 (sitting at Nairobi) Kiru Tea Factory Company Limited v. Stephen Maina Gitonga & 13 Others** pending the hearing and final determination of the Applicants' appeal filed before this Court.*
- iv) *This Honourable Court grants stay of further proceedings, the hearing and prosecution of the Application dated **30th of May 2019 and as filed on the 31st May 2019 in Nyeri Court of Appeal Civil Application No.132 of 2017, Kiru Tea Factory Company Limited v. Stephen Maina Githiga & 32 Others** pending the inter-parties hearing and final determination of **Supreme Court Petition No.12 of 2019, Stephen Maina Githiga & Others v. Kiru Tea Factory Company Limited.***

[22] We have, above, set out the background to the dispute but suffice it to say that, the Petitioners were convicted and sentenced for contempt by the Court of Appeal after a lengthy process involving *inter alia* the striking out of a certain prior contempt application (dated 28th May 2018).

[23] Upon their conviction on 22nd March 2019, the Petitioners sought a review of that decision but the same was dismissed prior to mitigation and sentence on 4th April 2019. Subsequently, a second contempt application was instituted by the Respondent for alleged breach of orders issued by the Court of Appeal on 6th December 2017, 20th December 2019 and 22nd February 2019. It is that second contempt application that has triggered the present Motion for stay of proceedings before the Court of Appeal pending determination of the appeal before us.

i) *The Petitioners'/Applicants' Submissions*

[24] Relying on ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** [2014] KLR, the Petitioners state that the proceedings before the Court of Appeal were highly irregular for reasons *inter alia* that the Court of Appeal cited non-parties to the said proceedings as contemnors thus raising issues of fair trial under Article 50 of the Constitution.

[25] Further, they submit that, if the second contempt proceedings are conducted, there is the risk that their appeal against the initial contempt proceedings would be rendered nugatory and in that regard rely on our decision in ***Michael Sistu Kamau v. DPP & 4 Others*** [2018] eKLR.

[26] Lastly, they rely on the public interest principle and the decision in ***Deynes Muriithi & 4 others v. Law Society of Kenya & another*** Civil Application No. 12 of 2015; [2016] eKLR to argue that this Court, as the custodian of the Constitution, ought to forestall an injustice by granting orders of stay as prayed.

ii) *The Respondent's Submissions*

[27] The first point taken by the Respondent is that we have no jurisdiction to entertain the Petition of Appeal as well as the present application because there are no constitutional issues arising from the appeal.

[28] Secondly, the Respondent has argued that the conduct of the Petitioners is that of contemptuous litigants undeserving of the discretion of this Court and they should not benefit from their illegal actions – citing ***Miguna Miguna v. DPP & 2 others*** [2018] eKLR.

[29] Thirdly, they have submitted that the Petitioners' appeal is exceptionally frivolous, disparaging and derogatory and ought not to be allowed.

[30] Fourthly, on the nugatory principle, they urge that, since the appeal is limited to refusal by the Court of Appeal to review the decision on contempt, there

is no constitutional question arising to be determined and therefore the appeal is a non-starter *ab initio*.

[31] Lastly, it is the Respondent's case that there is no public element exhibited in the appeal but on the contrary, the Petitioners' refusal to obey Court orders is against the public interest – citing the Indian decision in Civil Appeal No.1134 - 1135 of 2002 ***State of Uttaranchal v. Balwant Singh Chauhal & others***.

F. ANALYSIS AND DETERMINATION OF THE MOTION FOR STAY OF PROCEEDINGS

[32] It is now settled that in ***Gatirau Peter Munya***, this Court laid the principles for issuance of stay orders by this Court. Those principles have been applied in a long list of authorities including ***Board of Governors, Moi High School, Kabarak & another v. Malcolm Bell*** Petition Nos. 6 & 7 of 2013; [2013] eKLR. The principles are whether an appeal is arguable; whether denial of the order for stay will render an appeal, nugatory; and whether it is in the public interest to grant the order for stay.

[33] As stated above, we have in a separate ruling determined that we have the jurisdiction to hear the Petitioners' appeal and have, in that ruling, stated that the controversy around conduct of contempt proceedings by the Court of Appeal will require this Court's interrogation against constitutional principles. The Respondent's submissions on jurisdiction in the present application are therefore overruled.

[34] We also note that, throughout the appeal proceedings before the Court of Appeal, the sword of conviction for contempt has continuously been pointed at the Petitioners. It has been a back and forth to the extent that the substantive appeal has been shelved and contempt proceedings have taken centre stage. After the first conviction and sentence (the subject of the appeal before us), the Respondents have instituted fresh contempt proceedings against the Petitioners and we think

that the appeal may well be rendered nugatory if we do not address its merits before the second contempt proceedings are finalised.

[35] Lastly, we have no doubt that contempt proceedings are a matter of public interest more so where allegations are made that one party is misusing the same to get at another without due process. Contempt proceedings may lead to imprisonment and therefore, where allegations of breach of the right to fair hearing are raised, this Court ought to lend an ear to the complaining party.

[36] In a nutshell, we are satisfied that the Petitioners have made out a case for grant of stay orders as prayed.

[37] What of costs? Being a matter of discretion, parties shall bear their costs of the Motion for striking out as well as the one for stay of proceedings.

G. DISPOSITION

[38] For the above reasons, the following are the final orders to be made:

- a) ***The Motion for striking out dated 20th December 2019 is hereby allowed in terms of Prayers (i)(a)–(j).***
- b) ***The Motion dated 2nd December 2019 for stay of proceedings is allowed in the following specific terms:***
 - i) ***This Honourable Court grants stay of further proceedings in Nyeri Court of Appeal Civil Application No.137 of 2017 (sitting at Nairobi) Kiru Tea Factory Company Limited v. Stephen Maina Gitonga & 13 Others pending the hearing and final determination of the Applicants' appeal filed before this Court.***

ii) *This Honourable Court grants stay of further proceedings, the hearing and prosecution of the Application dated 30th of May 2019 and as filed on the 31st May 2019 in Nyeri Court of Appeal Civil Application No.132 of 2017, Kiru Tea Factory Company Limited v. Stephen Maina Githiga & 32 Others pending the inter-parties hearing and final determination of Supreme Court Petition No.12 of 2019, Stephen Maina Githiga & Others v. Kiru Tea Factory Company Limited.*

c) *Each party will bear its costs of both applications.*

[39] It is so ordered.

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

.....
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

JUDICIARY

REGISTRAR,

SUPREME COURT OF KENYA

