

REPUBLIC OF KENYA

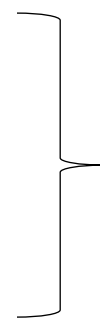
IN THE SUPREME COURT OF KENYA AT NAIROBI

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

APPLICATION NO. 12 OF 2019

– BETWEEN –

STEPHEN MAINA GITHIGA.....
ESTON GAKUNGU GIKOREH.....
PETER KINYUA.....
FRANCIS MACHARIA MARK.....
LERIONKA TIAMPATI.....
JOHN F. KENNEDY OMANGA.....



APPLICANTS

– AND –

KIRU TEA FACTORY COMPANY LTD.....RESPONDENT

*(Being an application for stay of the hearing and determination of the further contempt application dated 30 May 2019, in Nyeri Court of Appeal No. 137 of 2017, **Kiru Tea Factory Company Limited v. Stephen Maina Githiga & 32 Others**, and for amendment of the Notice of Motion Application dated 3 April 2019)*

RULING OF THE COURT

A. INTRODUCTION

[1] The applicants, having been convicted and sentenced for contempt of the Court of Appeal's Orders dated 6 December 2017, have filed an application before this Court to stay further contempt application by the respondent. Their prayers are contained in the Notice of Motion application dated 2 July 2019, supported by the affidavit of Stephen Maina Githiga, the 1st applicant herein. The motion is seeking the following Orders:

- (i) *that, pending the hearing and determination of this application, this Court do grant stay of further proceedings by way of hearing and prosecution of the contempt application dated 30 May 2019, as filed on 31 May 2019 in Nyeri Court of Appeal Civil Application No. 132 of 2017, **Kiru Tea Factory Company Limited v. Stephen Maina Githiga & 32 others**;*
- (ii) *that this Court do grant leave to the applicants, to amend the application dated 3 April 2019, as per the draft amended-application attached herein;*
- (iii) *that, following grant of prayer (ii) above, this Court do grant stay of further proceedings, and of the hearing and prosecution of the application dated 30 May 2019, as filed on 31 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 partes hearing and final determination of the amended application.*
- (iv) *that the costs of the application be provided for.*

[2] A number of other applications, some requiring determination by this Court, have also arisen, as will be indicated in this Ruling.

B. BACKGROUND

[3] The 1st – 4th applicants are either current, former, or disputed directors of Kiru Tea Factory Company Limited, the respondent herein. The 5th applicant is the group Chief Executive Officer of the KTDA Group of Companies, while the 6th applicant is now the Corporation Secretary of KTDA.

[4] A dispute arose between various members of the board of directors of the respondent, and its company secretary. This involves two factions, each one competing for the control of the affairs of the company. One faction, led Mr. Geoffrey Chege Kirundi, moved the Court of Appeal by way of Notice of Motion, in Nyeri Civil Application No. 133 of 2013, seeking to stop the holding of a parallel Annual General Meeting of the respondent, convened by the opposing faction led by Mr. Stephen Maina Githiga. The motion was heard on 6 December 2017, the Court issuing injunctive interim Orders as follows:

“Upon hearing learned counsel in this Motion, and in the Motion in Civil Application No. 133 of 2013, we are unable to deliver a reasoned Ruling right away . . .

“Considering the nature of the prayers sought we invoke Sections 3A and 3B of the Appellate Jurisdiction Act, and order that status quo be and is hereby maintained as of today, pending our Ruling as stated. No elections will be held until the Ruling is delivered.”

- [5] Notwithstanding the injunctive Orders above, an Annual General Meeting (AGM) *was* held on 14 December 2017. Pursuant to a resolution made at the said AGM, Mr. Stephen Maina Githiga’s faction was mandated to take over the Board, as Chairman. Another key resolution passed was that “*any and all purported previous resolutions and/or authority granting Messrs. Geoffrey Chege Kirundi, Paul K. Muite and Kithinji Marete & Company Advocates mandate to plead, depone, appear, act and/or represent the respondent in Court proceedings is hereby revoked in its entirety.*” A further resolution passed was that Dr. John F. Kennedy Omanga was reinstated as the respondent’s Company Secretary.
- [6] In anticipation of the said AGM, Mr. Geoffrey Chege Kirundi, in the name of the respondent, instituted contempt proceedings against the opposing faction, by way of an application filed on 13 December 2017. The application was amended on 28 May 2018. Another application was filed by the respondent on 31 January 2018, through a different firm, seeking the withdrawal of the contempt proceedings. This application was dismissed, prompting the respondent to make yet another application on 29 May 2018. The 2nd applicant, Mr. Eston Gakungu Gikoreh also filed an application dated 3 August 2018, seeking to strike out the amended contempt application dated 28 May 2018, as well as further affidavits that had been filed without leave.
- [7] The three applications were heard in sequence, culminating in three Rulings by the Court of Appeal, on 22 February 2019. The first Ruling upheld the application for review dated 29 May 2018. The second applicant’s motion of 3 August 2018, was partially allowed, with the effect that the amended application dated 29 May 2018, and certain affidavits, were struck out for having been filed without leave. The application dated

13 December 2017 was held to be properly on record. The third Ruling was in respect of the contempt application dated 13 December 2017. The applicants were convicted of contempt, and for disobeying the *status quo* Order issued by the Court of Appeal on 6 December 2017.

- [8] The applicants' attempt to review the said decision was unsuccessful. The Court of Appeal (*Ouko, P, Sichale and Otieno-Odek JJ.A*), on 28 March 2019, dismissed their application for review of the contempt Ruling, on grounds that there was no new evidence to warrant a reopening of the proceedings. The Court, thereafter, proceeded to summon the applicants to appear before it in person on 4 April 2019, for mitigation and sentence.
- [9] Following the Ruling of the Court of Appeal at Nairobi on 28 March 2019, the applicants filed (on 1 April 2019) an application under certificate of urgency, being Supreme Court Application No. 11 of 2019, for stay of further proceedings before the Court of Appeal, in respect of the Ruling on contempt (of 22 February 2019). The application was placed before a single Judge of this Court, and certified urgent. However, even before the same could be served upon the respondent, the applicants issued a notice withdrawing the same.
- [10] The applicants then, on 3 April 2019, filed an appeal (Supreme Court Petition No. 13 of 2019 – ***Stephen Maina Githiga & Others v. Kiru Tea Factory Company Limited***). In the Petition, they contend, the Court of Appeal had committed grave injustice, as well as breach of certain principles under Articles 27(1), 50(1) and 159(2)(a) & (e) of the Constitution. Contemporaneous with Petition 13 of 2019, they filed Supreme Court Application No. 12 of 2019, again under certificate of urgency, making prayers quite similar to those in the withdrawn

application. In particular, the application seeks stay of further proceedings, and also seeks mitigation of sentence scheduled for 4 April 2019, or any other date before the Court of Appeal, pending the *inter partes* hearing and final determination of the application and the appeal filed before the Court. This application was on the very day of filing, certified as urgent, with directions that the file be placed before the Chief Justice and President of this Court, for further directions.

[11] However, this application seems to have been overtaken by events, as the Court of Appeal proceeded on 4 April 2019, to sentence the applicants for contempt, fining them each Kshs.400,000/=, and in default, committing them to seven months' imprisonment.

[12] The respondent, on its part, on 3 May 2019, filed a lengthy replying affidavit in opposition to the first application. The replying affidavit was sworn by Mr. Geoffrey Chege Kirundi, an Advocate, and the respondent's Chairman. On 6 May 2019, the respondent filed an application under certificate of urgency, seeking to dismiss the first application with costs.

[13] On 6 May 2019, when the matter came up before the Deputy Registrar of this Court for directions, an issue arose on matters relating to legal representation of the respondent, between the law firms of Triple OK Law (Ochieng' Onyango Kibet & Ohaga Advocates), and M/s. Kithinji Marete & Company Advocates. The parties were directed to file affidavits on the issue. The firm of Triple OK Law filed the respondent's 51-paragraph affidavit on 14 May 2019, sworn by Mr. Francis Chege Kimari, who stated that he is the respondent's Director, and that he had been authorized to swear the affidavit on behalf of the respondent. On the other hand, the firm of M/s. Kithinji Marete & Company Advocates filed a brief affidavit, sworn

by Mr. Geoffrey Chege Kirundi, who deposed that he was the duly-authorized advocate for the respondent. Representation of the respondent is thus, one more issue to be determined by this Court. This is equivalent to having a *third* application for resolution.

[14] During the pendency of Supreme Court Petition No. 13 of 2019, and of the first application, Mr. Geoffrey Chege Kirundi as the respondent, *vide* an application dated 30 May 2019, commenced further contempt proceedings in the Court of Appeal, against (among others) the applicants herein, for alleged breach of that Court's Orders of 22 February 2019 — which Ruling is subject to appeal before this Court.

[15] On 3 July 2019, the applicants again, in what may be referred to as "*the fourth application*", sought stay of further proceedings, hearing and prosecution of contempt application dated 30 May 2019 (being Nyeri Court of Appeal Civil Application No. 132 of 2017, ***Kiru Tea Factory Company Limited v. Stephen Maina Githiga and 32 others***), pending the hearing and determination of this application. The applicants also ask for leave to amend their application dated 3 April 2019, and to file a further affidavit in support thereof; and further, that following the grant of such leave, the Court stays further proceedings, and stays the hearing and prosecution of the said application of 30 May 2019, pending the hearing and determination of the amended application. It is quite clear that, allowing the fourth application, effectively paves way for a "*fifth application*" — being an amendment of the fourth application.

C. APPLICATIONS BEFORE THE SUPREME COURT

[16] In order for the judicial process to function normally, as must be the Constitution's intent, we have to first deal with the issue of the respondent's representation. We remain cognizant of the fact that the respondents are entitled to participate, and to respond to the applicants' application, even though it is the applicants who moved the Court in the first instance, in pursuit of urgent recourse. In consequence, at this stage, only two applications fall due for disposal – the *third* and the *fourth*. This will pave the way for further directions on the current matters as a whole, including the other pending applications. The main cause in this setting is that we are reluctant to consider the merits of the application on the basis of contentious *representation*, on the part of the respondent.

[17] We proceed, on that basis, to consider the two applications – application dated 3 July 2019 (fourth application), and the one on respondent's legal representation (third application).

(i) *Application Dated 3rd July 2019*

[18] Only the applicants filed submissions, on 11 July 2019, and these are limited to the fourth application. The respondent, evidently, would not have filed submissions, as its legal representation is contentious, and it is not settled which counsel would be responsible.

[19] In support of the Notice of Motion of 3 July 2019, the applicants filed written submissions dated 10 July 2019 and these propose two issues for determination, namely:

- *whether the applicants have satisfied the conditions-precedent for amendment to the Notice of Motion application dated 3 April 2019;*
- *whether the applicants have established the conditions-precedent for grant of Orders of stay of proceedings.*

[20] On the first issue, it has been submitted that this Court, pursuant to Section 21(1) (b) and (2) of the Supreme Court Act, has same powers as the Court of Appeal, and, therefore, has powers in respect of amendment under Rule 44(1) of the Court of Appeal Rules. Court of Appeal practice in such matters was invoked, through case law: ***Kenya Hotels Limited v. Oriental Commercial Bank Limited*** [2018] eKLR; and ***John Gakuo & another v. County Government of Nairobi & another*** [2017] eKLR. It was urged that, allowing amendment of filed documents is discretionary, and that, amendment of pleadings before hearing should be allowed, especially as the application has been made in good faith, and there is no prejudice to the respondent if amendment is allowed.

[21] It is submitted that the substratum of the applicants' current application is in the earlier application dated 3 April 2019; and the respondent having filed a second contempt application at Court of Appeal, which raises similar issues to the one before this Court, an amendment to the application dated 3 April 2019, will enable this Court to deal comprehensively with all issues relating to contempt proceedings.

[22] On the second issue, the applicants have made reference to a decision of this Court: ***The Board of Governors, Moi High School, Kabarak & Another v. Malcolm Bell***, SC Applications Nos. 12 and 13 of 2012 — where this Court held that, if interlocutory applications are excluded as a necessary step to preserve the subject matter of an appeal, the Supreme

Court's capability to arrive at a just decision on the merit of appeal would be substantially diminished. It is thus argued that the Court has jurisdiction to determine the application for stay, for purposes of sustaining the subject-matter.

[23] The applicants, in submitting that they have met the threshold in an application for Order of stay, have cited this Court's decision in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** [2014] eKLR, where three principles were set out for grant of an Order for stay of execution. On the first principle, it is urged that the application/appeal is arguable, on the basis that the Court of Appeal had convicted the appellants on Orders that had lapsed, on 20 December 2017; they have filed Supreme Court Petition No. 13 of 2019, which has challenged the Court of Appeal decision in respect of Orders of 6 December 2017; 22 February 2019; and 28 March 2019. They urge that an amendment to the application dated 3 April 2019, to include further contempt claims, will bring to light all the issues that are live in the petition and the application, for determination once and for all.

[24] The applicants urge that the proposed amendments seek to introduce the prayer that there be a stay of the proceedings, prosecution and determination of the further contempt dated 30 May 2019. They apprehend that, if the Court declines to grant stay, they will be prosecuted, and finally, the prayer of stay in the amended application will be rendered otiose.

[25] On the issue of public interest, it is submitted that the respondent is a public company with approximately 8,000 shareholders, and it has become a matter of public notoriety, that there has been strife amongst

directors, with consequential, unresolved controversies in the management of the company. It is in the public interest, they submit, that the company is not disrupted by further contempt proceedings.

[26] This application seeks to amend the application dated 3 April 2019 (first application), and to stay the subsequent contempt proceedings against the applicants. From a perusal of the draft amended application sought to be filed, we note that the applicant seeks to stay further proceedings arising from the application dated 30 May 2019 at the Court of Appeal, pending the determination of the appeal. This is in effect the same prayer sought in the present application. With this in mind, and considering the nature of the dispute, we are not inclined to consider the merits of the stay application at this stage, as considering it will in effect be an *ex parte* process, a practice that rarely carries the essentials of fairness. We prefer to accord the respondent, *after a determination of its legal representation*, an opportunity to reply; a duplication, by considering the prayer at this juncture, and again in the amended application, should be averted.

[27] This, in effect, leaves us with the question of whether the applicants have satisfied the conditions to be allowed to amend their application. It is evident that there have been developments in the case before the Court of Appeal, which would be adequately captured in the amended application as proposed. *Rule 3(5)* of the Supreme Court Rules gives this Court inherent power to make such Orders, or give such directions as may be necessary for the ends of justice. We are satisfied that the purpose of the proposed amendment is to define the real question in controversy, and that the respondents will still have an opportunity to respond to the

amendment, thereby addressing any potential prejudice that they may have suffered.

(ii) Respondent's Legal Representation

[28] The firm of M/s. Ochieng', Onyango, Kibet & Ohaga (Triple OK Law) has filed written submissions dated 24 July 2019, as directed by the Deputy Registrar of this Court on 6 May 2019. It has listed four issues for determination, namely:

- (a) *what amounts to legal/valid decision by a company?*
- (b) *are the Orders issued by the Court of Appeal operational up to this moment?*
- (c) *who were the directors of the respondent as at the date of the filing of the application and petition before the Supreme Court, and bearing the authority to appoint advocates to represent the respondent company?*
- (d) *whether the Notice of Motion dated 3 May 2019, and filed on 6 May 2019, is premature?*

[29] M/s. Triple OK Law submits that there are two separate resolutions emanating from the respondent company: one appointing Triple OK Law, and the other appointing M/s. Kithinji Marete & Co. Advocates. It is their submission that unlike the resolution filed by M/s. Kithinji Marete & Co. Advocates, the one appointing them has been properly authenticated in accordance with the Companies Act, and the respondent company's Articles of Association. They have cited in reliance, Section 37 of the Companies Act, 2015, Article 119 of the respondent company's Articles of Associations, and the case of ***Tatu City Limited & 3 Others v.***

Stephen Jennings & 6 Others [2015] eKLR; and they submit that their resolution is the valid one.

[30] On the second issue, M/s. Triple OK Law submits that the Orders of the Court of Appeal issued on 6 December 2017, do not run up-to-date, and therefore, did not prevent the company from appointing an Advocate to represent it. They have reproduced an extract of the Court of Appeal Ruling delivered on 22 February 2019, showing a listing of the directors of the respondent as at 6 December 2017. According to M/s. Triple OK Law, the Court did not appoint any director of the respondent, but only referred to the directors of the respondent prior to the *status quo* Order of 6 December 2017. They submit that the Court did not indicate who the directors of respondent were, as from 6 December 2017. They submit that the removal and appointment of new directors was done by the shareholders, in accordance with the Articles of association, and those directors who were excluded from office remain excluded, and cannot act on behalf of the company.

[31] M/s. Triple OK Law urges this Court to show restraint as regards internal management of the company, by declining to so interpret the Orders of 6 December 2017, regarding election for new directors, as to negate economic sense, or as to halt the due operation of the respondent company as conducted through its board. An unrestrained interpretation, they submit, would mean the recent resolution by the applicant faction of the directors, appointing the firm of M/s. Kithinji Marete & Co. Advocates, would also be a nullity.

[32] In addressing the 3rd issue, M/s. Triple OK Law has adverted to various sections of the Articles of Association of the respondent company. They

submit that one can either be elected under Article 90 of Articles of Association, or appointed as director of the respondent. Triple OK Law has outlined the process of appointment of directors under article 91 (1) and (2) of the Memorandum and Articles of Association. They urge that one cannot purport to be a director unless appointed pursuant to this Article. They have also outlined the instances when one would cease to be a director of the company under its Articles.

[33] The next issue is, who *are* the current directors of the company? Triple OK Law gives a long history of the directors, running from their appointment/election date, re-appointments, suspension, and retirement. They conclude that the current directors are Stephen Maina Githiga, Eston Gakungu Gikoreh, Michael M. Kamotho, John W. Wandurua, Francis M. Mark, Peter Kinyua, Yvonne Njoki Ndirangu, and Francis Chege Kimari. They state that Mr. Geoffrey Chege Kirundi had been replaced as chair on 27 November 2017, and suspended as director on 29 March 2018. They have also given names of directors who have vacated office, and the date they vacated — namely, John Ngaii Kariri, Florence Wanderi, David Gatu Waithaka, and Joseph Maina Gathonjia.

[34] M/s. Triple OK Law submit that the resolution to appoint M/s. Kithinji Marete & Co. Advocates, dated 10 April 2019, and allegedly passed by a board meeting of 10 April 2019, has been signed by four directors who have ceased to be directors, and one current serving director, Mr. Geoffrey Chege Kirundi who is on suspension. They thus conclude that the said board lacked quorum, and its resolution is, therefore, invalid. They submit, further that the persons who signed the resolution had been barred from signing, by court Order of 13 December 2017, in High Court Civil Suit No. 230 of 2017. On the other hand, they submit that the resolution appointing

M/s. Triple OK Law was valid, as it had been signed by current directors, and met the required quorum under Article 107.

[35] M/s. Triple OK Law submitted that the Notice of Motion application dated 3 May 2019, filed on 6 May 2019 by Mr. Kirundi through the firm of M/s. Kithinji Marete & Co. Advocates is premature, as the issue of representation is still pending, and the Court can only deal with the application once it is resolved. They also urged this Court not to entertain the application seeking to strike out the Notice of Appointment of Advocates, Notice of Change of Advocates, and any other pleading filed by Triple OK Law.

[36] The applicants proposed three issues for determination, namely:

- *legal appointment of advocate by a company;*
- *validity of appointment of an advocate representing a company;*
- *validity of the Notice of Appointment filed by the law firm of M/s. Kithinji Marete & Co. Advocates.*

[37] The applicants submit that the board of directors has the power to manage their company under Article 95 of the company's Articles, which powers include the power to appoint Advocates to represent it.

[38] On the second issue, the applicants submit that, for an appointment of an advocate to be valid, there must be a valid board resolution. As to what constitutes "valid board resolution", they have cited ***Bharat's Resolutions Notices Meetings & Minutes***, 8th Edition, (by K. V. Shanbhogue) (page 63) which lays five conditions/parameters to be met, namely:

- *the decision forming the resolution must have been taken by a body authorized to make such decision;*
- *the body making the decision must have been comprised of the individuals who are the legal part of the said body;*
- *the power is to have been exercised by the body with due authority, and within the authority, available to that body;*
- *the decision is to have been taken with consensus, of the individuals comprised in the said body; and*
- *the decision so taken has to have been recorded, and is verifiable.*

[39] On the first and second parameters, submissions are filed by the firm of M/s Millimo Muthomi & Company Advocates, which reiterate submissions made by M/s. Triple OK Law, citing Articles 87 – 93 of the Articles of Association in relation to the appointment/election and retirement of a director. So, who are the current directors? They have provided various dates of appointment and of suspension of nine directors, who are the current directors, as they submit. This leads to the third condition, under which they have examined in detail the two resolutions appointing two sets of directors.

[40] It is submitted that the resolution appointing M/s. Triple OK Law was signed by the current directors, save for Mr. Chege Kirundi (who they submit, is serving suspension), and was passed by a meeting convened by directors who met the required quorum — and therefore it was valid. On the other hand, they submit that the resolution appointing M/s. Kithinji Marete & Co. Advocates was signed by Mr. Chege Kirundi, who is on suspension, and four others who are no longer directors. They submit that the appointment was not valid.

[41] On whether the resolution is verifiable, the firm of M/s Millimo Muthomi & Company Advocates (on behalf of the applicants) takes a common stand with that of M/s Triple OK Law, urging that the appointment of M/s. Kithinji Marete & Company Advocates is devoid of a validating seal, and consequently, is unverifiable. They point out that the Notice of Appointment of M/s. Kithinji Marete & Co. Advocate is dated 5 April 2019, while the purported resolution is dated 10 April 2019 — begging the question: how can the appointment precede the resolution. According to the applicants, M/s. Triple OK Law having filed their Notice of Change of Advocates dated 15 April 2019, and filed on 17 April 2019, and this coming as last in time, M/s. Kithinji Marete & Co. Advocates has no right to continue participating in these proceedings. They urge the Court to strike out the notice of appointment by M/s. Kithinji Marete & Co. Advocates, and find M/s. Triple OK Law as the duly appointed Advocates for the company.

[42] The issue of the respondent's legal representation is not being raised for the first time. It was the subject of one of the Court of Appeal Rulings delivered on 22 February 2019. A total of six affidavits have been filed to shed light on this issue. The 1st-to-4th applicants swore theirs on 13 May 2019, through the firm of M/s. Millimo Muthomi & Company Advocates; Francis Chege Kimari swore his on 13 May 2019, through the firm of M/s. Triple OK Law, while Mr. Geoffrey Chege Kirundi swore his on 20th May 2019, filed through the firm of M/s. Kithinji Marete & Co. Advocates. As we noted earlier, this is a contest centring upon the management of the respondent, with different factions in strife, to grasp full control on behalf of their respective camps.

[43] The Court, in its judicial-service setting, is mindful not to contribute in the furtherance of a popularity contest between the factions, and must remain steadfast in the path of fidelity to the law. From the motions of the contest, we would highlight certain material facts, as follows:

- (a) *there is no dispute as to the instruction of Millimo Muthomi & Company Advocates by the applicants;*
- (b) *the firm of M/s. Triple OK Law was appointed to represent the respondent, on the strength of a resolution made on 1 April 2019, and reiterated by a resolution made on 11 April 2019, by the respondents' board, through KTDA Management Services Limited, who communicated to the said firm by way of its letter dated 1 April, 2019;*
- (c) *according to the said resolution, the 1st to 4th applicants are members of the Board, with Mr. Geoffrey Chege Kirundi also being a member of the board but currently under suspension; the said Board is chaired by the 1st applicant;*
- (d) *the firm of M/s. Kithinji Marete & Company Advocates was appointed by the respondent, by way of a board resolution dated 10 April 2019, chaired by Mr. Geoffrey Chege Kirundi, with other members being: John Ngaii Kariri, David Gatu Waithaka, Joseph Maina Gathonjia, Florence Wacuka Wanderi and the 2nd to 4th applicants (who are indicated as directors serving sentence following conviction on 22 February 2019, by the Court of Appeal for contempt);*
- (e) *the Court of Appeal Ruling on contempt, though subject to an appeal before this Court, is yet to be overturned;*
- (f) *the directors of the respondent's board (in accordance with (d) above) are confirmed as such through official search at the Companies Registry by a CR 12 dated 15 May 2019;*

- (g) *the applicants were convicted of contempt of the Court of Appeal's Orders of 6 December 2017;*
- (h) *the elections held on 14 December 2017, in which the 1st applicant was elected Chairman of the respondent, and the consequential actions and resolutions, were nullified by the Court of Appeal through the Ruling made on 22 February 2019 – hence their conviction for contempt;*
- (i) *the issue of the bona fide directors of the respondent, including its Company Secretary, is currently contested before the Registrar of Companies.*

[44] These facts lead us to agree with the Court of Appeal decision, that in order to conclusively determine the question of representation, we must first establish the *bona fide* directors of the respondent. Whereas the CR 12 points to the current directors of the respondent, the same is, in our view, inconclusive, owing to the disputed position awaiting resolution by the Companies Registry.

[45] It is still more necessary to ascertain the respondent's *bona fide* directors; for yet more uncertainty arises from the fact that the respondent's board elections of 14 December 2017 had been annulled by the Appellate Court; and no less doubt comes from the fact that entirely different agencies had managed the appointment of Advocates' firms for the respondent.

[46] The remit of the Registrar of Companies to ascertain the *bona fide* directors of the respondent is a lawful and legitimate one, bearing validity under the commercial laws at play; and this Court holds that such a critical public-office function is to be accorded the necessary leverage, in accordance with the law.

[47] The affidavit by Mr. Geoffrey Chege Kirundi proceeds from the Orders of 6 December 2017 and the Ruling of 22 February 2019, by the terms of which he is the rightful Chairman of the respondent. Mr. Francis Chege Kimari, on the other hand, deposes as to the transition of small-scale tea factories, such as the respondent, to come under the management of the Kenya Tea Development Agency. It is in compliance with such a statutory framework that the respondent's board at the time entered into a management agreement with the Agency, assigning its responsibilities, rights and duties to KTDA Management Services Limited, a wholly owned subsidiary of the Agency, with effect from 26 June 2010. On the basis of this arrangement, Mr. Francis Chege Kimari avers that the respondent's board can only function through the KTDA Management Services. Such an account in our view, would appear to be logical.

[48] However, we have considered the *effect of the Court of Appeal Ruling of 22 February 2019*. As we understand Mr. Geoffrey Chege Kirundi, the situation affirming him as the Chair has *not changed*: hence his pursuit of the contempt proceedings. The stand of Mr. Francis Chege Kimari, it is to be noted, is that the company management has been going on normally, and it currently has directors — the Court Orders seemingly not having had any effect.

[49] In the end, we are constrained to proceed on the basis of the *existence of the Court Order*, as issued by the Court of Appeal, through its Ruling delivered on 22 February 2019. The same not having been reviewed or overturned, as evidenced by the appeal filed before this Court, it follows that *its full tenor and effect remains in force*. We shall not go into the integrity of the said Court of Appeal decision, as that is a matter of merits, for the appeal itself. Such a standpoint rests, normatively, on the fact that the applicants *have been convicted for contempt*. This means that the

status quo enacted by the Court of Appeal still obtains: to wit, no elections, nor change of directors.

[50] It was incumbent upon the parties, and especially on the faction led by the 1st applicant, to demonstrate that there has been a change of directors subsequent to the Ruling of 22 February 2019. Without such proof, we are not persuaded that they are the *bona fide* officials, for the purpose of the question currently before us. Moreover, just as the Court of Appeal noted, allowing the 1st applicant's faction to appoint its preferred Advocates through Agency arrangement, would compromise the integrity of the proceedings, and of the administration of justice: for the actual contest between the parties will not, then, be adequately articulated before us.

[51] As the firm of M/s. Kithinji Marete & Company Advocates was previously on record on behalf of the faction led by Mr. Geoffrey Chege Kirundi, we allow the same to remain on record for the respondent. This will be so in particular, considering that it is this faction that is responsible for the actions complained of by the applicants in the proceedings before the Court of Appeal, that the applicants seek to stay.

D. FINAL ORDERS

[52] Accordingly, we make the following Orders:

(a) ***The Application dated 2 July 2019 is partially allowed, to the extent that the applicants be and are hereby granted leave to amend the application dated 3 April 2019, in the terms of the draft annexed to the application.***

(b) ***The applicants shall file and serve the amended application, together with written submissions thereon, within ten (10) days from the date of this decision.***

- (c) *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.*
- (d) *The respondent is at liberty to file a response, together with written submissions thereon, within seven days of service of the amended application.*
- (e) *Costs shall be in the cause.*

DATED and DELIVERED at NAIROBI this 29th day of November, 2019.

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

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M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....

J. B. OJWANG
JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

**I certify that this is a
true copy of the original**

**REGISTRAR,
SUPREME COURT OF KENYA**