

EPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION (APPLICATION) NO. 13 OF 2019

-BETWEEN-

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

-VERSUS-

KIRU TEA FACTORY COMPANY LIMITED.....RESPONDENT/APPLICANT

(Being an application to correct and review parts of the decision of this Court delivered on 29th November 2019 in SC Application No. 12 of 2019 and Leave to file a further affidavit and written submissions in opposition to the Petition dated 3rd April 2019)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion application dated 1st December 2020 filed online on 7th December 2020 with the physical copy being filed on 27th May 2022 pursuant to Articles 1 (2), 10, 50 (1), 159, and 163 (7) of the Constitution and Sections 3 and 21 (2) and (4) of the Supreme Court Act, No. 7 of 2011 and all enabling provisions of the law seeking the following orders:

1. **THAT** on the grounds more specifically set out in the Certificate of Urgency filed herewith this Application be and is hereby certified urgent to be heard and determined in priority to any other step being taken in related matters.
2. **THAT** this Court be pleased to enlarge the time within which the application for review/correction of the error apparent at Paragraph 44 and other parts of the Ruling delivered on 29th November 2019.
3. **THAT** this Court be pleased for the benefit of case law and principle of stare decisis to review and or correct the error apparent at Paragraph 44 of the Ruling delivered on 29th November 2019 to wit:-

“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”. Emphasis

4. **THAT** leave be and is hereby granted to the Applicant to file a Supplementary Affidavit and Supplementary Written Submissions in opposition to the Petition dated 3rd April 2019.
 5. **THAT** the Costs of and incidental to this Application be provided for;
- [2] UPON** perusing the grounds on the face of the application; the supporting affidavit sworn on 1st December 2020 by Geoffrey Chege Kirundi and submissions dated 14th June 2022 filed online on 16th June 2017 with the physical copy filed on 17th June 2022. It is the applicant’s main argument that the import of this Court’s ruling delivered on 29th November 2019 at paragraph 44 has the possibility of creating uncertainty, unpredictability, and confusion and ultimately wreaking havoc in the corporate world, independent public and private corporate offices by the proposition that Form CR-12 is inconclusive; that this Court accommodates this application for correction despite it not being made within fourteen days from the date of the decision on grounds of public

interest as the error was discovered upon reflection and re-reading of the ruling; and that leave be granted to the applicant to file a supplementary affidavit and written submissions to answer various questions set out in rulings of this Court; and

[3] UPON perusing the replying affidavit by the 6th appellant, Dr. John Kennedy Omanga sworn on 28th June 2022 and filed online on 5th July 2022 with the physical copy filed on 18th July 2022 on his own behalf and on behalf of the other appellants, and the written submissions dated 28th June 2022, filed online on 5th July 2022 with the physical copy filed on 18th July 2022 all in opposition to the application. It is contended that the application is incompetent and incurably defective for not being filed within fourteen days of the ruling of this Court but close to one year later to which the applicant has not sought extension of time or given explanation for the delay, hence making the application a non- starter and therefore, the Court should not be persuaded to exercise its discretion in favour of the applicant. Moreover, that the applicant has not established any of the grounds for review as stipulated by this Court in ***Hussein Khalid and 16 others v Attorney General & 2 others*** [2020] eKLR; and that the applicant cannot purport to seek leave to file supplementary affi

davit and submissions considering that to date, the applicant has not filed its submissions and the applicant cannot purport to bring new issues, the issues for determination being already disclosed in the main petition before the Court.

[4] NOTING that the Court, under Section 21(4) of the Supreme Court Act 2011 (repealed) as read with Rule 28(5) of the Supreme Court Rules 2020 confers upon this Court power to review its decision based on the following conditions: that the correction can only be sought within fourteen days of delivery of the judgment, ruling or order; that the relevant parties have been notified, and that the substance of review must relate to any oversight, errors of clerical computation, or errors apparent on the face of the judgment, ruling or order, with the aim of giving effect to the intention of the Court. This threshold was

articulated by this Court in ***Musembi & 13 other (Suing on their own behalf and on behalf of 15 residents of Upendo City Cotton village at South C Ward, Nairobi) v Moi Educational Centre Co. Ltd & 3 others (Application E019 of 2021)*** [2022] KESC 19 (KLR) (Civ)(19 May 2022) (Ruling)); while in ***Fredrick Otieno Outa v. Jared Odoyo Okello***, SC Petition No 6 of 2014; [2017] eKLR where the Court spelt out the guiding principles on review of a court's own decision; and

[5] **CONSIDERING** that the applicant failed to file its application within the fourteen days of delivery of the ruling and extension of time as sought by the applicant is an equitable remedy involving the exercise of judicial discretion, and the guiding principles set out in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*** [2014] eKLR, the applicant's argument is unmerited. We say so because, first and foremost the application does not meet the principles set out in ***Nicholas Kiptoo Salat Case*** since the delay in filing the application is close to one year the applicant having filed the application dated 1st December 2020 filed online on 7th December 2020 with the physical copy being filed on 27th May 2022 against the ruling sought to be reviewed which was delivered on 29th November 2019. This is an unexplained undue delay which borders on indolence. Secondly, the argument put forth that the error was discovered upon reflection and re-reading of the ruling is unsatisfactory and appears to be an afterthought.

[6] In the same breadth, taking into account Rule 3(5) of the Supreme Court Rules 2020 and guided by the principles enunciated by this Court in ***Fredrick Otieno Outa case*** and the argument put forth by the applicant relating to inconclusiveness of the CR-12, we opine that the applicant's interpretation is misconstrued. This is because, in our view, the appeal before us does not relate to the conclusiveness or otherwise of the CR-12 in issue but rather the ruling of the Court of Appeal arising from the contempt proceedings before the said Court and our reference to the said CR 12 needs to be placed in the proper context. In addition, the review sought does not relate to any oversight, errors of clerical

computation, or errors apparent on the face of the ruling. For these reasons, the prayers for extension of time and for review are not merited.

[7] WITH RESPECT to the prayer for leave to file a further affidavit and written submissions to address questions raised by the Court in its ruling, we are of the view that the prayer is unsubstantiated and the applicant has not specified which questions it seeks to address in the additional pleadings, the applicant not having in its earlier decision delineated the issues falling for determination under the Court's limited jurisdiction. Further considering that the applicant already filed its submissions dated 26th May 2020 on 28th May 2020 in the main appeal and the matter has since been certified ready for hearing, it is only fair and in the greater interests of justice that the parties, rather than extend their duel through the numerous applications, re-route their efforts and focus towards the hearing and disposal of the main appeal which needs to be expedited based on its long and winding nature.

[8] FOR THESE reasons we come to the inevitable conclusion that the application lacks merit in its entirety and is for disallowing. As for costs, we note that the parties are still engaged in litigation before the Court, it is prudent that we defer the costs to follow the ultimate outcome of the appeal.

[9] Consequently, we make the following orders:

- (i) *The Notice of Motion dated 1st December 2020, filed online on 7th December 2020 and physically on 27th May 2022 be and is hereby disallowed.*
- (ii) *The costs of this application to abide the outcome of the appeal.*

DATED and DELIVERED at NAIROBI this 8th day of August 2022.

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P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE
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

