REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
(Coram: Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. 13 OF 2019
BETWEEN

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

KIRU TEA FACTORY COMPANY LTD.....RESPONDENT

(Being an Appeal from the Ruling of the Court of Appeal at Nyeri (Ouko(P), Sichale & Otieno-Odek, JJA) in Civil Application No. 137 of 2017 delivered on 28th March 2019)

Representation
Mr. Millimo for the appellants
(Millimo Muthomi & Co. Advocates

Mr. Kithinji Marete for the respondents
(Kithinji Marete Advocates)

JUDGMENT OF THE COURT

[1] The petition of appeal dated 3rd April 2019 and lodged on 26th April 2019 is brought pursuant to Article 163 (4) (a) of the Constitution. It arises from the Ruling of the Court of Appeal at Nyeri (*Ouko (P) (as he then was), Sichale & Otieno-Odek, JJA*) in Civil Application No. 137 of 2017 delivered on 28th March 2019. The Court

of Appeal dismissed the applicants' application seeking to review a contempt ruling delivered on 22nd February 2019.

B. BACKGROUND

[2] On or about 9th July 2009, Kiru Tea Factory Company Ltd (KTFC) and Kenya Tea Development Agency Holdings Limited (KTDA-HL) entered into a management agreement with KTDA-HL being an agent of KTFC. In turn, KTDA-HL assigned its obligations under the agreement to Kenya Tea Development Agency Management Services Limited (KTDA-MS) creating a further agency relationship. KTDA-HL through its agent, KTDA-MS provided KTFC with company secretarial services as and when required through their Company Secretary, John Kennedy Omanga. This arrangement continued until 11th September 2017 when the Board of Directors of KTFC replaced John Kennedy Omanga with Benard Kiragu Kamau as its Company Secretary responsible for the conduct of elections in its Electoral Areas and Buying Centre Committees.

[3] However, on 5th October 2017, John Kennedy Omanga on behalf of KTDA-HL and KTDA-MS purportedly published an announcement in the daily newspapers convening an Annual General Meeting (AGM) of KTFC scheduled for 20th November 2017. Further, on 9th October 2017, John Kennedy Omanga allegedly issued a notice of a meeting in the Company's Buying Centre Committee in two Electoral Areas known as Mioro and Kiambuthia. As a consequence, a dispute arose between various members of the Board of Directors of KTFC and its Company Secretary. The dispute involved two factions, having a war of attrition with each faction competing for control of the affairs of the KTFC. One faction was led by Mr. Geoffrey Chege Kirundi (Kirundi) while the opposing faction was led by Mr. Stephen Maina Githiga (Githiga). The subject matter of the dispute was the holding of a general meeting and the nomination of persons as members of the Board of Directors of KTFC or Tea Buying Centre Committees.

(i) Proceedings at the High Court

[4] Aggrieved by the actions of KTDA-MS, KTFC filed a suit against KTDA-HL and KTDA-MS in the High Court at Nyeri being, **Nyeri HCCC No. 18 of 2017**, where it claimed that the Management Agreement between KTFC and KTDA-HL did not oust the lawful authority of KTFC's Board of Directors over the company's affairs and the latter remained KTFC's apex decision making body legally responsible for the affairs of KTFC. Furthermore, it contended that the notices issued by John Kennedy Omanga on behalf of KTDA-HL and KTDA-MS were issued without the authority of KTFC. It claimed further that, the motive of KTDA-HL and KTDA-MS was to conduct the elections and convene the AGM to ensure the election of malleable candidates that would supplant KTFC's Board of Directors and silence the then-current Board of Directors of KTFC which was allegedly resolute in its accountability, transparency, and corporate governance principles. In the suit, KTFC sought *inter alia* a declaration and affirmation that the authority and mandate to determine the affairs of KTFC was solely vested in its Board of Directors and prayed for an injunction restraining KTDA-HL and KTDA-MS from interfering with the conduct of elections for nominees to the Board of KTFC.

[5] While ***Nyeri HCCC No. 18 of 2017*** was still pending determination, Kirundi, the Chairman of the Board of Directors of KTFC, filed on his own behalf an application by way of Chamber Summons being ***Nyeri JR Misc. Application No. 5 of 2017***, ***Geoffrey Chege Kirundi v. The Dispute Resolution Committee of KTDA-HL and KTDA-HL*** seeking *inter alia*: judicial review orders of certiorari, prohibition, and mandamus against the Dispute Resolution Committee of KTDA-HL and KTDA-HL; leave to stay the decisions made by KTDA-HL dated 13th October 2017 and 18th October 2017 respectively; and leave to stay the elections to the zonal representatives to KTDA-HL's Board of Directors in Zone 3 of the company's electoral zone that were scheduled for 24th October 2017.

[6] In response, the Dispute Resolution Committee of KTDA-HL filed a preliminary objection stating that it was an *ad hoc* committee established under the Election Rules and Regulations of KTDA-HL whose term expired on 18th October 2017, when it stood dissolved, therefore, it was not a legal person capable of suing or being sued. It added othat KTDA-HL filed a preliminary objection on the ground that it was a public limited liability company incapable of being sued in a judicial review proceeding and that there existed another suit Milimani HCCC No. 105 of 2017 ***Stephen Maina Githiga v. Kiru Tea Factory Limited & 3 Others***, which substantially raised similar issues to the subject matter in that suit and therefore the interlocutory orders sought were *sub judice*.

[7] The learned Judge of the High Court *(Matheka, J.)* in determining the application for judicial review, found that the Dispute Resolution Committee of KTDA-HL was a non-legal entity incapable of being sued or suing and that the suit was *sub-judice* in view of Milimani ***High Court Civil Suit No.106 of 2017***. As a corollary, she found that she had no jurisdiction and therefore struck out the application with costs.

(ii)Proceedings at the Court of Appeal

[8] Dissatisfied by the decision of *Matheka J,* KTFC filed ***Nyeri Civil Application No. 132 of 2017*** where it sought an injunction against KTDA-HL and KTDA-MS from *inter-alia* convening and/or conducting any AGM of KTFC or nominating any person as a member of KTFC's Board of Directors or Tea Buying Centre Committees or confirming the nomination of any person to the office of KTFC.

[9] Similarly, before the court was a Notice of Motion dated 24th October 2017 lodged on 27th November 2017 by Kirundi being **Nyeri Civil Application No.**

133 of 2017 seeking to stop the purported parallel AGM of KTFC, convened by the opposing faction led by Githiga. These two applications were consolidated.

[10] On 6th December 2017, the Court of Appeal (*G.B.M Kariuki, Sichale & Kantai JJA)* directed that *status quo* be maintained and that no elections be held until a ruling is delivered. In disregard of the Court of Appeal's injunctive orders, an AGM was held on 14th December 2017. Pursuant to the said AGM, three key resolutions were made as follows: that Githiga's faction was mandated to take over the Board, as Chairman; that any and all purported previous resolutions and/or authority granting Messrs. Kirundi, Paul K. Muite, and Kithinji Marete & Company Advocates mandate to plead, depone, appear, act and/or represent the respondent in court proceedings was revoked in its entirety; and that Dr. John F. Kennedy Omanga be reinstated as KTFC's Company Secretary.

[11] On lis**,** filed through the firm of Kithinji Marete & Company Advocates. Subsequently, without leave of the Court, the application was amended on 28th May 2018.

[12] During the pendency of the contempt proceedings, another application was filed by Githiga in the name of KTFC on 31st January 2018, through a different firm, Njoroge Regeru Company Advocates, seeking the withdrawal of the contempt proceedings for having been filed without the sanction of the company. This application was dismissed vide a Ruling dated 11th May 2018. Aggrieved by this decision, KTFC through Githiga filed another application dated 29th May 2018 seeking to review the Court of Appeal's Ruling dated 11th May 2018 on the grounds that in the said Ruling, the Court of Appeal determined the issue of representation and failed to hear the parties on the withdrawal application hence, the court *suo motu* considered the withdrawal application and proceeded to dispose of the same without hearing the parties' Advocates.

[13] Correspondingly, the 2nd appellant, Mr. Eston Gakungu Gikoreh also filed a third application dated 3rd August 2018, seeking to strike out both the original and

the amended contempt application dated 13th December 2017 and 28th May 2018 respectively, as well as further affidavits in support thereto filed by Kirundi on the grounds that they had been filed without the sanction of KTFC and that the amended contempt application was filed without leave of the court.

[14] On 7th August 2018, the Court of Appeal scheduled the applications dated 28th May 2018, 29th May 2018, and 3rd August 2018 for hearing on 19th September 2018. The three applications were heard consecutively on 15th November 2018, culminating in three rulings by the Court of Appeal, which were all delivered on 22nd February 2019 as follows:

i. The first ruling upheld the application dated **29th May 2018** seeking a review of the appellate court's order on the ground that the court *suo motu* considered the withdrawal application without hearing the parties' Advocates.

ii. The second ruling partially allowed the 2nd appellant's motion of **3rd August 2018,** with the effect that the amended application dated 28th May 2018, and certain affidavits, were struck out for having been filed without leave. The application dated **13th December 2017** was held to be properly on record.

iii. The third ruling was in respect of the contempt application dated 13th December 2017. The appellants were convicted of contempt, and for disobeying the *status quo* Order issued by the Court of Appeal on 6th December 2017.

[15] Aggrieved by the third ruling on contempt, the appellants filed two applications seeking review and rescission of the ruling of the appellate court on

contempt. The attempt to review the contempt ruling was unsuccessful. The Court of Appeal (*Ouko, (P) (as he then was), Sichale and Otieno-Odek JJA*), on 28th 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 appellants to appear before it in person on 4th April 2019, for mitigation and sentence. It is this ruling dated 28th March 2019 that the appellants are challenging before this Court.

(iii)Proceedings before the Supreme Court

[16] Aggrieved by the ruling of the Court of Appeal, the appellants filed this Petition arguing that the Court of Appeal committed a grave miscarriage of justice and breach of Articles 27 (1), 50(1), and 159 (2) (a) & (e) by:

i. *Finding that the appellants were heard on the application dated 13th December 2017 despite the fact that it was not amongst the motions listed for hearing as per the Court of Appeal's order dated 7th August 2018 and further despite their responses on contempt allegations being on record, the court deliberately ignored the same, thus condemning them unheard;*
ii. *Finding that the appellants were heard on the application dated 13th December 2017 on 15th November 2018 despite the said application being non-existent by virtue of its amendment vide the application dated 28th May 2018 which amended application was fully heard on merit and conclusively determined with the effect of it being struck out in its entirety; and*
iii. *Finding that the ruling on contempt could stand yet the Limited Liability Companies by virtue of which relationship as either directors or employees the appellants had been cited for contempt were not parties to the contempt proceedings nor cited as alleged contemnors.*

[17] The appellants seek the following reliefs:

i) *A declaration that the appellants' constitutional rights were breached by the Court of Appeal in the impugned proceedings in Nyeri Civil Application No.137 of 2017 so as to render the proceedings and findings therein null and void.*

ii) *That the Court of Appeal's ruling delivered on 28th March 2019 in Civil Application No. 137 of 2017 be and is hereby set aside.*

iii) *That the Court of Appeal's ruling on contempt in Civil Application No. 137 of 2017 delivered on 22nd February 2019 be reviewed, rescinded, and set aside.*

C. PARTIES SUBMISSIONS

(i)The appellants' submissions

[18] The appellants' submissions are dated 17th January 2020 and filed on 20th January 2020. On the question of failure by the appellate court to list the application dated 13th December 2017 for hearing, yet it proceeded to hear the same on 15th November 2018, they submitted that the court had gone contrary to its express order granted on 7th August 2018 which did not list the application dated 13th December 2017 for hearing on 15th November 2018. They urged that this act amounted to amending the court order without informing the appellants, hence denying them the right to reply and an opportunity to be heard. Furthermore, they argued that one of the tenets of the right to be heard is that one should be granted a reasonable opportunity to present their case. They cited the case of ***Mbogholi Msagha v. Chief Justice & 7 Others*** Nairobi HCMCA No. 1062 of 2004 to support that assertion.

[19] The appellants also argued that the appellate court's ruling that the application dated 13th December 2017 had been listed for hearing by virtue of prayer 2 of the application dated 3rd August 2018 was erroneous as the said prayer 2 was in respect of striking out the application for contempt dated 13th December 2017. In addition, they submitted that contempt of court orders being quasi-criminal in nature, should be specific and be responded to specifically as was held in ***Republic vs. Principal Magistrate's Court & 2 others Ex-parte Jack and Jill Supermarkets Limited*** [2014] eKLR.

[20] Furthermore, the appellants submitted that once a pleading has been amended, the original pleading is superseded and no longer exists. As such, it was their view that the application dated 13th December 2017 ceased to exist upon the filing of the amended application dated 28th May 2018 and that, as of 7th August 2018, there was no doubt to either of the parties and the Court of Appeal as to the non-existence of the application dated 13th December 2017. They cited ***Kenya Power & Lighting Company Limited vs. Margaret Akoth Olang*** Civil Appeal No. 72 of 2016 to support this argument.

[21] They also posited that once an amended pleading has been fully argued on merit and concluded with a judicial decision, that ought to mark an end to the proceedings; and that a court can only be moved further in the same proceedings by way of review or appeal. Expounding on this submission, they contended that the amended application was fully prosecuted on its merits on 15th November 2018; that one of their defences was that the said contempt proceedings were defective for want of the court's leave prior to the amendment. In addition, they claimed that this defence was contained not only in their replying affidavits, their oral and written submissions but also expressly in an application dated 3rd August 2018; that the Court of Appeal agreed with the appellants and struck out the contempt proceedings as argued vide the amended motion dated 28th May 2018. They urged

that the legal effect of the striking out was that there was nothing left upon which the Court of Appeal would have proceeded to determine on matters contempt. In this regard, they fault the Court of Appeal for reverting to the original pleading *suo motu* without provocation of either party and subsequently delivering the impugned ruling.

[22] The appellants asserted that a judicial process is anchored on the legitimate expectation that every party is given a fair hearing which includes equal consideration of evidence submitted by parties. They submitted that the failure of the Court of Appeal to consider their defences in response to the contempt allegations rendered the decisions delivered on 22nd February 2019 and 28th March 2019 null and void.

[23] They submitted in addition that, for a company to institute proceedings, such a step must be authorized by the company itself through its Board of Directors in a duly convened meeting and a board resolution passed thereof under seal; that this legal requirement is essential in guarding unauthorized litigations in the name of public companies whilst pursuing private interests and more so, where there are wrangles amongst directors. In this regard, they contended that the 1st to 4th appellants are the directors of the KTFC and are still serving; that the four appellants form a quorum of 4 directors under the Articles of Association of KTFC; that their responses to the contempt proceedings were to the effect that there was no board meeting or board resolution passed to authorize the commencement of those proceedings.

[24] In addition, they contended that a board resolution of KTFC dated 14th December 2017 under seal was presented to the court which resolution was express that the company had not authorized institution of proceedings in **Civil**

Application No. 137 of 2017 and; that despite their objections and the board resolution, Kirundi continued with the contempt proceedings and swore an affidavit on his own behalf.

[25] Further, it was their submission that the question of legal representation which the court purported to resolve could only have followed after the issue of whether the company was properly before the court was answered. As such, the appellants invited this Court to review the application dated 13th December 2017, verify that it had no board resolution, and strike out the entire contempt proceedings on this ground. For this proposition, they relied on the case of ***Chevron (K) Ltd v. Harrison Charo wa Shutu*** [2016] eKLR.

[26] They furthermore averred that all actions done by directors and or staff of a company are done for and on behalf of the company and; that nowhere were the appellants accused of acts done in their private capacities on their own frolics yet nowhere was KTFC cited as a respondent or contemnor for the alleged breaches. As such, they posed the question of how the appellants could be liable for acts allegedly done for and on behalf of the company yet the company had not been found guilty in the first place. For this reason, they posited that this was an error that was tantamount to lifting the corporate veil without any proceedings having been prosecuted and orders thereof granted.

[27] Regarding the issue of whether contempt proceedings can lie against the 1st to 3rd appellants, they submitted that the 1st to 3rd appellants were not parties to the primary proceedings which gave rise to the contempt proceedings and that the orders of 6th December 2017 were not directed against them, therefore, they should not have been cited for contempt. In view of the foregoing, the appellants urged that their appeal be allowed.

ii) Respondent's Submissions

[28] KTFC's submissions are dated 26th May 2020 and filed on 28th May 2020. The main thrust of KTFC's case is that the petition presents no jurisprudential or cardinal issues revolving around the interpretation or application of the Constitution and that there is a deliberate and laboured effort by the appellants to invite the Court to delve into matters that do not meet the settled threshold to invoke this Court's jurisdiction. Further, it submitted that the petition is an attempt to mislead this Court through a well-orchestrated conspiracy to defeat the course of justice.

[29] KTFC pointed out that the appellants have invoked this Court's jurisdiction under Section 3 of the Supreme Court Act, 2011 which provision does not clothe it with the jurisdiction to determine the subject petition.

[30] According to KTFC, among the issues for determination was whether or not the appellants were heard by the Court of Appeal and whether or not they were in contempt of its Orders made on 6th December 2017. In this regard, it submitted that the answer lies in the court proceedings of 15th November 2019 and the hearing notice of the material day where all counsel for the parties were heard exhaustively on whether or not there was contempt of the Order made by the Court of Appeal on 6th December 2017.

[31] KTFC submitted that tracing the trajectory of the issues from the High Court to the Supreme Court, no issues involving constitutional interpretation or application arose. It further argued that at all material times, the issue remained the election of Directors and usurpation of the roles of the Board of Directors of KTFC which issue remains so to date.

[32] KTFC submitted that it sought to cite among others, the appellants for contempt of the court orders of 6th December 2017 in **Kiru Tea Factory**

Company Limited v. Stephen Maina Githiga & Others, Nyeri Civil Application No. 137 of 2017 and that this contempt application was amended without leave thus the amendment was declined by the Court of Appeal. As such, the hearing and determination of the contempt charges proceeded on the basis of the original contempt application. In addition, it argued that the effect of this amendment cannot mutate into a question of interpretation and application of the Constitution.

[33] It was KTFC's case that the Court of Appeal sentenced 6 contemnors out of a possible 14 therefore the proposition that the 6 appellants were not heard was illusory. It was their case that they were heard to exhaustion on whether or not they were in contempt of court orders.

[34] KTFC also argued that the Court of Appeal was not at any point invited to determine any issue on Articles 50 (1), 159(2) (a) & (e), and 160 (1) of the Constitution, therefore, no issue of interpretation and application in the context of Article 163(4)(a) of the Constitution arose. In addition, they submitted that the subject of this appeal is premised on the decision of the Court of Appeal declining to review its decision finding the appellants in contempt. Hence, according to it, the appellant's failure to meet the threshold for consideration of their review application cannot be construed to mean an invigorating discourse over cardinal issues of constitutional application and interpretation.

[35] KTFC took issue with the appellants' submissions on the ground that they argued a case entirely different from what led them to this Court. KTFC opined that whereas in their petition they pleaded one ground with three branches, in their submissions the ground mutated to seven distinct grounds. Consequently, KTFC urged that this was an abuse of the court process as parties are bound by their pleadings. It also submitted that the evidence that was at variance with pleadings

ought to be rejected. For this proposition, KTFC relied on the holding of the Supreme Court of Nigeria in the case of ***Adeotun Oladeji (NIG) v. Nigeria Breweries PLC,*** SC 91/2002.

[36] It was KTFC's position that neither of the parties nor the court was dealing with the "*Hermeneutic Aspect*" or "*Constitutional Construction*" as contextualized by this Court in the case of ***Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 Others*** [2014] eKLR. It was submitted instead that, what was before the Court of Appeal was the issue of whether the appellants were heard or not and whether they were in breach of the court's orders of 6th December 2017.

[37] On the issue of costs, KTFC urged the Court to consider an award of costs to it against the appellants jointly and severally both in the Supreme Court and the Court of Appeal. To buttress this position reliance was placed on the case of ***Bellevue Development Company Limited v. Francis Gikonyo & 3 Others,*** [2020] eKLR.

D. ANALYSIS AND DETERMINATION

[38] This Court in a ruling in SC Application No. 12 of 2019 delivered on 4th September 2020 framed the following issues for determination;

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 motu* ***to determine the original pleading without invitation and participation of either party 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.***

[39] Before interrogating the issues as framed, we would like to address two preliminary issues. The first issue is on the jurisdiction of this Court to entertain the appeal. We note that even though the issue of jurisdiction was determined by this Court vide a Ruling dated 4th September 2019, it is important to elaborate on the same as it was argued by the parties during the hearing. Second, we shall also address ourselves to the issue of striking out of the 3rd, 4th, 5th, and 6th respondents from the proceedings.

a) Jurisdiction of the Court to entertain the matter

[40] It is now settled that a matter coming for determination on appeal before this Court under Article 163 (4) (a) of the Constitution must have progressed through the appropriate appellate mechanisms and revolve around the interpretation and application of the Constitution. This has been the position taken by this Court in several decisions. In ***the matter of the Interim Independent Electoral Commission*** *SC* Application No. 2 of 2011 [2011] eKLR, we stated thus:

"...the High Court has been entrusted with the mandate to interpret the Constitution. This empowerment by itself, however, does not confer upon the High Court an exclusive *jurisdiction; for,* ***by the appellate process, both the Court of Appeal and the Supreme Court are equally empowered to interpret the Constitution, certainly in respect of matters resolved at first instance by the High Court****." (Emphasis added).*

[41] Likewise, in ***Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another***, SC. Petition No. 3 of 2012 [2012] eKLR, ***Erad Suppliers & General Contractors Ltd. vs. National Cereals & Produce Board*** SC. Petition No. 5 of 2012 [2012] eKLR and ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 others*** **SC. Petition No. 10 of 2013** [2014] eKLR this Court reiterated that an appeal lies to this Court if the issues before it revolved around the interpretation and application of the Constitution and that the interpretation of the Constitution formed the basis for the determination at the superior courts below, and the issues had also progressed through the normal appellate mechanisms to reach this Court.

[42] Furthermore, in ***Rutongot Farm Ltd v Kenya Forest Service & 3 Others*** SC Petition No. 2 of 2016 [2018] eKLR, this Court further reiterated that to evaluate its jurisdictional standing under Article 163 (4) (a) of the Constitution, the test to apply is whether the appeal raises a question of constitutional interpretation or application and whether such a constitutional issue has been canvassed in the superior Courts leading to the present appeal. It thus noted that to establish these facts, the Court needs to ask itself the following questions:

(i) What was the question in issue at the High Court and the Court of Appeal?

(ii) Did the superior Courts dispose of the matter after interpreting or applying the Constitution?

(iii) Does the instant appeal raise a question of constitutional interpretation or application, which was the subject of judicial determination at the High Court and the Court of Appeal?

[43] Coming back to the instant case, we note that the substratum of the appeal before us did not emanate from the determination of the High Court but from the determination of the Court of Appeal in **Civil Application No. 137 of 2017** which sought to review the court's contempt order of 22nd February 2019. In the said application for review, the appellants cited a breach of their constitutional right to a fair hearing before a court of law and equal protection of the law which the appellate court found not to have been violated as they were duly heard and no rules of natural justices were violated. From the above, it is our considered opinion that the contempt proceedings and the interpretation and application of the Constitution arose at the Court of Appeal making it a court of first instance.

[44] Taking into consideration the peculiarity and the unique nature of this matter, does this Court have jurisdiction to entertain the appeal? The instructive provision in this regard is Article 159 of the Constitution which vests judicial authority derived from the people in courts and judicial tribunals. In the exercise of this judicial authority courts are to be guided by principles embodied under Article 159 (2) of the Constitution which provides:

> **"In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**
>
> **(a)justice shall be done to all, irrespective of status...**
>
> **(e) the purpose and principles of this Constitution shall be protected and promoted."**

The word **shall** as used in the context of Article 159 (2) connotes a mandatory obligation, thus, courts in exercising judicial authority should ensure that the purpose and principles of the Constituted are protected and promoted.

[45] Furthermore, Article 259 of the Constitution reads:

> "**(1) This Constitution shall be interpreted in a manner that-**
>
> **(a)promotes its purposes, values, and principles**

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of rights…".

[46] The above-quoted provisions require courts to interpret the Constitution in a purposive manner that advances the rule of law and adheres to human rights. Thus, in ***the Matter of the Principle of Gender Representation in the National Assembly and the Senate*** SC Advisory Opinion No.2 of 2012 [2012] eKLR this Court stated:

> *"[54] Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in the scope for necessary public actions. A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment.* ***But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions****…."*

[47] Hence in addressing the question of its jurisdiction under Article 163(4) (a) of the Constitution this Court should keep an open mind and evaluate the issues raised on a case-by-case basis as was held in ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 others*** **SC. Petition No. 10 of 2013** [2014] eKLR where we rendered ourselves thus:

"[37] *In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is* whether the appeal raises a question of constitutional interpretation or application*, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under Article 163(4)(a) of the Constitution.* ***Indeed, ordinarily, in our view, a question regarding the interpretation or application of the Constitution may arise from a multiplicity of factors and interrelationships in the various facets of the law. Consequently, the Constitution should be interpreted broadly and liberally, so as to capture the principles and values embodied in it."***

[48] Furthermore, in **Joho supra**, we stated:

"[52] *Applying a principled reading of the Constitution,* ***this Court responds to the demands of justice by adjudicating upon issues that tend to bring the interpretation or application of the Constitution into question****. However, it is to be affirmed that any appeal admissible within the terms of Article 163 (4) (a) is one founded upon cogent issues of constitutional controversy. The determination that a particular matter bears an issue or issues of constitutional controversy properly falls to the discretion of this Court, in furtherance of the objects laid out under Section 3 of the Supreme Court Act, 2011 (Act No. 7 of 2011)."*

[49] Also in **Geoffrey M. Asanyo & 3 others v Attorney General** Petition No. 21 of 2015 [2018] eKLR we stated in paragraph 62 that:

"…We have no doubt that whereas the issue before us may not have been articulated at the Court of Appeal, ***the inherent jurisdiction of this Court to right jurisdictional wrongs committed by the Superior Courts in executing their constitutional mandates would necessitate that this Court should assume jurisdiction and interrogate those alleged wrongs****.*

> ***[63]*** *We further reiterate that* ***this Court should only depart from the principle that issues of constitutional interpretation must rise through the Superior Courts to this Court in the clearest of cases and the exception to that principle should be carefully considered by the Court in the manner we have expressed herein."***

[50] Due to the quasi-criminal nature of contempt proceedings and the gravity of the consequences that flow from these proceedings, courts are required to adhere to the principles of natural justice, procedural fairness, and the right to a fair hearing. This is because, in contempt proceedings, the liberty of the subject is usually at stake, therefore, if a party alleges breaches of his fundamental rights and freedoms as envisaged under the Constitution albeit, at the Court of Appeal, this Court cannot afford to shut its eye to such serious legal issues that call for settling as the apex Court.

[51] As a consequence, due to the uniqueness and peculiarity of this case, it is important for this Court to settle how the Court of Appeal procedurally and substantially deals with contempt proceedings where violation of rights is questioned for the first time at the Court of Appeal. In our view, this case, therefore, raises exceptional circumstances that warrant us to depart from the now-settled jurisdictional requirement that a case concerning the interpretation and application of the Constitution must progress through the appropriate appellate mechanism so as to reach this Court on appeal to enable it to exercise its jurisdiction under Article 163 (4) (a) of the Constitution. Ultimately, we find that we have jurisdiction to entertain the appeal.

(b) Whether the names of the 3rd, 4th, 5th, and 6th appellants should be struck out?

[52] Vide an application dated 17th October 2022, the respondent seeks to strike out the names of the 3rd, 4th, 5th, and 6th appellants. Its claim is based on the fact that the 3rd to 6th appellants were not parties to the review application before the Court of Appeal since they withdrew their application for review before the Court of Appeal hence, they cannot be parties to the present petition of appeal.

[53] A perusal of page 13 of the record reveals that only the 1 and 2nd appellants were parties to the impugned ruling of the Court of Appeal which is the subject of the present appeal. Therefore, it is our considered view that the orders given could only affect the two appellants as stated. The 3rd, 4th, 5th, and 6th appellants were not subject to the orders given therein.

[54] Accordingly, we restate the position adopted by this Court in ***Lawrence Nduttu (supra)*** that an appeal must originate from the Court of Appeal where issues of contestation revolved around the interpretation and application of the Constitution and as a corollary, only parties before those courts should have an audience before this Court. Any exception to that rule must be sufficiently explained and appreciated by this Court. Having withdrawn their review application, the Court of Appeal did not interrogate any issues affecting the 3rd to 6th appellants. As a consequence, being not parties to the impugned ruling subject of the petition herein we hereby strike out the names of the 3rd, 4th, 5th, and 6th appellants from the present appeal.

[55] We now turn to the issues as framed by this Court in regard to the 1st and 2nd appellants:

i. Whether a Court presiding over contempt proceedings has a right to ignore deliberately the responses/defences placed before it by the cited contemnors?

[56] The appellants' core contention was that the appellate court deliberately ignored their responses on record thereby condemning them unheard. Specifically, they claimed that in its ruling of 22nd February 2019, the court did not make any references to their responses.

[57] Courts possess the inherent power to enforce compliance with their lawful orders through sanctions imposed through contempt of court. We note that the Contempt of Court Act having been declared unconstitutional in ***Kenya Human Rights Commission v Attorney General & Another [2018] eKLR*** on 9th November 2018 the instructive provision remains Section 5 (1) of the Judicature Act which grants the High Court and the Court of Appeal the power to punish for contempt. It provides:

> **"5. (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of Subordinate Courts.**

[58] In enforcing compliance with lawful court orders, the procedures adopted by the court must be fair and reasonable in which full opportunity is given to an alleged contemnor to defend himself or herself. This is because contempt proceedings being quasi-criminal, require a higher standard of proof than in normal civil cases, and one can only be committed to civil jail or penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability.

[59] This was the position taken by this Court in ***Republic v Ahmad Abolfathi Mohammed & another*** SC Criminal Application No. 2 of 2018 [2018] eKLR where we stated:

> *It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of* ***Mutitika v. Baharini Farm Limited*** *[1985] KLR 229, 234 the Court of Appeal held that:*
>
> > ***"In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt…The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature."***

[60] Accordingly, Article 50(2) of the Constitution on the right to a fair trial imposes a duty on the court to guarantee the parties to contempt proceedings procedural justice by evaluating the evidence brought forth by all parties. We note that, while there exists no fixed content to the duty to afford procedural fairness, the fairness of procedure depends on the nature of the matters in issue and that would constitute a reasonable opportunity for parties to present their cases in any given circumstance. Procedural fairness in the administration of justice involves the fair hearing rule and the rule against bias. The fair hearing rules require a decision maker to *inter alia* afford a

person an opportunity to be heard before making any decision affecting his/her interests.

[61] Likewise, procedural fairness in decision-making requires courts not to deprive any person of their right without due process of the law, a fundamental precept that implies that the right of a person affected by any adverse decision or action is present before a tribunal that pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense, to be heard by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved.

[62] Accordingly**,** the doctrine of due process encompasses the right to be treated fairly, efficiently, and effectively in the administration of justice. This Court acknowledged that due process is a fundamental pillar of the rule of law under the Constitution that should be observed by all courts in the administration of Justice in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*** SC Petition No. 23 of 2014 [2015] eKLR where we stated:

i. *"[97] All Courts must consider the principles and values of the rule of law, participation of the people, equity, inclusiveness, equality, human rights, transparency, and accountability.* ***This is because the four corners of due process of the law, specifically the right to be heard and the right to a fair hearing require that both parties be heard if an issue is raised before the court in order to accord the court the opportunity to pronounce itself on the issue."*** *(emphasis added)*

[63] Similarly, the United States Supreme Court in ***Goldberg v. Kelly***, 397 U.S. 254, 267 (1970) emphasized that the fundamental requisite of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.

[64] From the foregoing, courts are required to adhere to the principles of procedural fairness and due process in the administration of justice. The question that begs therefore is, did the Court of Appeal have a right to ignore deliberately the responses placed before it?

[65] The Court of Appeal in its ruling for contempt delivered on 22nd February 2019, stated as follows:

> *" 8. In opposing the application for contempt, in an affidavit dated 25th April 2018 by* **Dr. John Kennedy Omanga***, the 15th respondent avers that he is aware* **Mr. Geoffrey Chege Kirundi** *filed* **Nyeri HCCC No. 18 of 2017** *but he did so without the authority of KTFC Limited and Mr. Kirundi had no authority to appoint any advocate to act for KTFC...*
>
> **Dr. Omanga** *further avers that he is aware of the present contempt of court proceedings but due to the jurisdictional issue raised that* **Mr. Kirundi** *had no authority to act for and on behalf of KTFC and also in view of the application by Njoroge Regeru & Co. Advocates seeking to withdraw the contempt proceedings, he is constrained and refrains from answering the contempt allegations in this matter."*

[66] Further, the appellate court states:

> *"13. Learned counsel* **Mr. Millimo** *for the 5th to 15th respondents in opposing the application cited submitted that a* status quo *order*

cannot form a basis for conviction for contempt of court as it is too vague and subject to multiple interpretations and is a term of ambiguity; that the 5th to 15th respondents are not decision makers of KTFC and cannot in any way pass any resolutions for the Company…"

[67] A perusal of page 570 of the record of appeal reveals first that, Dr, John Kennedy Omanga swore the affidavit on his own behalf and not on behalf of the other respondents therein. Secondly, his replying affidavit was specifically in response to an application dated 31st January 2018 and not the application for contempt of court dated 13th December 2017.

[68] We note therefore that the Court of Appeal did not specifically take into account the responses by the 1st appellant (Stephen Maina Githiga), who filed his response on 20th August 2018 in response to the application dated 28th May 2018, and 2nd appellant (Eston Gakungu Gikoreh). Did the Court of Appeal have a right to ignore the defenses or responses by the appellants?

[69] The United States of America Supreme Court in ***Re Oliver***, 333 U.S. 257, 265 (1948), observed that the question of a grand jury's power to punish summarily is limited by the higher principle that, every contempt procedure must conform to the standards of due process applicable to regular court proceedings.

[70] The Court of Appeal like all courts in Kenya, is required to adhere to the principles of procedural fairness and due process when dispensing justice. Therefore, when considering the contempt proceedings, the court did not have a right to deliberately ignore the appellants' defenses or responses. Such action violates the principle of procedural fairness and due process which require meaningful participation in matters before the court. We, therefore,

find that the Court of Appeal did not have the jurisdiction to deliberately ignore the defenses or responses by the 1st and 2nd appellants and by doing so, fell into fatal error.

ii. Whether a Court hearing a contempt of Court application can convict the alleged contemnors without affording them a hearing?

[71] With regards to the right to a fair hearing, the appellants' case was that the Court of Appeal despite not listing the application dated 13th December 2017 for hearing, proceeded to hear the same on 15th November 2018. They claimed that the only applications listed for hearing on 15th November 2018, were applications dated 28th May 2018, 29th May 2018, and 3rd August 2018. Therefore, hearing the application dated 13th December 2017 without prior listing denied the appellants the right of reply and the opportunity to be heard.

[72] Article 50 (1) of the Constitution provides for the right to a fair hearing, it states:

> **"(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body".**

[73] This right to a fair trial is a non-derogable right as stipulated under Article 25 of the Constitution which provides as follows:

> **"Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited--**
>
> **(a) freedom from torture and cruel, inhuman, or degrading treatment or punishment;**

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and

(d) the right to an order of habeas corpus."

[74] In a concurring opinion, Njoki Ndungu, SCJ in the decision of ***Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*** SC Petition No 18 of 2014 as consolidated with Petition No 20 of 2014 [2014] eKLR expounded on the right to fair hearing as follows:

> *" (257)Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem(hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, Judicial Review: Law, Procedure and Practice 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that "although the necessity of hearing is well established, its scope and contents remain unsettled.*
>
> *(258) What then are the norms or components of a fair hearing? The Supreme Court of India, in Indru Ramchand Bharvani & others v Union of India & others, 1988 SCR Supl (1) 544, 555* ***found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable*** *(citing Bal Kissen Kejriwal v Collector of Customs Calcutta & others AIR 1962 Cal 460).(259)That court in Union of India v JN Sinha & another, 1971 SCR (1)*

791 and CB Boarding & Lodging v State of Mysore, 1970 SCR (2) 600 held that with regards to fair hearing, each case has to be decided on its own merits. In Mineral Development Ltd v State of Bihar, 1960 AIR 468, 160 SCR (2) 909 the court further observed that the concept of fair hearing is an elastic one and "is not susceptible of easy and precise definition."

(261)It is important to restate that a literal reading of the provisions of the Constitution show that the right to a fair hearing is broad and includes the ***concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context****. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that: "it is central to the concept of a fair trial, in civil as in criminal proceedings,* ***that a litigant is not denied the opportunity to present his or her case effectively before the court."*** *(See Steel and Morris v United Kingdom, [2005] ECHR 103, paragraph 59).*

[75] In the instant case, the appellate court in the impugned ruling acknowledged that on 7th August 2018, it gave directions that the pending applications dated 28th May 2018, 29th May 2018, and 3rd August 2018 be listed for hearing back-to-back and that the hearing finally took place on 15th November 2018. Furthermore, the Court of Appeal stated thus:

> ***"In addition, the Amended Notice of Motion dated 28th May 2018 is substantially similar to the Motion dated 13th December 2017 save for the addition of eleven more individuals cited for contempt of court...***

With the foregoing in mind, the notes on the proceedings before this Court on 15th November 2018 clearly indicate that all parties understood and appreciated that the substance of the proceedings before the Court were contempt proceedings in terms of the contempt applications…

In other words, the record of proceedings before this Court on 15th November 2018 aptly shows that the contempt application was argued and submissions made by all parties."

[76] It was uncontested that the proceedings of 15th November 2018 were never availed as part of the record therefore; we are not able to verify what happened on that particular day. However, from the contents of the impugned ruling and the record of appeal, did the Court of Appeal deny the appellants the right to a fair hearing by failing to specifically list the application dated 13th December 2017 for hearing?

[77] We are persuaded by the position taken by *Odunga J* (as he then was) in ***Alfred Mutua v Boniface Mwangi*** [2022] eKLR where he held that:

"22. In my view, considering the seriousness with which the Court takes contempt of court proceedings, ***every stage of the hearing must be expressly clear to the Defendant and any ambiguity must be resolved in favour of the Defendant since such proceedings are quasi-criminal in nature, otherwise, a benefit of doubt would inure to the benefit of the Defendant."*** *(Emphasis added)*

[78] From the foregoing, the appellate court should have expressly made it clear in its directions issued on 7th August 2018 that the application dated 13th December 2017 was coming up for hearing on 15th November 2018. Failure to expressly list

the application was detrimental to the appellants because they had no prior notice that the application was coming up for hearing on that day. It is our considered view that it is not enough for the appellate court to conclude that parties before it on 15th November 2018 understood and appreciated that the substance of the proceedings before it was contempt proceedings in terms of the contempt applications. The right to a fair hearingndictates that an individual shall not be penalized by a decision affecting his rights or legitimate expectations unless he has been given prior notice of the case against him, a fair opportunity to answer, and the opportunity to present his case.

[79] It is our considered opinion that hearing the application dated 13th December 2017 without expressly listing the same amounted to trial by ambush. Given the quasi-criminal nature of contempt proceedings, the court ought to have given the appellants the opportunity to be heard and that opportunity must be reasonable as was held in ***Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others(supra).*** The appellate court denied the appellants a reasonable opportunity to be heard by failing to expressly list the application dated 13th December 2017 for hearing. As a consequence, we find that the 1st and 2nd appellants' rights to a fair hearing were violated by the appellate court's action of convicting them without affording them a hearing.

iii. Whether a Court hearing a contempt of Court application can overlook a miscarriage of justice to convict for contempt?

[80] The Black's Law Dictionary, 11th Edition defines 'miscarriage of justice' as:

> ***"A grossly unfair outcome in a judicial proceeding as when a defendant is convicted despite lack of evidence on an***

essential element of the crime…… also termed a <u>failure of justice.”</u>

[81] This Court stated in ***Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone*** SC Application No. 4 of 2012 [2013] eKLR that:

> ***“[63]*** *From the example thus given, it is clear that* “miscarriage of justice” *is more consistent with failings in the judicial process of a rather glaring nature, and threshold trial stages, than with the adjudication of complex questions of law at tertiary-level Courts.”*

[82] In ***Zahira Habibullah Sheikh & Another vs. State of Gujarat & Others*** AIR 2006 SC 1367, the Supreme Court of India stated:

> *“It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial,* ***and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted****…****Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law.*** *It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and pretence….The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice”*

[83] As stated earlier in this Judgment, the Court of Appeal is granted the power to punish for contempt under Section 5 of the Judicature Act. However, in the exercise of this jurisdiction, the Court is required to adhere to the tenets of the Constitution and Section 3B (1) (a) of the Court of Appeal Act which states:

> **"(1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-**
>
> **a. The just determination of proceedings…."**

[84] Furthermore, Article 159 of the Constitution obligates courts to ensure that the procedures in the administration of justice would not lead to a miscarriage of justice. Thus, the overriding objective as stipulated under Section 3A and 3B of the Court of Appeal Act and Article 159 of the Constitution required the appellate court to ensure they are just and fair when handling cases to ensure procedural and substantive justice.

[85] From the foregoing, it is our finding that the Court of Appeal overlooked a miscarriage of justice and proceeded to convict the 1st and 2nd appellants and fine each of them Kshs. 400,000/- or in default to serve a term of seven (7) months imprisonment.

iv. 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?

[86] The appellants' case in this regard was that once an amended pleading has been heard and a determination given by the court, the court can only be

moved through review or appeal. They contended that once the amended application dated 28th May 2018 seeking amendment of the contempt application dated 13th December 2017 was disallowed the Court of Appeal could not revert and determine the original pleading *suo motu*.

[87] In ***Phoebe Wangui (Formerly known as Phoebe Wangui Kamore) v James Kamore Njomo*****,** Nairobi High Court Civil Suit No. 367 of 2010, the court held that:

> *"I have read the decision of Ringera, J (as he then was) in Mutuku & 3 Others vs United Insurance Company Ltd (supra). Whereas I agree that the effect of an amended pleading is to supersede and replace the original pleading, that is only true with respect to the issues for determination. That, in my view, does not mean that the only relevant document is the amended pleading. In my view, that is the rationale behind the provision that the amendment in the amended pleading be legible and ought not be obliterated.* ***To say that once an amended pleading is struck out, the party has no pleading on record would ignore the fact that a suit is not instituted by an amended pleading but by original pleading.*** *Order 8 rule 2 for example empowers the Court to disallow or strike out an amended pleading if the same was improperly amended. That rule does not state that in that event the whole suit is struck out." (emphasis added)*

[88] Similarly, in ***Gerald Iha Thoya v Chiriba Daniel Chai & another*** [2018] eKLR the court found that:

> *"...that where an amended petition is struck out,* ***the original petition is not obliterated. The original petition is revived by the act of striking out the amendments and if the original***

petition is capable of being heard, *then the election court should hear and determine the same on merit." (emphasis added)*

[89] Also, in ***Kalema vs. Ssekibinge*** (Civil Suit 104 of 2018) [2019] UGHCLD 10 (13 March 2019) the High Court of Uganda held:

" I find that there was no amended plaint on the record to be withdrawn by the Plaintiff and as such, the alleged withdrawal did not vitiate or remove the original plaint filed on 21st February 2018. I also agree with the Defendant's application to struck out the amended plaint Vide Misc. Application No. 1789 of 2018."

[90] Persuaded by the above decisions, we agree with the Court of Appeal that to the extent that striking out the amended application dated 28th May 2018 had the legal effect that the application dated 13th December 2017 stood unamended and was properly on record. However, we opine that once the appellate court had determined that the application dated 13th December 2017 was properly on record it ought to have informed the parties as such and given them another hearing date to enable the parties to canvass the application.

[91] It is our considered view the failure to issue another hearing date for the original unamended application amounted to reviving the application dated 13th December 2017 in chambers, prosecuting and convicting the appellants without giving them an opportunity to be heard. We find that decision to have been made in error and we have stated why.

v. 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 party in the proceedings?

[92] We reiterate our reasoning above that the Court of Appeal upon striking out the application dated 28th May 2018, ought to have given the parties a hearing date for the application dated 13th December 2017 as it was not among the applications expressly listed for hearing that day. Thus, the Court of Appeal erred by *suo motu* proceeding to determine the application dated 13th December 2017 without the invitation and participation of the parties to the proceedings and particularly, the appellants. A court presiding over contempt proceedings must make every stage of hearing expressly clear to the contemnors since such proceedings are quasi-criminal as was held in ***Alfred Mutua v Boniface Mwangi* (supra).** This is to ensure meaningful participation of the contemnors in contempt proceedings.

[93] Flowing from the above, it is our finding that the appeal herein must succeed. On costs**,** in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*****,** SC. Petition No. 4 of 2012; [2013] eKLR we found that costs follow the event, therefore the 1st and 2nd appellants shall have costs of the appeal.

E. ORDERS

[94] Consequently, we issue orders as follows:

1. ***The appeal dated 3rd April 2019 is allowed.***
2. ***A declaration that the 1st and 2nd appellants' right to a fair hearing was breached by the Court of Appeal in Nyeri Court of Appeal in Civil Application No. 137 of 2017.***
3. ***The Ruling of the Court of Appeal delivered on 28th March 2019 in Civil Application No 137 of 2017 is hereby set aside.***

4. ***The Ruling of the Court of Appeal delivered on 22nd February 2019 in Civil Application No 137 of 2017 in regard to the 1st and 2nd appellants is hereby set aside.***
5. ***Any monies paid by the 1st and 2nd appellants as punishment for contempt of court shall be refunded to them forthwith by the Registrar of the Court of Appeal.***
6. ***Costs to the 1st and 2nd appellants.***
7. ***We hereby direct that the sum of Kshs. 6000/- deposited as security for costs upon lodging of this appeal to be refunded to the appellants.***

[95] It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **16th** day of **June 2023.**

.....

P.M MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
OF THE SUPREME COURT

.....	.....
M.K IBRAHIM	**S.C WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
NJOKI NDUNGU	**I. LENAOLA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA