



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. E254 OF 2020**

**KENYA TEA DEVELOPMENT AGENCY**

**HOLDINGS LIMITED & 55 OTHERS.....PETITIONERS**

**VERSUS**

**THE CABINET SECRETARY, MINISTRY OF AGRICULTURE**

**LIVESTOCK, FISHERIES & CO-OPERATIVES...1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AGRICULTURE & FOOD AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. In Petition No.E254 of 2020 are three applications. The first one is dated 2<sup>nd</sup> November, 2021 filed by the firm of Munyao Muthama & Kashindi advocates on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners. It is brought under Rules 2, 8, 32 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, sections 1A and B, 3A and 75 of the Civil Procedure Act and Order 43 Rules 1(2) and 1(3) of the Civil Procedure Rules, 2010.

2. The application seeks the following orders:

*i. Spent;*

*ii. The petitioners be granted leave to appeal against the directions of the court issued on 21<sup>st</sup> October 2021;*

*iii. There be a stay of any further proceedings herein pending hearing and determination of this application inter partes;*

*iv. There be a stay of the proceedings herein pending hearing and determination of the intended appeal;*

*v. The court do issue any other order deemed fit and fair to be granted in the circumstances;*

3. It is premised on Patrick Ngunjiri Maina's sworn affidavit dated 2<sup>nd</sup> November, 2021 and the grounds on its face. He deposes that on 18<sup>th</sup> June 2021 the petitioners changed their legal representatives from Triple OK Law to the firm of Munyao Muthama and Kashindi Advocates, but the former law firm has repudiated this change and continues to act for them.

4. He avers that the issue of legal representation is a grave preliminary issue that was nevertheless overlooked by the Court when it subsumed all the applications in the consolidated petitions and rendered its directions on 21<sup>st</sup> October 2021. It is his averment that the petitioners were denied their right to a fair hearing, access to justice and legal representation and they stand to be greatly prejudiced. Additionally, that they will lose economically in the end as they will have to pay legal costs to their already discharged legal representatives. On this premise they seek leave to appeal this Court's directions dated 21<sup>st</sup> October 2021.

5. None of the parties filed responses to this application notwithstanding this Court's directions issued on 21<sup>st</sup> December 2021.

6. Counsel for applicants filed written submissions dated 15<sup>th</sup> November 2021 in support of their application. He identified the issues for determination to be as follows;

*(i) whether the petitioners have established sufficient grounds for grant of leave to appeal*

*(ii) whether the intended appeal is arguable and*

*(iii) whether the application has satisfied the principles for grant of stay of proceedings.*

7. On the first issue, he notes that while the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 do not expressly provide the need to apply for leave, the rules imply under Rule 3 (8) that the Court by virtue of its inherent power can make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. He submitted that in constitutional petitions it is permissible to import the Civil Procedure Rules to fill any gaps left in the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013. This was the position observed in the cases of **Karl Wehner Claassen v. Commissioner Lands & 4 others [2019] eKLR**, **Kitty Njiru v Nature & Style Fun Day Events & another and Rebecca Muriuki t/a Kahaari (Proposed third Party) [2020] eKLR** which were cited in support.

8. It is counsel's contention that grant of leave to appeal is a matter of discretion which should be exercised judicially depending on the circumstances of each particular case as opined by the Court in the case of **Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR**. Further reliance was placed on the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR**.

9. Counsel submits that the intended appeal is arguable and meritorious owing to the errors of law and fact by the court, by subsuming all the pending applications into the main petition including the issue of contested legal representation. Referring to the cases of **Speedwall Building Technologies Limited v County Government of Migori [2018] eKLR** and **Tom Kusienya & Others v Kenya Railways Corporation & others [2013] eKLR** he submits that courts do not tell parties who should represent them.

10. On whether the respondents will be prejudiced, the petitioners relied on the case of **JTK v MWK [2021] eKLR** where it was noted that the respondents would not suffer prejudice save for having to wait longer before the matter was concluded. That on the contrary it was the petitioners who would suffer more prejudice if the instant application was not allowed as they would not be able to exercise their right of appeal. Counsel further relied on the case of **Hezekiah Ngugi v Kenya Power & Lighting Co Limited [2020] eKLR** in support.

11. On the issue of stay of proceedings, Counsel contends that the Court has power to stay proceedings pending appeal pursuant to Order 42 Rule 6 of the Civil Procedure Rules and the inherent jurisdiction in Section 3A of the Civil Procedure Act and Rule 3 (8) of the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013. He cited the case of **Kenya Power & Lighting Co. Ltd vs. Esther Wanjiru Wokabi Civil Appeal No. 326 of 2013 (2014) eKLR** in support.

12. Counsel has urged the court to consider whether failure to grant the order will render the appeal nugatory. Further to be considered is whether what has been sought to be stayed is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved as held in **Hashmukhlal Virchand Shah & 2 others v Investment & Mortgages Bank Limited [2014] eKLR**.

13. The second application is dated 4<sup>th</sup> November, 2021 and filed by the firm of Mwangi, Wahome and Co. Advocates. It is brought under Rules 22 and 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, section 1A and B, 3A of the Civil Procedure Act. The application is by the 1<sup>st</sup> Petitioner and 55 others.

14. The application seeks orders that:

*(i) and (ii) .....Spent;*

*(iii) Pending hearing and determination of this application inter partes, there be a stay of any further proceedings herein and a stay of the directions issued by the Honourable Court;*

*(ii) The Honourable Court be pleased to review, set aside and/or vary its directions issued on 21<sup>st</sup> October 2021;*

*(iii) The Court do issue any other order and/or direction deemed fit and fair to be granted in the circumstances; and*

15. The application is premised on the applicants' Company Secretary, Patrick Ngunjiri's affidavit sworn on 4<sup>th</sup> November, 2021 and the grounds on its face. He depones that prior to issuance of this Court's directions dated 21<sup>st</sup> October 2021, there existed eight pending applications. One of those applications dated 29<sup>th</sup> June 2021 sought to not only withdraw the petition but also the pending applications by the applicants.

16. He avers that the applicants who had initially been represented by Millimo, Muthomi & Company Advocates have since retained Mwangi, Wahome & Co. Advocates as the new advocates to represent them in this suit. This representation was opposed by Millimo, Muthomi & Co. Advocates who as a result filed the applications dated 29<sup>th</sup> June 2021, 20<sup>th</sup> July 2021 and 22<sup>nd</sup> July 2021 to have the Court strike out the Notice of Change of Advocates.

17. He depones that the issue of representation should not have been subsumed into the consolidated petitions, since the applicants will be greatly prejudiced. This will be occasioned by the fact that, their constitutional right to a fair hearing, access to justice and legal representation will be violated. They will further have to meet the legal costs of two law firms one of which they have since discharged.

18. The petitioners through the firm of Millimo, Muthomi & Co. Advocates opposed the said application through Dr. John Kennedy Omanga's sworn replying affidavit dated 26<sup>th</sup> November 2021. He avers that the petitioners filed various petitions namely *Petition No.E254 of 2020*, *Petition No.E243 of 2020* and *Petition E083 of 2021*, and there are a number of applications filed therein. He further avers that various Court orders exist in these suits with regard to these applications.

19. He depones that it is essential to recognize that the five contempt applications made under *Petition No.E243 of 2020* and *Petition No.E083 of 2021* are pending determination. That Patrick Ngunjiri the deponent has been cited for contempt in the above mentioned petitions. Further his firm is still on record for the interested parties in *Petition 243 of 2020*, *Petition 334 of 2020*, and the Agriculture Food Authority in *Petition M009 of 2021*, which is a clear case of conflict of interest. To him the orders issued by the Court on 21<sup>st</sup> October 2021 would have settled all the issues raised in the consolidated petitions within judicious time, considering the numerous applications pending.

20. The respondents support the instant application and as such did not file any pleadings.

21. The firm of Mwangi, Wahome & Co. Advocates filed written submissions dated 9<sup>th</sup> December 2021 in support of their application. Counsel submits that the Court's directions on 21<sup>st</sup> October 2021 overlooked a germane preliminary issue on legal representation and the weight of its clients instructions to withdrawal of the petition and the applications filed herein. He noted that a party under Order 9 Rule 5 of the Civil Procedure Rules, 2010 is at liberty to change its advocate in any matter without an order for that purpose. In support reliance was placed on the Court of Appeal case of **Lawrence Ndutu & 6000 others v Kenya Breweries Limited & another (2012) eKLR** which dealt with the gravity of the issue of legal representation in prosecution of a suit.

22. On the issue of review, Counsel notes that for an applicant to obtain a review they must show that there was a mistake or error apparent on the face of the record or any other sufficient reason as was held in the case of **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers (2016) eKLR**. He also referred to the case of **Francis Origo & Another vs Jacob Kumali Mungala (2005) eKLR**.

23. It is counsel's submission that the Court's directions were made without granting the parties an opportunity to be heard on these matters as a result of which some of these facts were not expressed to the Court. Further that their right under Article 50(1) of the Constitution, was infringed. Counsel urged the Court to exercise its discretion and set aside its orders to avoid the injustice resulting from this error as held in the cases of (i) **Shah v Mbogo (1968)EA 93** and (ii). **Onyango v Attorney General (1986-1989) EA 456 and Mbaki & Others v Macharia & Another(2005) 2 EA 206**.

24. The firm of Millimo, Muthomi & Co. Advocates filed written submissions dated 17<sup>th</sup> December 2021 in opposing the application. Counsel contends that entertaining the application implies that the firm of Mwangi, Wahome & Co. Advocates is on record for the petitioners. This in turn would have a negative outcome on the pending contempt of court proceedings. Counsel contends that the question as to who represents the petitioners is paramount in the determination of the issues raised in the petition, and will avoid any prejudices.

25. On the second issue, counsel submits that the composition of the petitioners board of directors is a vehemently contested matter which will be determined by the pending contempt of court proceedings. To add on that there were no board resolutions and authorization annexed to the instant application. He further submits that the petitioners have filed an application in *Consolidated Petition No.E016 of 2021* seeking leave to appeal the Court's directions on the same grounds as the instant application. He argues that in law a party cannot pursue review and an appeal at the same time as observed in the case of **Shiltun Kalumbo Baraza v Joseph Kamau Karanja (2021) eKLR**.

26. He submits that the applicants fault the Court for directing the issue of representation to be subsumed in the main petition which according to them is an error of law. This they argue cannot constitute a ground of review as appreciated in the case of **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya (2019) eKLR**. It is counsels contention that the application is misconceived since the applications challenging legal representation were filed by Millimo, Muthomi & Co. Advocates. Further that the firm of Mwangi, Wahome & Co. Advocates has neither filed an application or preliminary objection on the issue of legal representation before this Court.

27. Lastly, counsel while relying on the cases of (i) **James Omariba Nyaoga & 8 others v County Education Board –Kisii County & 2 others; Principal, Kenyero Secondary (Interested Parties) & 3others s(2021) eKLR**. (ii) **Nyamogo & Nyamogo v Kogo 2001 EA 173** submits that there is no discovery of new or important evidence. Further that there is no error apparent on the record.

28. Next is the 3<sup>rd</sup> application dated 4<sup>th</sup> November, 2021 and filed by the 1<sup>st</sup> petitioner through Kale Maina and Bundotich advocates. The same is filed under Rules 22 and 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, sections 1A and B, 3A of the Civil Procedure Act.

29. The application seeks orders that:

**(i) and (ii).....Spent;**

**(iii) The Honourable Court be pleased to discharge, set aside and/or vary its directions issued on 21<sup>st</sup> October 2021;**

**(iv) The Court do issue any other order deemed fit and fair to be granted in the circumstances; and**

30. The application is premised on the applicant's Company Secretary, Patrick Ngunjiri's sworn affidavit dated 4<sup>th</sup> November, 2021 and the grounds on its face. He deposes that prior to issuance of the Court's directions dated 21<sup>st</sup> October 2021, there existed three pending applications in this matter. The said applications are dated 17<sup>th</sup> March, 2021, 22<sup>nd</sup> June, 2021 and 29<sup>th</sup> June, 2021..

31. He avers that it is important that this Court first determines the issue of legal representation. He adds that representation of the applicant by two firms and maintenance of two contrary pleadings is legally untenable. On this premise the deponent states that it is in the interest of the public and justice that a determination on the issue of legal representation is made to avoid unnecessary confusion and avert a grave illegality.

32. The application was opposed by the petitioners through Millimo, Muthomi and Co. Advocates. A replying affidavit by Dr. John Kennedy Omanga dated 26<sup>th</sup> November, 2021 was relied on. This affidavit is similar to that filed in opposition to the application filed by Mwangi, Wahome & Co. Advocates dated 4<sup>th</sup> November, 2021. We will therefore not repeat the contents here.

33. The respondents support the instant application and as such did not file any pleadings.

34. The firm of Kale Maina & Bundotich Advocates filed written submissions dated 17<sup>th</sup> December 2021 in support of the application. Counsel submits that they came on record on the applicant's behalf in place of the firm of Millimo, Muthomi & Co. Advocates through a Notice of Change of Advocates dated 29<sup>th</sup> June, 2021. He argues that the said firm has contested the change in representation and seeks to strike out the Notice of Change of Advocates. In view of this he submits that they are properly on record unless the Court makes an order to the contrary. It is his contention that at the time of issuance of the Court Orders dated 21<sup>st</sup> October 2021 no restoring order had been issued with regard to the advocates on record for the applicant.

35. Counsel submits in light of this that the impugned direction to subsume all the applications with the petition was a mistake or error as the orders overlooked the provisions of Order 9 Rule 5 and 6 of the Civil Procedure Rules, 2010 and as a consequence there is a proper basis laid out for the Court to review its orders. It is their case in a nutshell that unless the issue of legal representation is dealt with the petition and pending applications cannot be legally determined by this Court.

36. The firm of Millimo, Muthomi & Co. Advocates in this matter sought to adopt their written submissions dated 17<sup>th</sup> December 2021 in response to the Notice of Motion application dated 4<sup>th</sup> November 2021 filed by the firm of Mwangi, Wahome & Co. Advocates in Consolidated Petition No.E254 of 2020.

37. A 4<sup>th</sup> application dated 4<sup>th</sup> November, 2021 was filed in petition No.E016 of 2021 by the firm of Guandaru Thuita & Co. Advocates. It is brought under Rules 2, 8, 32 of the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules, 2013, Sections 1A & B, 3A and 75 of the Civil Procedure Act & Order 43 Rules 1 (2) and 1(3) of the Civil Procedure Rules, 2010.

38. The application seeks the following orders:

*i. .... spent;*

*ii. Pending the inter partes hearing and determination of this application, there be a stay of the orders/directions given herein on 21<sup>st</sup> October 2021;*

*iii. The 4<sup>th</sup> to 55<sup>th</sup> petitioners be granted leave to appeal against the orders/directions of the Court issued on 21<sup>st</sup> October 2021;*

*iv. There be a stay of the proceedings herein pending hearing and determination of the intended appeal;*

*v. The court do issue any other order deemed fit and fair to be granted in the circumstances;*

39. The application is premised on Joseph Mwangi Mbote's (17<sup>th</sup> Petitioner) affidavit sworn on 4<sup>th</sup> November, 2021 and the grounds on its face. He deposes that following the consolidation of the matters in this Petition and Constitution Petition No.E254 of 2020 vide court orders dated 8<sup>th</sup> July 2021, the constituted three judge bench heard the matters for the first time on 21<sup>st</sup> October 2021. Further that prior to the consolidation, there were numerous pending applications and a consent between the petitioners and the Attorney General. The petitioners depose that they were aggrieved by the Court directions on the material day because they expected to present their issues before the three judge bench, which they argue are untenable.

40. He deposes that the 4<sup>th</sup> to 55<sup>th</sup> petitioners no longer desire to prosecute the petition with regards to the reform agendas within the Tea sector as they want to collaborate with the government on the issue. This they say is demonstrated by the consent referred to above. This consent was recorded between the Attorney General and the firm of Guandarau Thuita & Co. Advocates on their behalf. He avers that the issue of representation which is raised in one of the applications is significant. Taking into consideration the Court's directions in light of this, the petitioners argue that it is unsustainable to have them prosecute the petition on one hand and oppose the petition on the other through two different law firms.

41. Interestingly, the firm of the Millimo, Muthomi & Co. Advocates who also represent the 4<sup>th</sup> to 55<sup>th</sup> petitioner in the consolidated suits opposed the Notice of Motion application, through Dr. John Kennedy Omanga's sworn replying affidavit dated 25<sup>th</sup> November 2021. He deposed that the 4<sup>th</sup> to 55<sup>th</sup> petitioners filed various petitions namely *Petition No.M009 of 2021*, *Petition No.E254 of 2020*, *Petition E243 of 2020* and *Petition E083 of 2021* which have since been consolidated in two sets. He adds that there exists various Court orders with regards

to the applications that had been filed in these suits.

42. He avers that it is essential to recognize that five contempt applications made under *Petition No.E243 of 2020* and *Petition No.E083 of 2021* are pending determination. Further that the instant application is sworn by Joseph Mwangi Mbote who is cited for contempt under *Petition No.E243 of 2020*. Moreover, that he (Joseph M. Mbote) is a galloping litigant whose litigation history has been to challenge the petitioners directors election manual and procedure against the will of the company and majority of the shareholders. That owing to the numerous pending applications the firms representing the parties in the consolidated petitions addressed the Court on this issue on 30<sup>th</sup> June 2021 seeking the best way forward. That in light of this, the orders issued by the Court on 21<sup>st</sup> October 2021 would have settled all the issues raised in the consolidated petitions within judicious time.

43. He in addition challenges Guandaru Thuita & Co. Advocates authority to act on behalf of the petitioners herein as the petitioners have not instructed them to act for them. He depones that the firms of Triple OK Law and Millimo Muthomi & Co. Advocates are the only legitimate firms representing the petitioners. He contends as a result that the instant application lacks merit, is misconceived and should accordingly be dismissed.

44. The respondents support the instant application and as such did not file any pleadings.

45. The firm of Guandaru Thuita & Co. Advocates filed written submissions dated 17<sup>th</sup> November 2021 in support of this application. Counsel has identified the issues for determination to be as follows;

- *whether the threshold for leave to appeal has been met,*
- *whether the intended appeal is arguable, and*
- *whether the application has satisfied the principles for grant of stay of proceedings.*

46. On the first issue, counsel submits that while the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, do not expressly provide for the need to apply for leave, the rules imply under Rule 3 (8) that the Court by virtue of its inherent power can make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. He relied on a number of authorities that observe that in constitutional petitions it is permissible to import the Civil Procedure Rules to fill any gaps left in the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013. These cases are **Karl Wehner Claassen v. Commissioner Lands & 4 others [2019] eKLR**, **Kitty Njiru v Nature & Style Fun Day Events & another and Rebecca Muriuki t/a Kahaari (Proposed third Party) [2020] eKLR**.

47. On the test for grant of leave to file an appeal counsel submits that it is a matter of discretion as opined by the Court of Appeal in the case of **Kenya Shell Limited vs. Kobil Petroleum Limited [2006] eKLR**. Additionally that the grant of leave should ordinarily be granted as long as the grounds have merit with a probability of success on appeal as seen in the case of **Francis Mwanza Mulwa v Kanji Vagjiani & 2 others [2018] eKLR**.

48. Counsel argues that the intended appeal is not frivolous but to the contrary, arguable and meritorious owing to the grounds set out on their draft memorandum of appeal. The grounds they say are arguable regardless of its likelihood of success. To buttress this point reliance was placed on **Kenya Railways Corporation v Erdemann Property Limited [2012] eKLR**.

49. Moreover counsel argues that the issue of legal representation is vital and should be determined prior to hearing of the consolidated petitions. Referring to the cases of: (i) **Speedwall Building Technologies Limited v County Government of Migori [2018] eKLR** (ii) **Tom Kusienya & Others v Kenya Railways Corporation & others [2013] eKLR** he submits that it is not the court's business to tell parties who should represent them.

50. Answering the question on whether the other parties will be prejudiced, counsel relied on the cases of **Hezekiah Ngugi v Kenya Power & Lighting Co Limited [2020] eKLR** and **JTK v MWK [2021] eKLR** where following consideration of the parties positions, it was found that the applicant would suffer prejudice if the application was removed before the intended appeal was heard on merit. The petitioners argue that the respondents will not be prejudiced if the appeal is allowed.

51. On stay of proceedings, counsel submits that the Court has power to stay proceedings pending appeal pursuant to Order 42 rule 6 of the Civil Procedure Rules as well as the inherent jurisdiction in Section 3A of the Civil Procedure Act and Rule 3 (8) of the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013. What's more is that they have fulfilled the principles of stay of proceedings spelt out in the case of **Kenya Power & Lighting Co. Ltd vs. Esther Wanjiru Wokabi Civil Appeal No. 326 of 2013 (2014) eKLR**.

52. The firm of Millimo, Muthomi & Co. Advocates filed written submissions dated 17<sup>th</sup> December 2021 in opposing the application, counsel cited the issues for consideration to be:

- *whether determination of the application will prejudice the pending proceedings,*
- *whether the application was sanctioned by the 4<sup>th</sup> to 55<sup>th</sup> petitioner,*
- *whether the application is incompetent due to want of election and*

· whether the application is incompetent for lack of a legal underpinning.

53. Counsel made similar submissions as referred to at paragraphs 24 – 25 of this Ruling. We shall therefore not repeat the same here.

54. Counsel contends that no law requires leave to be sought before lodging an appeal in a constitutional petition pointing out that the application fails to state the legal basis for this position. The application is thus misconceived counsel submits.

55. Still on the 1<sup>st</sup> application dated 2<sup>nd</sup> November, 2021 the firm of Triple OKLaw LLP, advocates for the 1<sup>st</sup> – 54<sup>th</sup> Petitioners filed a replying affidavit sworn on 12<sup>th</sup> January, 2022 by Dr. John Kennedy Omanga. In his 19 paragraph affidavit the deponent opposes the application filed by Munyao, Muthama and Kashindi advocates. He avers that the said law firm is not lawfully on record having been appointed by unknown directors. He has gone on to explain how advocates should be appointed by bonafide directors.

56. Triple OKLaw LLP, advocates filed submissions in respect of this application. The same are dated 12<sup>th</sup> January, 2022. Counsel does admit that this court has jurisdiction to grant stay of proceedings pending appeal. Referred to are the cases of:

(i) **Owners of Motor vessel “Lilian S” [1989] eKLR**

(ii) **Supreme court in Nyutu Agrovet Ltd V. Airtel Networks Kenya Ltd [2019] eKLR**

(iii) **Rule 32 of the “Mutunga Rules”**

57. Counsel further submits that the application has not met the requirements for an order of stay to issue. Firstly he argues that the applicant has not demonstrated that it has an arguable appeal as set out in the case of **cooperative Bank of Kenya Ltd. v. Banking Insurance and Finance Union (Kenya) [2015] eKLR**. He further submits on the orders issued by this court which were disobeyed and new directors elected. It is the said directors who appointed the firm of Munyao, Muthama & Co. Advocates as the legal counsel for the applicants. On this ground he opposes the application.

58. Counsel has further argued that the applicant will suffer no prejudice if the order of stay is not granted. He cited the Court of Appeal decision in the case of **Abdirahman Abdi alias Abdirahman Mohamed Abdi v. Safi Petroleum Products Ltd & 6 others Civil Application No.Nai 173 of 2010 [2011] eKLR** where the court stated:

*“.....The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party, if the court strikes out its document. The court in that regard exercises Jurisdiction.”*

59. Counsel submits that determination of the applications herein and in particular the issue of legal representation will be determining the whole petition. He therefore supports the grounding of the directions of 21<sup>st</sup> October, 2021.

#### **Analysis and Determination**

60. The genesis all these applications are the directions given by this court on 21<sup>st</sup> October, 2021. Since the said applications are inter related, we have opted to give a joint Ruling.

61. We wish to first of all set out exactly what this court directed on 21<sup>st</sup> October, 2021. This is what we said:

**“After carefully considering the various petitions and applications herein, we have found that the issues in them are so intertwined. Our view is that we hear and determine the main petition. The continued pendency of these matters is causing a lot of anxiety in the tea industry and this court does not have the luxury of time. We therefore give the following directions for compliance.**

**(iv) All interlocutory applications to be subsumed into the main petitions. The applications are mainly on:**

**(a) Representation**

**(b) contempt**

**(c) Conservatory orders**

**(v) Those who have not filed responses to the applications and petitions to do so within 14 days.**

**(vi) Leave is granted to the petitioners to file any further affidavits or so within 7 days upon service of the responses.**

**(vii) All petitioners and any other party in support of the petitions to file and serve their submissions on the petitions and applications within 21 days.**

(viii) The respondents and any other parties opposed to the petitions to file their submissions on the petitions and applications as the case may be within 21 days.

(ix) Mention on 20.12.2021 at 11.00 a.m. to confirm compliance and further directions.

(x) All orders in force remain extended until then. Any consent orders shall remain in force.

(xi) Any party not satisfied with the directions is at liberty to apply.

**Order:**

**These directions to apply to petitions No.E016 of 2021 as consolidated.”**

**1<sup>st</sup> application dated 2<sup>nd</sup> November, 2021**

62. From the foregoing account, the key issues for determination are:

*i. Whether the applicants’ have met the threshold for grant of leave to appeal; and*

*ii. Whether this Court should grant an order of stay of proceedings pending hearing of the intended appeal.*

**Whether the applicants’ have met the threshold for grant of leave to appeal**

63. The law on constitutional petitions is established under the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 also known as the **Mutunga Rules**. The Rules as correctly inferred by the petitioners are silent on the need to seek the leave of this Court before lodging an appeal.

64. While this is the position, this Court remains alive to the principles and purposes of the Constitution. In fact Rule 3(2) of the **Mutunga Rules** reminds this Court that *‘the overriding objective of these rules is to facilitate access to justice for all persons as required under Article 48 of the Constitution.’* Moreover, Rule 3(8) affirms that *‘Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.’*

65. The Courts have on numerous occasions pronounced that the Civil Procedure Rules can be appropriately invoked to fill these gaps. The Court of Appeal faced with a different gap in the Mutunga Rules in the case of **Karl Wehner Claasen v Commissioner of Lands & 4 others (supra)** opined as follows:

***“...in the absence of express provisions in the Practice Procedure Rules, an application for substitution may be based on the applicable Civil Procedure Rules. However, we add that Rule 3(8) of the Practice and Procedure Rules gives the court inherent power to make such orders as may be necessary for the ends of justice and that Article 159(2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of the Constitution.”***

Also see the case of **Vallerie Namtilu Wafula & Another V Kenya National Union Of Teachers (Knut) & 2 Others [2012] eKLR**.

66. Guided by the above authorities and Order 43 Rule 1(2) of the Civil Procedure Rules, 2010, we find the question requiring an answer to be whether the threshold for grant of leave to appeal has been satisfied.

67. The Court of Appeal in the case of **Kenya Shell Limited vs. Kobil Petroleum Limited [2006] eKLR** while discussing what should be considered held that the decision is discretionary and the discretion must be exercised judiciously. Also see (i) **Francis Mwanza Mulwa Vs. Kanji Vagjiani & 2 others [2018] eKLR** (ii) **Muhamed Yakub & Another vs. Mrs Badur Nasa Civil Application No. Nai. 285 of 1999**. The court must be satisfied that the grounds of appeal appear meritorious.

68. A perusal of the facts of this case indicates that the intended appeal raises legal questions, being the question of right of representation, right to be heard and right to access justice. It goes without saying that these issues establish a prima facie case and as a result cannot be deemed inapt. We find that this is merited and the leave sought is granted.

**Whether the leave granted should operate as stay of proceedings.**

69. The jurisdiction of this Court to stay proceedings pending appeal flow from Rule 32 of the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013. From this provision, it is clear that an appeal or intended appeal does not automatically operate as stay of proceedings. Grant of such an order must be in the real interest of Justice, as it infringes on the right to access to Justice, right to be heard without delay, and above all right to fair trial. See (i) **Kenya Wildlife Service v James Mutembei [2019] eKLR**. (ii) **Global Tours and Travels Limited; Nairobi H.C. Winding up Cause No.43 of 2000**, (iii) **Halsburys Laws of England, 4<sup>th</sup> Edition, Vol.37 page 330 & 332**, (iv) **Kenya Power & Lighting Company Limited v. Esther Wanjiru Wokabi (supra)**

70. From the onset, it is appreciated that the applicants filed the application in a timely manner. Secondly, it is clear from reading the

pleadings, the court record and submissions that there is a conflict of interest in the legal representation of the applicants due to the two positions adopted in this matter. The petitioners on one part argue that they desire to prosecute the petitions on merit while the other part is no longer interested in prosecuting the petitions. These positions are adopted depending on the law firm appearing. It is worth rehashing that the overriding objective of this Court is to facilitate access to justice for all persons as required under Article 48 of the Constitution. This means that this court while making its determination must consider both positions.

71. This Court takes cognizance of the fact that it has in its preceding rulings emphasized the prominence of the issues raised in the consolidated petitions. In Ruling No. 4 **Kenya Tea Development Agency Holdings Limited & 55 others v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 others; Kenya Small Tea Holders Growers Association (Kestega (Interested Parties) [2021] eKLR** Mrima J stated as follows:

*“18. As I stated in Ruling No. 3, ‘... the tea sector in Kenya is not only one of the main pillars of the economy, but also key in foreign exchange earnings since currently, Kenya is rated second to China in tea exports. The sector commands a considerable fraction of the Kenyan population. The sector includes many players among them farmers, factory owners, workers, agents, brokers, tea auctions, and many others. It is, therefore, on the foregoing basis that any intended reforms in the tea sector must be carefully undertaken...’*

*19. The reforms have also elicited several suits in Kenya. This Court has taken note of the number of suits so far filed and the magnitude of the issues raised therein. The matters are of immense public interest and the issues raised are not only weighty, but also complex. Further, the issues raised in the matters fall within the terms of Article 165(3) (b) or (d) of the Constitution. The various Petitioners have also crafted several questions of law to be dealt with.”*

72. The Applicants are apprehensive that if the proceedings are not stayed pending appeal there is a risk that their intended appeal will be rendered nugatory. Owing to the material placed before this Court, our view is that the intended appeal does not touch on all the merits of the consolidated petitions. The issues raised are principally on the question of legal representation and their resolve not to prosecute the petition on one part while the other seeks to have the petition heard on its merit which revolves around the disputed ownership, management and operations of Kenya Tea Development Agency Holdings Limited and its subsidiaries. In light of this we are of the view that hearing of the consolidated petitions will not render the intended appeal nugatory. In fact granting this order would only cause unnecessary delay in their hearing which would be against the principles set out under Article 159 (2) of the Constitution.

73. The upshot is that the application partially succeeds and the following orders made:

- (i) Leave is granted to the applicants to file appeal within 30 days.
- (ii) The prayer for the leave to operate as stay of the proceedings is declined.
- (iii) Costs in the cause.

**2nd application dated 4<sup>th</sup> November, 2021 filed by M/s Mwangi, Wahome and Co. Advocates.**

74. For this application, the main issue for determination is *whether the applicants’ have met the threshold for grant of the review order sought. The court in the case of Karl Wehner Claasen (supra) held:*

*“20. The Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules does not specifically provide for review. However, as held in the above persuasive decisions of the courts, where there is a lacuna in the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, the Civil Procedure Act and the Civil Procedure Rules will apply. Moreover, the invocation of the wrong provision of the law will not of itself be fatal to an application. Courts are charged to do substantive justice to parties and will not pay undue regard to procedural technicalities. The reliance on the Civil Procedure Act and the Civil Procedure Rules is therefore not fatal to the application...”*

75. The guiding principles upon which Kenyan Courts make findings on grant of an order for review are explicitly provided for under Section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 45 of the Civil Procedure Rules. The Court in the case of **Jimi Wanjigi & another v Inspector General of Police & 3 others [2021] eKLR** while discussing the principle of review stated thus:

*“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law.”*

76. Furthermore, a reading of the cited provisions on review discloses that a party who is desirous to obtain this order must demonstrate that his/her case satisfies the elements set out. Order 45 Rule 1(1) restricts the grounds for review to three elements which are; discovery of new and important matter or evidence, existence of some mistake or error apparent on the face of the record and where a party shows any other sufficient reason. The Courts have discussed these elements in numerous decisions.

77. The Court of Appeal while expounding on the discovery of new evidence in the case of **Rose Kaiza v Angelo Mpanju Kaiza [2009] eKLR** opined as follows:

***“However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed. In the words of the rule itself, it is***

***“.....discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed.....”***

Also see **Nyamogo & Nyamogo (supra); Republic v Cabinet Secretary for Interior Co-ordination of National Government ex-parte Abulahi Sadi Salad [2019] eKLR**

78. The applicants predominantly cite the second element, error apparent on the face of the record and any other sufficient reason as the reason upon which they seek the review. An examination of the facts makes it clear that one of the grounds upon which the application is sought, is the applicants' assertion that there was a change of legal representation from the firm of Triple OK Law and Millimo Muthomi & Co. Advocates to Mwangi Wahome & Co. Advocates. The second ground is that through their application dated 29<sup>th</sup> June 2021 they sought to withdraw the petition and all other pending applications in this suit.

79. It is their argument in essence that failure by the court to give them an opportunity to articulate these facts before the directions of 21<sup>st</sup> October, 2021 is an error of law. According to them the said facts were never within the court's knowledge and it was an oversight on the part of the court, not to consider them.

80. Nothing could be further from the truth. If anything, the record tells a different story. We would like to take cognizance of the fact that Mrima J in his Ruling delivered on 8<sup>th</sup> July 2021 in **Kenya Tea Development Agency Holdings Limited & 55 others v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 others; Kenya Small Tea Holders Growers Association (Kestega (Interested Parties) [2021] eKLR** gave a brief synopsis of the same. He observed as follows:

***“4. The matters came up before me on 30th June, 2021 for directions. The Court urged the Counsel appearing in those matters to give their proposals on the way forward. The Counsel made elaborate proposals and applications.***

***5. Some of the issues raised include the following: -***

***i. The representation of The Kenya Tea Development Agency Holdings Limited and its subsidiaries;***

***ii. Whether further conservatory orders be issued;***

***iii. Whether some parties are in disobedience of Court orders;***

***iv. Whether an expanded bench be constituted to hear all the matters.***

***6. I patiently listened to Counsel for a better part of the day.***

***7. There is no doubt the ownership, management and operations of Kenya Tea Development Agency Holdings Limited and its subsidiaries is hotly contested. That is the basis of Nairobi High Court Constitutional Petition No. E254 of 2020 and Nairobi High Court Constitutional Petition No. 083 of 2021.”***

81. The facts and issues as raised by the applicants are not unique and have plagued the consolidated suits from inception. It goes without saying that it was incumbent on the applicants to demonstrate through the facts and evidence that the Court's verdict was some mistake or error apparent on the face of the record. This was fittingly captured by the Court in the case of **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR** which pronounced itself as follows:

***“13. The starting point is that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter...”***

82. It is clear that even though the applicants allude to the Court's decision having been done in error, they fail to establish how that conclusion was an obvious error on the face of the record. We find ourselves in agreement with the conclusion held in the **Nyamogo case (supra)** which we find worthy to reiterate. If a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review.

83. In the circumstances of this case we find the case of **Evan Bwire –V- Andrew Nginda, Civil Appeal No. 103 of 2000, Kisumu, (2000) LLR 8340** which was cited with approval in the case of **Omulele & Tolo Advocates v Mount Holdings Ltd [2018] eKLR** serves as an appropriate guide in a nutshell. The Court opined as follows:

***“An application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case afresh.”***

84. We humbly find that the applicants' reasons have not met the conditions envisaged under Order 45 Rule 1(1) of the Civil Procedure

Rules, 2010. The upshot is that the application lacks merit and is disallowed. It follows that the request for stay of further proceedings and stay of the directions is also disallowed.

**3<sup>rd</sup> application dated 4<sup>th</sup> November, 2021 filed by Kale Maina and Bundotich Advocates.**

85. The main issue for determination in this application is whether the applicant has met the threshold for grant of the review order sought. We have already set out above the principles upon which a court may review/set aside its orders. We also refer to the already cited provisions of the law and the decisions by the superior courts in the previous Ruling.

86. This application is on all fours with the application dated 4<sup>th</sup> November, 2021 and filed by Mwangi, Wahome advocates. The facts relied on are just the same. The issue of legal representation and withdrawal of the petitions has been cited. Just as is the case with the previous application there is no evidence laid before us to show an error on the face of the record. There is equally no mention of discovery of new evidence.

87. It was well known to this court that there is the issue of legal representation which is yet to be sorted out. Just as we have found in the previous application, this court has not found any good reason to set aside/review or vary any of the directions it gave on 21<sup>st</sup> October, 202. The upshot is that this application is disallowed.

**The 4<sup>th</sup> and last application is by Guandaru Thuita and Co. Advocates and is dated 4<sup>th</sup> November, 2021.**

88. In this application the issues we find falling for determination are as follows:

- i. Whether the 4<sup>th</sup> to 55<sup>th</sup> petitioners have met the threshold for grant of leave to appeal; and*
- ii. Whether this court should grant an order of stay of proceedings pending hearing of the intended appeal.*

89. This application is similar to the 1<sup>st</sup> application dated 2<sup>nd</sup> November, 2021 and filed by Munyao Muthama and Kashindi advocates. In the Ruling in respect of the said application, we have already referred to the provisions of the law, **Mutungu Rules** plus a number of decided cases in respect of what the court should consider before granting leave to appeal. We shall not refer to the same here, as it shall be a mere repetition.

90. The 4<sup>th</sup> to 55<sup>th</sup> petitioners/applicants through their application seek an order for leave to appeal this Court's directions dated 21<sup>st</sup> October 2021. As guided by the law and authorities cited this leave should not be withheld unreasonably. A perusal of the draft Memorandum of Appeal indicates that the intended appeal raises legal questions. The said legal questions touch on fair hearing, legal representation and right to access justice. It is noble to grant them the leave to appeal in order for a second eye to scrutinize what this court did. We therefore grant the applicants leave to appeal as sought.

91. On whether the leave granted should operate as stay of proceedings we have set down the legal grounds for grant of such orders at paragraphs 71 – 75 of this Ruling and would not wish to repeat the same here. There is no dispute that the 4<sup>th</sup> to 55<sup>th</sup> petitioners/applicants filed the application in a timely manner. Secondly, it is clear from a reading the pleadings that there is a conflict of interest in the legal representation of the 4<sup>th</sup> to 55<sup>th</sup> petitioners/applicants due to the two positions presented in this matter. It is also clear from Ruling No. 4 by Justice Mrima in this matter that the issue of the tussle over legal representation is real. This arises from the fact that there are two sets of management i.e. The New and Old at the Kenya Tea Development Authority. Each of them has engaged lawyers.

92. This court has to make a determination on this issue of management which is a core issue in the consolidated petitions. Determining the issue of legal representation at this interlocutory stage will be determining the issue of management and making the petitions moot. It is a wrangle between the two sets of management and that is why we have some lawyers fronting for withdrawal of the petitions and applications while others want them to proceed.

93. Our view is that proceeding with the consolidated petitions will not render the intended appeal nugatory, while the staying of the proceedings will cause unnecessary delays and backlog. There is no compelling argument to justify the stay of these proceedings pending the hearing and determination of the intended appeal. The application therefore partially succeeds and the following orders are issued:

- (i) Leave granted to the applicants to file appeal within 30 days.**
- (ii) The prayer for the leave to operate as stay of the proceedings is declined.**
- (iii) Costs in the cause.**

Orders accordingly.

**Delivered virtually, signed and dated this 18<sup>th</sup> day of February, 2022 in open court at Milimani, Nairobi.**

**H. I. Ong'udi     A. Mrima     J. Nyagah**

**Presiding Judge     Judge     Judge**