



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAIROBI)

(CORAM: OUKO (P), SICHALE, OTIENO-ODEK JJA)

CIVIL APPLICATION No. 137 of 2017 (UR 100/2017)

BETWEEN

KIRU TEA FACTORY

COMPANY LTDAPPELLANT/APPLICANT

AND

STEPHEN MAINA GITHIGA.....1ST RESPONDENT

ESTON GAKUNGU GIKOREH.....2nd RESPONDENT

PETER KINYUA3RD RESPONDENT

FRANCIS MACHARIA MARK4TH RESPONDENT

LERIONKA TIAMAPATI5TH RESPONDENT

PETER KANYAGO6TH RESPONDENT

PHILIP NGETICH7TH RESPONDENT

JOSEPH WAKIMANI.....8TH RESPONDENT

ERASTS GAKUYA10TH RESPONDENT

BENSON NGARI11TH RESPONDENT

ALFRED NJAGI12TH RESPONDENT

ARTHUR RIMBERIA.....13TH RESPONDENT

J. KIPNGETICH14TH RESPONDENT

JOHN F. KENNEDY OMANGA.....15TH RESPONDENT

(Being an application for Contempt of Court of Appeal Orders issued by (Hon. GBM Kariuki, Sichale & Kantai, JJA) on 6th December 2017

in

RULING OF THE COURT

1. This is an application to name and cite the respondents for contempt of court. In the case of **Director General of Fair Trading vs. Smith Concrete: Re Supply of Ready Mixed Concrete, [1992] QB 212** it was held that “**for a person to be found in contempt of a court order it is necessary to show that he knew of the relevant order and with that knowledge he intended to do the act which amounted to a breach of the court order; that it is not necessary to show that he intended to disobey the court order.**” In **Jihan Freighters Ltd vs. Hardware & General Stores Ltd [2015] eKLR**; and in **A.B. & Another v. R. B. [2016] eKLR**, this Court emphasized that to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing.

2. The Applicant, ***Kiru Tea Factory Company Limited (KTFC)***, by Notice of Motion dated 13th December 2017 has moved this Court to cite and find the respondents in contempt of this Court’s Orders issued on 6th December 2017 by GBM Kariuki, Sichale & Kantai JJ.A at Nyeri.

3. At the outset, we remind ourselves the application for our consideration is the Notice of Motion dated 13th December 2017 and not the amended Notice of Motion dated 25th May 2018. The latter which had twenty-seven (27) Respondents was struck out for having been filed without leave of this Court.

4. In the instant Motion, the applicant has prayed for the respondents to be committed to six months in jail for contempt. The respondents are either Directors of ***Kenya Tea Development Agency Holding Company Limited (KTDA)*** or Directors of ***Kenya Tea Development Agency Management Services Limited*** or Directors of ***Kiru Tea Factory Company Limited (KTFC)***.

5. The grounds in support of the application for contempt are that the respondents convened and held an unlawful and parallel Annual General Meeting (AGM) for KTFC on 14th December 2017 in contumacious and contemptuous disregard of the injunctive *status quo* order issued by this Court on 6th December 2017 in these terms;

“Status quo be and is hereby maintained as of today pending our ruling to be delivered as stated. No elections will be held until the ruling is delivered.” (Our emphasis)

6. The applicant avers that the *status quo* obtaining and that was to be maintained was the *status quo* of KTFC Limited as at 6th December 2017 pending the ruling by the Court which was finally delivered on 20th December 2017. The applicants urged that the *status quo* preserved by the Court was to the effect that no elections to change the membership of the Board of Directors of KTFC Limited was to be held pending delivery of the ruling and no AGM or any meeting of the Company was to be convened with the agenda to change membership or composition of the Board of Directors or the holder of office of Company Secretary.

7. The applicant contends the following respondents were served with the above order but disobeyed it by doing the following acts:

(a) *Despite two advocates for KTDA, namely Messrs Benson Millimo and Teddy Ochieng, being present in Court on 6th December 2017 when the status quo order was issued, the respondents convened an AGM of Kiru Tea Factory Company on 14th December 2017.*

(b) *The orders made on 6th December 2017 was served upon the respondents by e-mail as follows:*

(i) *E-mail sent to Mr. Joseph Wakimani, a Director of KTDA at jwakinami@ktdateas.com and jmwakimani@yahoo.com at 2.27 pm on 6th December 2017.*

(ii) *E-mail sent to Mr. Erastus Gakuya, a Director of KTDA at egakuya@ktdateas.com at 2.27 pm on 6th December 2017.*

(iii) *E-mail sent to Mr. Francis Mark, a Director of KTDA and a co-opted Director of KTFC at fmark@ktdateas.com at 2.27 pm on 6th December 2017.*

(iv) *E-mail sent to Benson Ngari, a Director of KTDA at bngari@ktdateas.com and jmwakimani@yahoo.com at 2.27 pm on 6th December 2017.*

(v) *E-mail sent to Mr. Alfred Njagi, a Director of KTDA at anjagi@ktdateas.com at 2.27 pm on 6th December 2017.*

(vi) *On 6th December 2017, Mr. Nzuki Musyoki a licensed process server served upon the Chief Executive Officer (CEO) of KTDA Mr. S. L. Tiampati and Dr. John F. Kennedy Omanga a hard copy of the Order which they both retained a copy thereof but declined to acknowledge service by signing on the return copy.*

(vii) *That all the respondents had knowledge of the injunctive orders issued by this Court on 6th December 2017.*

(viii) That the respondents through Dr. John Kennedy Omanga, former Company Secretary for KTFC organized the AGM scheduled for 14th December 2017.

(ix) That John Kennedy Omanga having ceased to be the Company Secretary for KTFC lost all donated powers of conducting elections for Kiru Tea Farmers Company under Clause 118 of its Memorandum and Articles of Association; that the said Dr. John Kennedy Omanga illegally convened the AGM on 14th December 2017.

(x) That by letter dated 8th December 2017, the said Dr. John Kennedy Omanga not being the duly authorized Company Secretary and in total contempt and violation of the Order of 6th December 2017, illegally issued a Notice calling for a meeting of the Board of Directors of KTFC Limited.

(xi) That on 9th December 2017, Mr. Stephen Maina Githiga and Mr. Eston Gakungu Gikoreh convened a public rally in Kiriaini electoral area and stated the AGM scheduled for 14th December 2017 will proceed as scheduled despite this Court's order of 6th December 2017.

(xii) That by Circular dated 11th December 2017, the Corporate Affairs Department of KTDA issued a circular to all shareholders of KTFC announcing that "the AGM for KTFC scheduled for 14th December 2017 shall proceed as scheduled and that the Court of Appeal sitting in Nairobi on 6th December 2017 did not stop the scheduled meeting of 14th December 2017..."

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; that the Mr. Kirundi once again without authority instructed his own advocates, Messrs Kithinji Marete & Co. Advocates to file **Nyeri Civil Application No. 132 of 2017** before this Court, which application is the foundation of the present contempt application; and that **Mr. Kirundi** has now converted himself to 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.

9. Without prejudice to the legal representation issue, the respondents contend the AGM held on 14th December 2017 did not conduct any elections; that whereas the order issued on 6th December 2017 restrained the Board of Directors from conducting elections, there was no order restraining the Company from holding Board Meetings or convening an AGM so long as elections were not held. Learned counsel Mr. Regeru submitted that in obedience and in total compliance with the orders issued on 6th December 2017, the Circular from KTDA Corporate Affairs Department did not schedule any election for the position of Director of KTFC; this is evidenced by the express statement in the Circular which stated "**the Buying Centre Committee elections for Kiambuthia and Mioro electoral areas were suspended awaiting the Ruling of the Court of Appeal on 22nd December 2017.**"

10. Of significance to this application, **Dr. Omanga** in his replying affidavit at paragraph 10 thereof states that he has refrained from responding to the alleged contempt application until this Court has rendered itself on the jurisdictional issue as to whether the firm of Kithinji Marete & Co. Advocates and whether **Mr. Kirundi** had authority to act for KTFC.

11. It is further deposed in the replying affidavit of Dr. Omanga that since Kenya Tea Development Agency Holdings Limited (KTDA Holdings) is an independent legal person and not party to the instant proceedings, this Court should bar either party from prosecuting any issue against KTDA Holdings; that KTDA Management Services Limited is the Managing Agent of KTFC and is not a party to these proceedings and cannot respond to the contempt application.

12. **Dr. Omanga** further deposes that he is aware KTFC held its Annual General Meeting on 14th December 2017; that neither KTDA Holdings nor KTDA Management Services are shareholders of KTFC Limited.; that his removal from office of Company Secretary by Board Resolution of 11th September 2017 was recalled and revoked at a Board meeting held on 4th October 2017; that as at 6th December 2017 when the interim injunctive orders was issued, he was the Company Secretary for KTFC Limited and thus empowered to convene and attend the AGM held on 14th December 2017.

13. Learned counsel **Mr. Millimo** for the 5th to 15th respondents in opposing the application cited submitted that a *status quo* order cannot form basis for conviction for contempt of court as it is too vague and subject to multiple interpretation 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; that to allow the instant prayers would be tantamount to determining the proceedings now pending before the High Court before the same are heard and concluded on merit and that this would be a breach of the rules of natural justice.

14. On the legal framework conferring jurisdiction on this Court to punish for contempt, it was urged the proceedings giving rise to the application was initiated when legal framework conferring jurisdiction to this Court to punish for contempt was the **Contempt of Court Act No. 46 of 2016**; that **Section 38 of the Contempt of Court Act** deleted **Section 5 of the Judicature Act (Cap 8, Laws of Kenya)** which hitherto provided the legal foundation for punishment for contempt of court by this Court. **Section 5 of the Judicature Act** provides as follows:

"5. 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 such power shall extend to upholding the authority and dignity of subordinate courts.

15. The **Contempt of Court Act** was declared be inconsistent with the Constitution by the High Court in the case of **Kenya Human Rights Commission -v- Attorney General & Another** [2018] eKLR, **Constitutional Petition No. 87 of 2017** on the ground that there was no public participation in its enactment as required by **Articles 10 and 118(b) of the Constitution** and that it encroaches on the independence of the Judiciary.

16. In this matter, it has been urged the Contempt of Court Act having been declared unconstitutional and Section 5 of the Judicature Act having been deleted by the Contempt of Court Act, this Court has no legal framework to punish for contempt in this matter.

17. We wish to dispose of this argument at this stage. By **Section 38, Section 5** of the **Judicature Act** was repealed by deleting it. Similarly **Sections 39 and 40** of the **Contempt of Court Act** repealed by deleting **Sections 36 and 35** of the **High Court (Organization and Administration) Act** and the **Court of Appeal (Organization and Administration) Act**, respectively. It must be stressed that once an Act has been declared unconstitutional, it is void *ab initio* as if it had never been enacted. Consequently, the Contempt of Court Act having been declared unconstitutional, it follows that anything done under or pursuant to it is a nullity and for that reason **Section 5 of the Judicature Act, section 36 of the High Court (Organization and Administration) Act** as well as **section 35 of the Court of Appeal (Organization and Administration) Act** were never deleted and remain in force as the legal framework for this Court to punish for contempt. (See Supreme Court decision in **Mary Wambui Munene - v - Peter Gichuki King'ara & 2 others** [2014] eKLR).

18. **Section 35(1) of the Court of Appeal (Organization and Administration) Act**, which was the applicable law at the time the alleged contempt was committed, provides in pertinent part that;

“35. (1) Subject to the provisions of any other law, the Court. Court shall have power to punish for contempt.

(2) A person who, in the face of the Court —

(a)

(b)or

(c) without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence”.

This provision, for our purpose is subject to **Section 5 of the Judicature Act** which grants this Court jurisdiction to punish for contempt. In exercising jurisdiction, both the High Court and this Court are enjoined by **Section 5** of the Judicature Act to ascertain the applicable law of contempt in the High Court of Justice in England at the time an application is brought before our courts. (See **Christine Wangari Gachege v Elizabeth Wanjiru Evans, and 11 others**, Civil Application No. 33 of 2013; see also **In the Matter of Application by Gurbanresh Singh and Sons Ltd**, Misc. Civil Case No.50 of 1983).

19. Having disposed of that question we turn to consider the merits of the application. We have considered the rival submission and factual contestations by the applicant and respondents as to whether contempt of court was committed. We remind ourselves of the standard of proof as stated in **Mutitika vs. Baharini Farm Limited** [1985] KLR 229, 234 that:

“... 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.”

20. In the often cited case of **Wildlife Lodges Ltd vs. County Council of Narok & Anor.** (2005) 2 EA. 344, it was expressed that there is an unqualified obligation of every person against, or in respect of whom, an order is made by court of competent jurisdiction, to obey it unless and until that order is discharged.

Rule 81.8.—(1) of the Civil Procedure (Amendment No.2) Rules 2012 of England provides that;

“In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it—

(a)by being present when the judgment or order was given or made; or

(b)by being notified of its terms by telephone, email or otherwise”.

In **Basil Criticos vs. Attorney General & 2 Others** [2016] eKLR (Lenaola, J. as he then was) confirmed the paradigm shift saying:

“.....the law has changed. And as it stands today knowledge supersedes personal service. where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.” **Shimmers Plaza Ltd vs. National Bank of Kenya Limited** (2015) eKLR also restated the law as follows:

“As per rule 81.8, dispensation of service on the basis of notice or knowledge of the terms of an order will only apply to a court judgment or order requiring a person not to do an act, that is, a prohibitory order. The dispensation of service under

rule 81.8 (1) is subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is satisfied if the person or his agent can be said to either have been **present** when the judgment or order was given or made; or was **notified** of its terms by **telephone, email or otherwise**. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to willfulness and mala fides disobedience.” (Our emphasis)

21. In the instant matter, the orders issued by this Court on 6th December 2017 was explicit that *status quo* was to be maintained and no elections were to be held. The question that must follow is: did the respondents have knowledge of this Court’s order and did they willfully disobey it? (See **Republic vs. Ahmad Abolfathi Mohammed & another [2018] eKLR**). It is not disputed that an AGM was held on 14th December 2017.

22. The respondents contend that the order of 6th December 2017 did not restrain or prohibit the convening of an AGM so long as no elections were held. On 6th December 2017 when this Court issued the status quo order, no AGM had been held during the meeting. Consequently, the holding of an AGM on 14th December 2017 contravened the *status quo* order of 6th December 2017. The *status quo* order meant that, pending the ruling of this Court slated for 22nd December 2017, no meeting or resolution whatsoever was to be passed altering the Board membership and Company Secretary for KTFC as existed on 6th December 2017. The AGM held on 14th December 2017 purported to alter the *status quo* by incorporating two new Directors for KTFC Limited namely **Mr. Michael Kamotho** and **Mr. John Waweru Wandurua**. This alteration of *status quo* was part of the specific act that was prohibited by the order made on 6th December 2017.

23. Accordingly, we find that whoever convened, presided over and attended the AGM held on 14th December 2017 violated the *status quo* order of this Court issued on 6th December 2017 if the person had knowledge of that order.

24. In **Nyamogo & another vs. Kenya Posts and Telecommunications (1999-194) EA at 464** it was expressed that service of a Court order on the company does not constitute service on the directors and personal service on each officer is required to be effected by law. In the instant matter, the respondents were served by electronic mail or personal service and no evidence by way of affidavit or otherwise was tendered to rebut service of the Court Order. In **Halsbury’s Laws of England (4th Ed) Vol 9 on p 37 para 61** it is stated:

“61. Necessity of personal service. As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question ...”

Where the order is made against a company, the order may only be enforced against an officer of the company if this particular officer has been served personally with a copy of the order ...”

25. The cases of **Mutitika v Baharini Farm (1982-88) I KAR 863**, **Hadkinson v Hadkinson (1952) All ER 567**, **Johnson v Grant (1923) SC 7890** and **Christine Wangari Gachege v Elizabeth Wanjiru Evans, and 11 others, Civil Application No. 33 of 2013**, are all to the effect that a person who knowing of the existence of an order of injunction or stay but willfully does an act that violates the terms of the injunction or stay is liable to be committed for contempt; that a party directed by an order of court to do or to refrain from doing any act must comply with the direction until it is discharged, irrespective of that party’s view or opinion over the order; that contempt of court proceedings are intended not to protect personal dignity of the individual judge or the private rights of any litigant, but are meant to protect the fundamental supremacy of the law and the rule of law; and that leave to commence contempt of court proceedings is no longer required in view of the 1999 Civil Procedure Rules of England and the Civil Procedure (Amendment No.2) Rules, 2012 (of England).

26. We now consider who among the respondents had knowledge of the order of 6th December 2017 and whether they knowingly and contemptuously acted in flagrant disobedience of the same. From paragraphs 3 to 9 of the affidavit deposited by **Mr. Kirundi** dated 13th December 2017, on the face of the Notice of Motion of even date filed in support of the instant application and from the affidavit of service of Mr. Nzuki Musyoki dated 6th December 2017, we are satisfied that the following respondents had knowledge of the order made on 6th December 2017.

- i. Mr. S.L. Tiampati, the CEO of KTDA5th Respondent
(who was served through process server Mr. Nzuki Musyoki.)
- ii. Mr. Joseph Wakimani.....8th Respondent
- iii. Mr. Erastus Gakuya10th Respondent
- iv. Mr. Francis Macharia Mark.....4th Respondent
- v. Mr. Benson Ngari.....11th Respondent
- vi. Mr. Alfred Njagi.....12th Respondent

vii. Dr. John F. Kennedy Omanga.....15th Respondent

(who was served through process server Mr. Nzuki Musyoki.)

This evidence is not challenged.

27. Although there is no evidence of service of the court order upon the following respondents, there is sufficient affidavit evidence that they had knowledge of the order. They are:

(i) Mr. Stephen Maina Githiga1st Respondent, not served but had knowledge of the order as he convened a public rally on 9th December 2017 at Kiriaini where he referred to the Court order and insisted that the AGM slated for 14th December 2017 would proceed despite the order.

(ii) Mr. Eston Gakungu Gikoreh..... 2nd Respondent, not served but had knowledge of the order as he attended a public rally on 9th December 2017 at Kiriaini where he referred to the Court order and repeated that the AGM slated for 14th December 2017 would proceed despite the order.

(iii) Mr. Peter Kinyua 3rd Respondent also had knowledge of the order as he attended a public rally on 9th December 2017 at Kiriaini and like the two above made reference to the Court order.

28. Indeed, we find the respondents do not *per se* deny knowledge of the order of 6th December 2017; their argument is they did not violate it and they did not conduct any election. In **Peter K. Yego & Others vs. Pauline Nekesa Kode Nakuru HCCC No. 194 of 2004** the court recognizing that since contempt of court is a quasi criminal transgression, it must be proved that one has actually disobeyed the court order. An applicant in application for contempt must prove to the required standard that the respondent is guilty of contempt. In **Hadkinson v Hadkinson [1952] 2 All ER 567**, it was affirmed that it is an unqualified obligation of every person against, or in respect of whom, an order had been made by a court of competent jurisdiction, to obey it unless and until that order was discharged.

29. Comparatively, in the South African case of **Kristen Carla Burchell vs. Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005** it was held that in order to succeed in civil contempt proceedings, the applicant has to prove: (i) the terms of the order, (ii) knowledge of these terms by the Respondent, and (iii) failure by the respondent to comply with the terms of the order. Upon proof of these requirements, the presence of willfulness and bad faith on the part of the respondent would normally be inferred, but the respondent could rebut this inference by contrary proof on a balance of probabilities

30. Guided by the foregoing judicial decisions, the next issue for our consideration is what each of the above directors did that amounted to violation of the order made on 6th December 2017. In **Alken Connections Limited vs. Safaricom Limited & 2 others [2013] eKLR**, it was stated that where committal for contempt is sought for breach of an injunction, it must be made clear what each defendant is alleged to have done and whether it was in breach of the injunctive order.

31. From the affidavit evidence on record, we are satisfied that, despite having knowledge of the order, the following acts were undertaken by the named individuals in contemptuous violation of the court order of 6th December 2017.

1) Mr. Stephen Maina Githiga and Mr. Eston Gakungu Gikoreh convened a public rally on 9th December 2017 in Kiriaini and stated that the AGM scheduled for 14th December 2017 would proceed as scheduled despite the Order of this court issued on 6th December 2017.

2) That on Saturday 9th December 2017, Mr. Stephen Maina Githiga and Eston Gakungu Gikoreh convened a public rally at Kiriaini electoral area stating that the AGM of 14th December would go on as scheduled. (See paragraph 55 of the supporting affidavit of Mr. Geoffrey Chege Kirundi dated 13th December 2017).

3) Dr. John Kennedy Omanga planned, convened and attended the unlawful AGM held on 14th December 2017 in violation of the status quo order. Despite knowledge of the status quo order, he convened a meeting of the Board of Directors of Kiru Tea Factory by letter dated 8th December 2017.

4) Mr. Stephen Maina Githiga planned, convened, attended and presided over the unlawful AGM held on 14th December 2017 in violation of the status quo order.

5) Mr. S. L. Tiampati being the Chief Executive Officer of KTDA having been served with the injunctive order failed to prevent issuance of the Circular dated 11th December 2017 by the KTDA Corporate Affairs Department which circular stated that the AGM of KTFC scheduled for 14th December would proceed as planned. His inaction is a tacit positive approval for the officers under him to commit contempt.

6) Mr. Eston Gakunju Gikoreh despite having knowledge of the injunctive orders attended the unlawful AGM held on 14th December 2017.

7) Francis Macharia Mark despite being served by email with the injunctive orders attended the unlawful AGM held on 14th December 2017 where the persons present were notified of the Court of Appeal decision (paragraphs 1, 2, 3 and 4) but despite

knowledge of the order they proceeded with the meeting. (See his signature in resolutions of the Board of Kiru Tea Factory Company Ltd held on 14th December, 2017.)

8) Mr. Peter Kinyua attended the unlawful AGM held on 14th December 2017 where the persons present were notified of the Court of Appeal decision (paragraphs 1, 2, 3 and 4) but despite knowledge of the order they proceeded with the meeting. (See his signature in resolutions of the Board of Kiru Tea Factory Company Ltd held on 14th December, 2017.)

9) All the respondents who attended the unlawful AGM held on 14th December 2017 violated the injunctive orders issued on 6th December 2017 by altering the status quo that had been preserved by this Court. More specifically, they altered the status quo by convening and holding the meeting, by purporting to pass a resolution removing the Company Secretary Mr. Bernard Kiragu who was in office as at 6th December 2017 and incorporating two new members to the Board of Directors of KTFC, Mr. Michael Kamotho and Mr. John Waweru Wandurua.

32. We note that the respondents to be cited for contempt are directors of a corporate entity. The legal issue is whether directors of a company are personally liable for contempt committed by and in the name of the company. In Katsuri Limited vs. Kapurchand Deepar Shah [2016] eKLR, the High Court (Mativo, J.) in considering contempt by a director of a company observed that:

“The alleged contemnor is a director of the company. He is not a party to these proceedings in his personal capacity. The company is a legal entity. The proper procedure for the applicant was first to apply to lift the corporate veil then go for the directors in their personal capacities.”

33. In Re Supply of Ready Mixed Concrete [1992] 1 QB 213 (the Smith case), Lord Donaldson of Lymington MR held that a company was not liable for contempt if its employee were subject to an express prohibition not to do a particular action; if the company had adopted reasonable compliance systems to monitor employee activities and the employee did not have ostensible authority to do what he did. Provided there was an express prohibition and the employee had no ostensible authority, the company would not be liable for contempt.

34. Comparatively, the Supreme Court of Queensland in Beech Ovens Pty Ltd vs. Style Global Pty Ltd [2015] QDC 153 found the defendant company guilty of contempt of court when its officers failed to comply with a court order. In finding the company guilty of contempt the court expressed itself thus:

“Each respondent was aware of the court’s orders on or about 18 February 2015 and failed to comply with them. If it is necessary to find that the failure was ‘willful’ and not just ‘casual, or accidental or unintentional’ then I do. (See Lade & Co. Pty Ltd –v- Black [2006] 2 Qd R 531 Jerrard JA at pg. 26)

It was not incumbent on the solicitors for Beech Ovens to provide..... advice as to the meaning of the orders. Indeed, it was not for the parties to agree on the meaning of orders. The respondents were deliberately absent when the orders were made. If there was uncertainty in the mind of the respondents, they were to address the court. That was the time for the application now brought to set vary or aside the orders.”

35. Likewise in S. Hemalatha vs. P.Murali Vittal and Others reported in (2014 (5) MLJ 81) the High Court of Judicature at Madras in India at Special Page 82 and 83, it was observed and held as follows:-

“Nowhere in the counter affidavit, has it been stated by him that he had no knowledge of the status-quo order passed by this Court and his stand is that he has not received the notice in the application even though he entered appearance in the suit. It is not in dispute that the first respondent sold his 1/5th undivided share in the property. Court not inclined to accept the contentions of first respondent that the first respondent has no knowledge of the status quo order passed by this Court. There was ample evidence in the records to say that the first respondent/second defendant knows the status quo order passed by this Court.

1st Respondent impliedly made it clear that as it is an order of status-quo, he can sell the property, as it is not an order of injunction. Even assuming for argument sake, that the first respondent is entitled to have such an opinion, still he should have the wisdom and courtesy to approach this Court to interpret the order of status quo as to whether it will amount to prohibiting him from selling his 1/5th undivided share in the property. Therefore, first respondent/ second defendant has willfully violated the order passed by this Court, the facts of which came to his knowledge after he entered appearance in the suit.”

36. This Court in Industrial Designing & Researching Institute vs. Lagoon Development Limited [2015] eKLR quoting from the UK decision in Castanho vs. Brown & Root (UK) Limited & another (1981) 1 All ER 143 expressed that it has inherent power to prevent a party from obtaining by use of court process a collateral advantage which it would be unjust for him to retain.

37. In Eliud Muturi Mwangi (Practising) in the name and style of Muturi & Company Advocates) vs. LSG Lufthansa Services Europa/Africa GMBH & another [2015] eKLR, it was held thus:

“[18] The law is that any person who has committed an act of contempt of court is liable for indictment. Therefore, even third parties who are not parties in a suit may be committed for contempt of court and classic examples are contempt on the face of the court, contempt by officers of a company or corporation, contempt by persons who are claiming under the title of a party in a suit or as assigns or successors in title.”

38. In the instant case, the Chief Executive Officer (CEO) of KTDA **Mr. S. L. Tiampati** was personally served with the orders in question on 6th December 2017. Service upon him and his knowledge of the order has not been controverted. Subsequent to the service, the Corporate Affairs Department of KTDA issued a circular dated 11th December 2017 indicating the AGM for KTFC was to proceed as scheduled on 14th December 2017. In his capacity as the CEO, **Mr. Tiampati** has not tendered any evidence to demonstrate he took steps to ensure that the Board of KTDA and the Corporate Affairs Department complied with the order served upon him. It is that failure that constitutes contempt of court.

39. In relation to the convening of the AGM held on 14th December 2017, we find that **Dr. John F. Kennedy Omanga**, **Mr. Stephen Maina Githiga** and **Mr. Eston Gakungu Gikoreh** had personal knowledge of the *status quo* orders and actively participated in convening and attending the prohibited AGM held on 14th December 2017. Despite being served with the injunctive orders **Mr. Francis Macharia Mark** attended the illegal AGM.

40. On record, there is no evidence that **Mr. Peter Kinyua** was served with the Court order issued on 6th December 2017. However, he attended the unlawful meeting held on 14th December 2017 where the order of *status quo* was read and he understood the same. Accordingly, we cite and find him guilty of contempt.

41. Upon our evaluation of the affidavit evidence on record, we find nothing to suggest that the following eight (8) respondents did anything in violation of the court order issued on 6th December 2017.

- 1) Peter Kanyago.....6th Respondent
- 2) Phillip Ngetich7th Respondent
- 3) Joseph Wakimani 8th Respondent
- 4) Erastus Gakuya10th Respondent, although served by email there is no evidence he did any act in violation of the court order.
- 5) Benson Ngari11th Respondent
- 6) Alfred Njagi.....12th Respondent
- 7) Arthur Rimberia13th Respondent
- 8) J. Kipngetich 14th Respondent

Conversely, in our analysis, the Notice of Motion dated 13th December 2017 has merit and is partially successful. We hereby cite and find the following respondents guilty of contempt of court for disobeying the orders of this Court issued on 6th December 2017.

- 1) Mr. Stepehn Maina Githiga1st Respondent
- 2) Mr. Eston Gakunju Gikoreh.....2nd Respondent
- 3) Mr. Peter Kinyua.....3rd Respondent
- 4) Mr. Francis Macharia Mark.....4th Respondent
- 5) Mr. Lerioka Tiampati5th Respondent
- 6) Dr. John F. Kennedy Omanga.....15th Respondent

42. The final order of this Court is that we find the six above guilty of contempt of court for disobeying the *status quo* order issued by this Court on 6th December 2017. We order that the six to present themselves before this Court on 22nd March 2019 for mitigation and sentencing. It is so ordered.

Dated and delivered at Nairobi this 22nd day of February, 2019

W. OUKO (P)

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR