



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 LTD .....APPELLANT/RESPONDENT

AND

STEPHEN MAINA GITHIGA .....1<sup>ST</sup> RESPONDENT

ESTON GAKUNGU GIKOREH .....2<sup>nd</sup> RESPONDENT/APPLICANT

PETER KINYUA.....3<sup>RD</sup> RESPONDENT

FRANCIS MACHARIA MARK .....<sup>TH</sup> RESPONDENT

LERIONKA TIMAPATI.....5<sup>TH</sup> RESPONDENT

PETER KANYAGO.....6<sup>TH</sup> RESPONDENT

PHILIP NGETICH.....7<sup>TH</sup> RESPNDENT

JOSEPH WAKIMANI.....8<sup>TH</sup> RESPONDENT

ERASUS GAKUYA.....9<sup>TH</sup> RESPONDENT

BENSON NGARI .....10<sup>TH</sup> RESPNDENT

ALFRED NJAGI .....11<sup>TH</sup> RESPONDENT

ARTHUR NJAGI .....12<sup>TH</sup> RESPONDENT

J. KIPNGETICH .....13<sup>TH</sup> RESPONDENT

JOHN F. KENNEDY OMANGA .....14<sup>TH</sup> RESPONDENT

*(Being an application for the striking out the Amended Notice of Motion dated 28<sup>th</sup> May 2018, Notice of Motion dated 13<sup>th</sup> December 2017 together with all further affidavits filed by Geoffrey Chege Kirundi*

*in*

*Nyeri C. Appl Nos. 132 & Nyeri C. Appl. No. 133 of 2017)*

## **RULING OF THE COURT**

1. **Eston Gakungu Gikoreh**, the 2<sup>nd</sup> respondent, filed a Notice of Motion dated 3<sup>rd</sup> August 2018 seeking orders from this Court to strike out the Notice of Motion dated 13<sup>th</sup> December 2017 and the Amended Notice of Motion dated 28<sup>th</sup> May 2018 both filed by the law firm of Kithinji Marete & Co. Advocates. An additional prayer is to strike out all the Further Affidavits filed in the Motion deposed by Mr. Geoffrey Chege Kirundi variously dated 21<sup>st</sup> December 2017, 16<sup>th</sup> April 2018, 28<sup>th</sup> May 2018 and 3<sup>rd</sup> August 2018.

2. The ground in support of the application to strike out the Notice of Motion dated 13<sup>th</sup> December 2017 is that the said Motion was drawn and filed without authority of the Board of Directors of **Kiru Tea Factory Company** (KTFC) and filed by a law firm of Kithinji Marete & Co. Advocates who were not instructed by and or appointed by the legitimate Board of KTFC to represent the said Company in these proceedings.

3. The ground in support of the application to strike out the Amended Notice of Motion dated 28<sup>th</sup> May 2018 is the Amended Notice of Motion filed without leave of this Court and drawn and filed without authorization by the Board of KTFC and filed by a law firm not appointed or authorized by KTFC to draw or file the same.

4. The ground for striking out all Further Affidavits deposed by **Mr. Geoffrey Chege Kirundi** is that the r Affidavits dated 21<sup>st</sup> December 2017, 16<sup>th</sup> April 2018, 28<sup>th</sup> May 2018 and 3<sup>rd</sup> August 2018 were filed without leave of this Court and the same are not properly on record.

5. The contested facts in this matter is that a dispute has arisen between various members of the Board of Directors of **Kiru Tea Factory Company** (KTFC) and its Company Secretary; two factions exist with each group competing to control the affairs of the Company. Allegedly, one faction, led by Mr. Geoffrey Chege Kirundi moved this Court by Notice of Motion in Nyeri Civil Application No. 133 of 2013 seeking orders to stop the holding of a parallel Annual General Meeting (AGM) of the Company convened by the opposing faction led by **Mr. Stephen Maina Githiga**. The Motion was heard on 6<sup>th</sup> December 2017 and this Court upon hearing the parties issued the following injunctive interim orders:

**“Upon hearing learned counsel in this Motion and in the Motion in Civil Application No. 133 of 2013, we are unable to deliver a reasoned ruling right away as we have other appeals to deal with today. We shall deliver a ruling on Friday 22/12/2017 at 9.00 am. Considering the nature of the prayers sought we invoke sections 3A and 3B of the Appellate Jurisdiction Act and order that status quo be and is hereby maintained as of today pending our ruling to be delivered as stated. No elections will be held until the ruling is delivered. (Emphasis supplied)**

6. Notwithstanding the injunctive orders issued on 6<sup>th</sup> December 2017, an Annual General Meeting (AGM) of the Company was held on 14<sup>th</sup> December 2017. Anticipating the AGM of 14<sup>th</sup> December 2013, the faction led by **Mr. Geoffrey Chege Kirundi** filed in this Court a Notice of Motion dated 13<sup>th</sup> December 2017 being an application to cite and commit, among others the faction led by **Mr. Stephen Maina Githiga** for contempt of court for violation of the status quo order issued on 6<sup>th</sup> December 2017. An Amended Notice of Motion for contempt application was filed without leave of this Court on 28<sup>th</sup> May 2018. The Amended Motion is supported by an affidavit of even date and Further Affidavits deposed by the said **Mr. Geoffrey Chege Kirundi** dated 21<sup>st</sup> December 2017, 16<sup>th</sup> April 2018, 28<sup>th</sup> May 2018 and 3<sup>rd</sup> August 2018.

7. At the AGM held on 14<sup>th</sup> December 2017, a resolution was passed appointing the firm of Regeru & Co. Advocates to represent KTFC Limited in this litigation. Prior to and before the AGM, the firm of Kithinji Marete & Co. Advocates represented the KTFC.

8. It serves to note that each of the two law firms were appointed by a different faction of the feuding Board of Directors of the Company. It is in this context that each faction contends the pleadings filed by the other was drawn and filed without authorization of the Board and filed by an unauthorized law firm and hence the institution of this application.

9. The application has three main facets. First, an application to strike out the original Notice of Motion dated 13<sup>th</sup> December 2017; second, an application to strike out the Amended Notice of Motion dated 25<sup>th</sup> May 2018; and third, an application to strike out the Further Affidavits deposed by **Mr. Geoffrey Chege Kirundi** variously dated 21<sup>st</sup> December 2017, 16<sup>th</sup> April 2018, 28<sup>th</sup> May 2018 and 3<sup>rd</sup> August 2018.

10. The application to strike out the original Notice of Motion dated 13<sup>th</sup> December 2017 is intertwined with the issue of legal representation of KTFC Limited. The substratum of the application to strike out the Motion dated 13<sup>th</sup> December 2017 is that it was filed by a law firm of Kithinji Marete & Co. Advocates which firm was not authorized to draw and file the same. The determination of which law firm is authorized to represent KTFC is the subject matter of our ruling in the Notice of Motion dated 29<sup>th</sup> May 2018 seeking Review and or Rescission of the Orders made by this Court on 11<sup>th</sup> May 2018. Accordingly, the prayer to strike out the Notice of Motion dated 13<sup>th</sup> December 2017 shall be determined in our Ruling on the Review application.

11. In this Ruling, we consider the application to strike out the Amended Notice of Motion dated 25<sup>th</sup> May 2018 as well as the prayer to strike out all Further Affidavits filed in the matter as deposed by **Mr. Geoffrey Chege Kirundi**.

12. It is not in dispute that the Amended Notice of Motion dated 25<sup>th</sup> May 2018 was filed without leave of this Court. It is also not in dispute that the Further Affidavits deposed by **Mr. Geoffrey Chege Kirundi** and those dated 21<sup>st</sup> December 2017, 16<sup>th</sup> April 2018, 28<sup>th</sup> May 2018 and 3<sup>rd</sup> August 2018 were also filed without leave of this Court. The contestation is whether the Amended Notice of Motion and the Further

Affidavits are properly on record.

13. At the hearing of this application for striking out, learned counsel **Mr. Njoroge Regeru** appeared for the applicant while Senior Counsel **Mr. Paul Muite** and **Mr. Kithinji Marete** appeared for the respondents. Learned counsel Mr. **Waweru Gatonye**, **Benson Millimo** and **Teddy E. Ochieng** made submissions in support of the application to strike out.

14. Conversely, the opposing counsel submitted the subject matter of the Amended Notice of Motion is contempt of court; that in contempt applications, no leave of court is required and as such, the amended Notice of Motion dated 25<sup>th</sup> May 2018 and all the Further Affidavits are properly on record. Counsel referred to dicta in **Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR** where it was stated:

**“Before we conclude, we would like to state that contrary to the averment by the respondent herein that the application is bad in law for lack of leave to institute contempt of court proceedings, under the new Civil Procedure Rules of England (2012) which as stated earlier still apply in respect of contempt of court proceedings in this country, leave of the court before institution of an application such as this is no longer necessary”**

15. Likewise, counsel cited dicta in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others**, - Civil Application No. 233 of 2007 where this Court expressed:

**“We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the Second Supplement to the 2012 White Book that no leave is required before bringing an application, like the one before us, for committal for contempt relating to breach of this court’s order.”**

16. In determining this application, we have considered the contents of the replying affidavit deposited by **Mr. Stephen Maina Githiga** on 22<sup>nd</sup> August 2018 as well as the replying affidavit of **Eston Gakungu Gikoreh** sworn on 20<sup>th</sup> August 2018. We have also considered the various replying affidavits deposited by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> respondents. The core and gist of the replying affidavits, particularly those deposited by **Mr. Stephen Maina Githiga**, is that the amended Notice of Motion is not properly before this Court as they were filed in blatant disregard of the Resolutions of the Board of Directors of KTFC passed on 27<sup>th</sup> November 2017 and 14<sup>th</sup> December 2017 where KTFC disowned the firm of Kithinji Marete & Co. Advocates.

17. It is a question of law whether the amended Notice of Motion and the further affidavits are properly on record. The factual contestations as deposited in the affidavits filed in support of the application to strike out the amended Motion are prima facie not relevant to the question of law in this matter.

18. Unless expressly provided for in law, a party who wishes to amend his pleadings may do so with leave of the court. In **The Institute for Social Accountability & Another vs. Parliament of Kenya & Two Others HCCP No 71 of 2013 [2014] eKLR** it was stated as follows:

**“[17] The issue of amendment of pleadings is not novel and has been the subject of numerous court decisions, the common denominator being that as a general principle, courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. See generally Eastern Bakery v Castelino (1958) EA 461 ; Ochieng and Others v First National Bank Of Chicago CA Civil Appeal Number 149 of 1991, Kenyatta National Hospital v Kenya Commercial Bank Ltd & Another [2003] 2 EA.”**

19. In **Boniface Mutinda Kabaka vs. David Mutua Kamonde Katua & 51 others [2018] eKLR**, the trial judge expressed:

**“28. ....Having filed the Amended Defence and Counter- claim without the leave of the court, I find that the Amended Defence and Counter-claim dated 10<sup>th</sup> May, 2016 and filed on the same day is a nullity.”**

20. In this matter, **Rule 44** of the Rules of this Court provides as follows:

**“Application for leave to amend**

**44 (1) Whenever a formal application is made to the Court for leave to amend any document, the amendment for which leave is sought shall be set out in writing and, if practicable, lodged with the Registrar and served on the respondent before the hearing of the application or, if that is not practicable, handed to the Court and to the respondent at the time of the hearing.**

**(2) Where the Court gives leave for the amendment of any document, whether on a formal or informal application, the amendment shall be made or an amended version of the document be lodged within such time as the Court when giving leave may specify and if no time is specified then within forty-eight hours of the giving of leave and on failure to comply with the requirements of this sub-rule, the leave so give shall determine. ”**

21. **Rule 44** require leave of this Court to be obtained before any document can be amended. The dicta in **Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR** is correct that no leave is required to institute contempt of court proceedings. In the instant matter, the filing of the Notice of Motion dated 13<sup>th</sup> December 2017 being an application for contempt did not require leave of this Court. However, the Notice of Motion dated 13<sup>th</sup> December 2017 having been filed, any amendment thereto require leave of this Court. Taking into account the Notice of Motion dated 13<sup>th</sup> December 2017 was amended without leave and the amended Motion also filed without

leave, it follows the amended Notice of Motion dated 25<sup>th</sup> May 2018 is not properly on record and we hereby order it to be struck out.

22. We now consider whether the Further Affidavits deposited by **Mr. Geoffrey Chege Kirundi** filed in support of the amended Notice of Motion are properly on record. In the Uganda case of **Samuel Mayanja vs. Uganda Revenue Authority, HCT – 00 – CC – MC – 0017 of 2005** (unreported) the trial judge stated *inter alia* that:

**“Where the Applicant wants to file a further affidavit, he ought in my view, to seek the leave of the Court; otherwise the proceedings may turn simply into unregulated game of ‘ping pong’. As the affidavit was filed without leave of the Court, and it was objected to by the Respondent, I shall not have regard to the same.”**

23. In **Ariho Emmanuel & another vs. Centenary Rural Development Bank Limited & 2 others**, Uganda HCCC No. 14 of 2016, the trial judge expressed as follows:

**“The Amended pleadings were without leave of Court filed on the 10<sup>th</sup>/06/2016 which is clearly beyond the 14 days allowed under the Rule. The Amended Complaint and Chamber Summons are thus incorrectly on the Court record and are hereby struck off the record as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.”**

24. The common thread from the decisions cited above is that where leave of court is required, any pleading filed without leave is a nullity and liable to be struck out.

25. In the instant matter, the Further Affidavits deposited by Mr. **Geoffrey Chege Kirundi** variously dated 21<sup>st</sup> December 2017, 16<sup>th</sup> April 2018, 28<sup>th</sup> May 2018 and 3<sup>rd</sup> August 2018 were filed without leave of this Court.

26. **Rule 43** of the Rules of this Court stipulate

**“Every formal application to the Court shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts. An applicant may, with the leave of a judge or with the consent of the other party, lodge one or more supplementary affidavits and application for such leave may be made informally.”**

27. We hereby re-affirm the decision in **Shimmers Plaza** and **Christine Wangari Cases** (supra) and reiterate that, to institute contempt proceedings leave of court is not required. However, we state that leave must be obtained to amend any pleadings filed subsequent to institution of the contempt application. Taking into account that the amended notice of motion and the Further Affidavits deposited to by **Mr. Geoffrey Chege Kirundi** were filed without leave of this Court, we find that the said affidavits contravene **Rule 43** and **44** of the Rules of this Court and we hereby strike them out.

28. In the final analysis, we find that the Notice of Motion dated 3<sup>rd</sup> August 2018 is partially meritorious and we make the following orders:

**(i) The Amended Notice of Motion dated 25<sup>th</sup> May 2018 and the supporting affidavit thereof be and is hereby struck off the record as being incompetent for having been amended and filed without leave of this Court.**

**(ii) The Further Affidavits deposited by Mr. Geoffrey Chege Kirundi and variously dated 21<sup>st</sup> December 2017, 22<sup>nd</sup> January 2018; 16<sup>th</sup> April 2018, 28<sup>th</sup> May 2018 and 3<sup>rd</sup> August 2018 be and are hereby struck off the record as having been filed without leave of this Court.**

**(iii) The Notice of Motion dated 13<sup>th</sup> December 2017 and the supporting affidavit attached thereto be and is hereby held to be properly on record as its filing did not require leave of this Court.**

**(iv) Each party to bear its/his costs in this application.**

Dated and delivered at Nairobi this 22<sup>nd</sup> 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**