



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO (P), SICHALE, OTIENO-ODEK. JJ.A)

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

BETWEEN

KIRU TEA FACTORY COMPANY LTD.....APPLICANT

AND

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

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

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

FRANCIS MACHARIA MARK.....4<sup>TH</sup> RESPONDENT

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

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

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

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

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

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

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 Review and/or Rescission of the Orders of this Court made in the Ruling delivered on 11<sup>th</sup> May 2018 by (Makhandia, M'Inoti and Sichale. JJ.A)*

*in*

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

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## RULING OF THE COURT

1. This is an application for review of the Ruling of this Court delivered on 11<sup>th</sup> May 2018. The ground for review is that this Court erroneously dismissed without a hearing, the applicant's Notice of Motion dated 31<sup>st</sup> January 2018 seeking to withdraw contempt proceedings filed in this matter. A further ground is that the fundamental preliminary issue raised in the said application regarding legal representation of the applicant company was left undetermined.

2. In background facts, there are two factions of the Board of Directors of **Kiru Tea Factory Company Limited (KTFC)** who are feuding over the control of KTFC. Contempt proceedings have been filed by one faction against the other. Each faction has appointed a different law firm to represent the Company in contempt proceedings pending before this Court. One faction seeks to withdraw the contempt proceedings while the other determined to prosecute it and to cite the other for contempt.

3. On 1<sup>st</sup> February 2018, the firm of Njoroge Regeru & Co. Advocates filed a Notice of Change of Advocates dated 31<sup>st</sup> January 2018 allegedly taking over the conduct of contempt proceedings from the firm of Kithinji Marete & Co. Advocates. On the same day, the firm of Njoroge Regeru & Co. Advocates, by Notice of Motion dated 31<sup>st</sup> January 2018 filed application to withdraw contempt proceedings lodged against the respondents that was filed by the firm of Kithinji Marete & Co. Advocates.

4. A preliminary issue was raised by the parties as to which law firm was competent and had instructions to represent KTFC. The parties submitted that the preliminary issue affect the jurisdiction of this Court to determine the application filed by which advocate is properly on record.

5. The applicants' Notice of Motion dated 31<sup>st</sup> January 2018 was heard on 26<sup>th</sup> April 2018. Both law firms made submission and each claimed to have instructions to represent KTFC. Upon hearing counsel from both law firms, this Court delivered its Ruling on 11<sup>th</sup> May 2018. In various excerpts of the Ruling, it was expressed as follows:

**“The crisp issue determined by this ruling is whether the applicant, Kiru Tea Factory Company Limited, is represented in these proceedings by Messrs Kithinji Marete & Co. Advocates or by Messrs Njoroge Regeru & Co. Advocates.**

**Having considered the matter, the order that best commends itself to us in the circumstances of this case, is to decline to allow the applicant to withdraw the application for contempt of court where it is alleged that the primary purposes of the withdrawal is to shield and validate blatant violation of the orders of this Court. The contempt of court proceedings will determine not only whether the respondents are in contempt of court as alleged, but also more importantly, which Directors are lawfully in office and competent to instruct advocates on behalf of the applicant. We are afraid that allowing the withdrawal of the application at this stage will pre-empt all those issues. That we should not do.**

**Accordingly, we dismiss the application dated 31<sup>st</sup> January 2018.”**

6. Aggrieved by the Ruling, the firm of Njoroge Regeru & Co. Advocates filed the instant Notice of Motion for Review dated 29<sup>th</sup> May 2018 seeking two orders namely:

*(a) this Court to give the requisite direction as to the determination of the issue of legal representation of Kiru Tea Factory Company Limited by either the law firm of Kithinji Marete & Co. Advocates or the law firm of Njoroge Regeru & Co. Advocates and*

*(b) this Court be pleased to review and set aside the Order dismissing the Notice of Motion dated 31<sup>st</sup> May 2018.*

7. At the hearing of this application, learned counsel Mr. Njoroge Regeru appeared for the applicant company. Learned Senior Counsel Paul Muite and Mr. Kithinji Marete appeared for the 1<sup>st</sup> respondent and also allegedly appeared for the applicant company. A replying affidavit deposed by Mr. Geoffrey Chege Kirundi dated 26<sup>th</sup> June 2018 was filed in opposition to the instant application.

8. Learned counsel Mr. Regeru rehashed the grounds in support of the Motion for review as stated on the face of the application and in the supporting affidavit deposed by Mr. Stephen Maina Githiga dated 28<sup>th</sup> May 2018. It was submitted that the ruling delivered on 11<sup>th</sup> May 2018 did not determine the issue of legal representation of the applicant company, with the result that the issue of legal representation is still alive. It will continue to hamper the prompt and expeditious disposal of pending matters in these proceedings. Counsel submitted that during the hearing of the Notice of Motion dated 31<sup>st</sup> January 2018 on 26<sup>th</sup> April 2018, the respective advocates of the parties were not heard on the withdrawal application and the determination and dismissal of the said application was irregular and unprocedural.

9. Mr. Regeru submitted that parties have a constitutional right to be heard in the contested issue of withdrawal of the contempt application; that the Court in dismissing the application without affording the parties' Advocates an opportunity to be heard erred; that it was not open to the learned Justices to consider the withdrawal application *suo moto* and proceed to dismiss the same without hearing the parties' Advocates.

10. It was submitted the instant application has been brought without delay and there is sufficient ground for review of the Ruling delivered

on 11<sup>th</sup> May 2018; and that the review application is not calculated to forestall the contempt proceedings.

11. Learned counsel Mr. Milimo and Mr. Waweru Gatonye in supporting the application for review submitted that as early as 27<sup>th</sup> November 2017, the Board of Directors of KTFC had passed a resolution under seal disowning grant of any instructions to the law firm of Kithinji Marete & Co. Advocates and their lead counsel Mr. Paul Muite; the Company resolution was brought to the attention of the law firm of Kithinji Marete & Co. Advocates who in flagrant disregard thereof and without authority proceeded to file pleadings on behalf of KTFC. Counsel urged that allowing an uninstructed and an unauthorized advocate to act for KTFC that has expressly revoked the alleged authority would be prejudicial to the applicants.

12. Learned counsel Mr. Marete opposed the application for review and or rescission. Basing his submission on the replying affidavit deposed by Mr. Geoffrey Chege Kirundi dated 26<sup>th</sup> June 2018, counsel urged that this Court's ruling delivered on 11<sup>th</sup> May 2018 stated the issue of legal representation would be considered and determined during the hearing of the contempt of court application. It was submitted the review application is an abuse of court process and is a contumacious defiance of the injunctive orders issued by this Court. Counsel submitted that **Mr. Stephen Maina Githiga** ceased to be a Director of KTFC in compliance with the decision of Mbogholi Msagha, J. delivered in HCCC No. 106 of 2017 **Stephen Maina Githiga vs. Kiru TFC; Stepehn Maina Githiga vs. Kiru Tea Factory Company Limited, Geoffrey Chege Kirundi, and KTDA-MS & KTDA – HL**).

13. We have considered the grounds in support of the application for review, the replying affidavits filed in opposition and support thereto, submissions by counsel and all authorities cited by the parties.

14. This Court has very restricted power to review or rescind its decisions. Where the power to review exists, it is to enable the Court correct an error or mistake so as to give effect to what was the intention of the Court at the time when the error or mistake was made.

15. In Kenya, this Court's decision in **Nguruman Limited vs. Shompole Group Ranch & Another [2014] eKLR** espouse the restricted power of this Court to review its decisions.

16. In the ruling dated 11<sup>th</sup> May 2018, this Court correctly stated that the crisp issue on legal representation of KTFC Limited was dependent on which Directors were lawfully in office and competent to instruct advocates on behalf of the Company. To appreciate the contestation on legal representation of KTFC, it is noteworthy that on 6<sup>th</sup> December 2017, this Court made the following order injuncting the holding of elections for Directors of **KTFC**:

**“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)

17. The injunctive part of the order was:

**“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.”**

We note that the *status quo* to be maintained was the status of the Board of Directors and company secretary of **KTFC** Limited as of 6<sup>th</sup> December 2017. The then existing *status quo* is a question of fact that require evidence to prove. In this contestation, the applicant as represented by the firm of Njoroge Regeru & Co. Advocates submitted the *status quo* as at 6<sup>th</sup> December 2017 is that the Chairman of the Board was not **Mr. Geoffrey Chege Kirundi** but **Mr. Stephen Maina Githiga**. Conversely, the respondents contend that as at 6<sup>th</sup> December 2017, the *status quo* is the Board of Directors of the Company under the Chairmanship of **Mr. Geoffrey Chege Kirundi**.

18. The composition of the Board of Directors of **KTFC** and its Chairperson as at 6<sup>th</sup> December 2017 is critical in determining the lawful and competent Board that could instruct either of the two law firms to represent the applicant Company in these proceedings.

19. The applicants as represented by the law firm of Njoroge Regeru & Co. Advocates contend that pursuant to the Resolution of the KTFC passed at the Annual General Meeting held on 14<sup>th</sup> December 2017, the following nine (9) individuals are the bona fide Directors of KTFC as confirmed by Mr. Josiah Ndegwa, the Factory Unit Manager of KTC.

- (1) Mr. Stephen M. Githiga .....Chairman
- (2) Mr. Eston Gakungu Gikoreh .....Vice Chairman
- (3) Mr. Geoffrey C. Kirundi (HSC) .....Director
- (4) Mr. Michalel M. Kamotho ..... Director

- (5) Mr. John W. Wandurua .....Director
- (6) Mr. Francis Macharia Mark .....Director
- (7) Mr. Peter M. Kinyua ..... Director
- (8) Mr. John N. Kariri ..... Director
- (9) Ms Florence W. Wanderi .....Director

20. The applicants further contend that one of the key Resolutions passed at the AGM held on 14<sup>th</sup> December 2017 was that “any and all purported previous resolutions and or authority granting Messrs. **Geoffrey Chege Kirundi**, Paul **K. Muita and Kithinji Marete & Co. Advocates** mandate to plead, depone, appear, act and or represent KTFC in court proceedings is hereby revoked in its entirety.” A further resolution passed was that Dr. John F. Kennedy Omanga was reinstated as the Company Secretary for KTFC.

21. The opposing respondents contend the AGM held on 14<sup>th</sup> December 2017 was in contravention of the *status quo* order of this Court and consequently, the *bona fide* of members of the Board of KTFC as at 6<sup>th</sup> December 2017 were the following:

- (1) Mr. Geoffrey Chege Kirundi – Chairman
- (2) Mr. John Ngaii Kariri
- (3) Mr. David Gatu Waithaka.
- (4) Mr. Eston Gakungu Gikoreh
- (5) Mr. Joseph Maina Gathonjia
- (6) Ms. Florence Wacuka Wanderi
- (7) M. Stephen Maina Githiga
- (8) Mr. Francis M. Mark
- (9) Mr. Peter Kinyua.

22. The respondents contend that by a resolution of the Board of Directors under the Chairmanship of Mr. Chege Kirundi passed on 11<sup>th</sup> September 2017, the appointment of Dr. John F. Kennedy Omanga as the Company Secretary to KTFC was revoked and he was replaced by Mr. Bernard Kiragu Kimani as the Company Secretary.

23. As per the Articles of Association of KTFC, a Director of the Board can only be elected at an Annual General Meeting. The Court order prohibited election of Directors to the Board of KFTC. It is not disputed that an AGM for the Company was held on 14<sup>th</sup> December 2017. In our considered view, the AGM held on 14<sup>th</sup> December 2017 contravened the status quo order of this Court issued on 6<sup>th</sup> December 2017. The said AGM of 14<sup>th</sup> December 2017 was null and void and any resolution passed thereat is equally null and void.

24. It follows the resolution passed on 14<sup>th</sup> December 2017 appointing the law firm of Njoroge Regeru & Co. Advocates to represent KTFC is null and void. The legal consequence is that all pleadings, notice of change of advocate, the application to withdraw the contempt Notice of Motion dated 13<sup>th</sup> December 2017 were all drawn and filed by a law firm that was not authorized in a lawfully convened AGM.

25. The upshot is that we find the Notice of Motion dated 29<sup>th</sup> May 2018 has merit and accordingly review the Ruling and Orders of this Court made on 11<sup>th</sup> May 2018 and make the following declarations and orders:

***(a) The AGM held on 14<sup>th</sup> December 2017 was an unlawful meeting held in violation of the status quo order issued by this Court on 6<sup>th</sup> December 2017 and consequently, the law firm of Njoroge Regeru & Co. Advocates was not appointed by resolution of a lawfully convened Annual General Meeting of Kiru Tea Factory Company.***

***(b) All pleadings filed by the law firm of Njoroge Regeru & Co. Advocates in relation to contempt proceedings are not properly on record and are hereby struck out for having been filed by a law firm authorized by a resolution passed at an illegal AGM meeting held on 14<sup>th</sup> December 2017.***

***(c) We hereby review the Ruling of this Court delivered on 11<sup>th</sup> May 2018 and substitute the Order dismissing the Notice of Motion application dated 31<sup>st</sup> January 2018 with an Order striking out the said Notice of Motion as incompetent for having been drawn and filed by an unauthorized firm of advocates.***

(d) As at 6<sup>th</sup> December 2017 when the interim orders of status quo were issued by this Court, the lawful Board of Directors of Kiru Tea Factory Company Limited comprised the following:

- i. Mr. Geoffrey Chege Kirundi .....Chairman
- ii. Mr. John Ngaii Kariri ..... Director
- iii. Mr. David Gatu Waithaka ..... Director
- iv. Mr. Eston Gakungu Gikoreh.....Director
- v. Mr. Joseph Maina Gathonjia ..... Director
- vi. Ms. Florence Wacuka Wanderi..... Director
- vii. M. Stephen Maina Githiga ..... Director
- viii. Mr. Francis M. Mark..... Director
- ix. Mr. Peter Kinyua..... Director

(e) As at 6<sup>th</sup> December 2017 when the interim orders were issued by this Court, the law firm that was legally and duly instructed to represent KTFC in these proceedings is the firm of Kithinji Marete & Co. Advocates.

(f) For avoidance of doubt, this Ruling relates only to legal representation of Kiru Tea Factory Company Limited by the firm of Kithinji Marete & Co. Advocates in the contempt proceedings arising from the status quo order issued on 6<sup>th</sup> December, 2017 and the enforcement of any orders made in relation thereto.

(g) Each party is to bear its/her/his own 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**