



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & SICHALE J.J.A)

CIVIL APPEAL NO. 9 OF 2018

BETWEEN

GEOFFREY CHEGE KIRUNDI.....1ST APPELLANT

JOHN NGAII KARIRI.....2ND APPELLANT

BERNARD KIRAGU KIMANI.....3RD APPELLANT

AND

STEPHEN MAINA GITHIGA.....1ST RESPONDENT

FRANCIS M. MARK.....2ND RESPONDENT

ESTON G. GIKOREH.....3RD RESPONDENT

PETER M. KINYUA.....4TH RESPONDENT

(Being an appeal against the Ruling and Orders of the High Court of Kenya

at Nairobi (Sergon J) delivered on 13th December 2017

in

H.C.C.C No. 230 of 2017)

JUDGMENT OF THE COURT

This is an appeal emanating from the ruling of **Sergon, J** made on **13th December, 2017** following a Notice of Motion dated **16th November, 2017** filed by **Stephen Maina Githiga, Francis M. Mark, Eston G. Gikoreh and Peter M. Kinyua**, the **1st, 2nd, 3rd and 4th** respondents herein. The appellants herein, **Geoffrey Chege Kirundi, John Ngaii Kariri, Christopher Mwangi Kioi and Bernard Kiragu Kimani** were the then respondents.

In the motion, the respondents sought a temporary injunction to restrain the appellants from publishing and circulating the booklets for the Annual General Meeting (AGM), from using the respondents' names and photographs on what the respondents alleged was on the "**false and unauthorized AGM booklet**" and from convening the AGM scheduled for **17th November 2017** or on any other date. On the same day the motion was filed, the respondents obtained *ex parte* orders of injunction restraining the appellants from publishing, circulating the AGM booklet containing their names, photographs, the tea factory's annual reports and financial statements for the year ending **30th June 2017** and from convening and conducting the AGM scheduled on **17th November 2017**. According to the respondents, the orders notwithstanding, the booklets were circulated and the AGM was

convened and conducted on **17th November 2017**. Aggrieved, the respondents took out a motion dated **22nd November 2017** seeking *inter*

alia orders for the appellants to be cited for contempt for breaching the *ex parte* orders issued on **16th November, 2017**.

On **4th December, 2017**, the matter was before **Sergon, J**. At the time, there were three pending applications. The first was the respondents' application dated **16th November, 2017** seeking temporary injunction which was yet to be heard inter partes, the second was the respondents' motion dated **22nd November, 2017** seeking to have the appellants cited for contempt and the third was the appellants' application dated **30th November 2017** seeking the discharge of the *ex parte* orders granted to the respondents on **16th November, 2017**. The learned judge after careful consideration found it prudent to commence with the contempt application and directed that the contempt application be heard first.

In the ensuing ruling delivered on **13th December 2017**, **Sergon J** was satisfied that the appellants were made aware of the existence of the *ex parte* court orders made on **16th November, 2017** and issued on **17th November, 2017** but nevertheless wilfully proceeded to breach the orders. The learned judge thus ordered the appellants **"to appear before this court to show cause why they should not be cited for contempt and to submit facts in mitigation to enable this court mete out the appropriate sentence"**.

Aggrieved, the appellants lodged this appeal on seven (7) grounds of appeal that:

- (i) there was no justiciable matter before the court;
- (ii) the respondents were guilty of material non-disclosure;
- (iii) the AGM was held in observance of the mandatory provisions of
- (iv) the court failed to do equity in granting the orders since the respondents were indolent in moving the court as the matters they complained of had been lawfully and procedurally undertaken long before they moved the court;
- (v) the learned judge erred by usurping the role of the Board of
- (vi) the learned judge failed to take into account all the pertinent facts.

On **6th May, 2019**, the appeal came before us for plenary hearing. Senior counsel, **Hon. P.K Muite** and learned counsel, **Mr. K. Marete**, appeared for the appellants whereas **Mr. J. Ohaga** and **Ms. Njoroge** appeared for the respondents. There was no appearance for the **4th** respondent in spite of service of the hearing notice on **8th April, 2019**.

In their oral and written submissions filed on behalf of the appellants on **7th December 2018**, the appellants urged three (3) main grounds. First and foremost, the appellants submitted that the respondents were part of the Board of Directors of KFTC Ltd and that in their suit, they had failed to plead and demonstrate any cause of action specific to the appellants. It was their contention that if any grievance existed, it should have been brought against the tea factory and not part of the membership of the Board. The appellants urged the court to find that the complaint over the use of names and photographs had mutated into a dispute touching on other corporate entities who were not made parties to the suit. Further, that since the AGM booklets were published by the tea factory on the authority of its board of directors, the contents therein did not belong to the appellants. It was the appellant's position that any perceived grievance should have been addressed to the board and that in actual fact, the publication, circulation and the use of the AGM booklet was part of the court record when the court purported to stop its publication and circulation.

Secondly, the appellants contended that the respondents were guilty of material non-disclosure as they failed to disclose the existence of other pending suits and applications before the Court of Appeal and the High Court directly related to the issues the respondents had raised in their suit. The appellants relied on **Brink's MAT Ltd v Elcomber [1988] 3 All E.R 188** and **Yogesh P. Sukhanandi v State of Gujarat and others (1996) 2 GLR 410** in support of their contention that favourable orders ought not to be granted to a party who is guilty of concealing material information which is well within his/her knowledge. Lastly, it was submitted that personal liability should not have attached for acts done in good faith and in compliance of the provisions of the Companies Act. It was submitted that the board of directors was seized of the company's financial accounts for the year ending **30th June 2017** as early as **4th September 2017** and the same was approved for presentation to the shareholders in accordance to Section 652 of the Companies Act. It was also argued that the contentious AGM was convened according to the provisions of the Company's Act and with the knowledge and participation of the full board of directors. In any event, it was argued, the publication, circulation and use of the booklets was done before the order was made and was in compliance with lawful statutory duty hence the question of contempt could not arise. In conclusion, it was submitted that the appellants knew about the order of the High Court issued on **16th November, 2017** after the AGM had been held on **17th November, 2017**. The court was urged to allow the appeal and set aside the ruling and orders of the High Court made on **13th December 2017**.

On behalf of **Christopher Mwangi Kioi**, appearing as an interested party, **Mrs Njoroge** supported the appeal and associated herself with **Hon. Muite's** submissions. In his brief written submissions filed on **7th June 2018**, **Mr. Kioi** told the court that the extent of his involvement was in the preparation and filing of the auditor's report on **5th October, 2017**; that he is a victim of boardroom fights between the warring directors; that he did not participate in the publishing or circulation of the booklet; that he was not invited and neither did he participate, in any way, in the AGM convened and conducted on **17th November 2017**. Thus, not being in contempt, he urged the court to vacate the orders issued against him.

Learned counsel, **Mr. Ohaga** on behalf of the respondents opposed the appeal vide their written submissions dated **16th January 2019** which were highlighted during the plenary hearing on **6th May, 2019**. They identified only one issue for resolution: whether the appellants were in contempt of the court order made on **16th November 2017**. The respondents relied on this court's decision of **Shimmers Plaza Ltd v**

National Bank of Kenya Ltd [2015] eKLR which underscores the fact that obedience of court orders is not optional but mandatory. The respondents also relied on the decision of Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2014] eKLR for the proposition that knowledge of the existence of the order is sufficient for purposes of contempt proceedings.

It was the respondent's submissions that the appellants had full knowledge of the court order made on 16th November 2017. Further that the appellants did not deny having knowledge of the court order of 16th November 2017 as deposed by the respondents as they did not refute the evidence of the process server who deposed that he served the order on the appellants in the morning of 17th November 2017. To the respondents it was clear that the appellants wilfully breached an unambiguous court order. It was the respondents' view that the appellants cannot justify blatant disregard of a court order by hiding behind statutory provisions. The respondents asserted that the appellants were obligated to obey the court orders even if they believed them to be void or irregular and that the only remedy available to the appellants would have been to apply for the order to be varied or discharged. For this proposition the respondents relied on Clarke & others v Chadburn & others [1985] 1 All ER (PC) 211; Isaacs v Robertson [1985] AC 97; Fred Matiang'I, CS Ministry of Interior & Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR which all reiterate the binding nature of court orders, despite a party's dissatisfaction with such an order.

Relying on Econet Wireless Kenya Ltd v Minister for Information and Communications of Kenya & another [2005] eKLR the respondents submitted that contempt proceedings will often suspend other pending proceedings until the matter is determined. To this extent, the learned judge was right in suspending the other applications until the contempt application was dealt with. **Mr. Ohaga** reiterated that whereas the appellants appeared to challenge the orders of 16th November, 2017, the memorandum of appeal dated 16th January, 2018 was at variance with the orders sought. The respondents urged the court to dismiss the appeal with costs.

We have anxiously considered the record, the written and oral submissions, the authorities cited and the law. It is undisputed fact that wrangles besetting KTF have been many and long running. Disputes arose among the directors as to the running and/or management of the Tea Factory. Such disputes included the appointment of **Bernard Kiragu Kimani** (the 3rd appellant herein) as the new Company Secretary and the revocation of the appointment of the previous Company Secretary. Two factions of directors emerged from the disputes culminating in the filing of multiple suits, some of which are still pending before the High Court while others are on appeal. Of interest to us is the suit filed by the respondents in the High Court on 16th November 2017 seeking orders of permanent injunction restraining the appellants from publishing, circulating and using what the respondents referred to as an "unauthorised AGM booklet" containing the financial statements of the tea factory for the year ended 30th June 2017. The respondents also sought a permanent injunction restraining the appellants from convening and conducting the AGM slated for 17th December, 2017. The appellants' main complaint is that on 4th December, 2017, when the matter came up for hearing of the contempt application, there were 3 applications pending hearing. As stated above, these were:

- (i) the respondents' application for injunctive orders filed on 16th November, 2017;
- (ii) the contempt application;
- (iii) the appellants' application to have the orders issued on 17th & 24th November, 2017 discharged.

The learned judge, (**Sergon, J**) directed that the contempt application be heard first. It is not lost to us that the orders complained of by the appellants had been issued *ex parte*. In Shiv Lal, Sub-Divisional ... vs. Ram Babu Dwivedi Son of Sri Puttu 2006 (2) AWC 1272 (DB - All), the court stated:

"We, therefore, hold that the High Court should have first taken up the stay matter without any threat to the respondents in the writ case of being, punished for contempt. Only after disposing it off, the other case should have been taken up. It is further significant to note that the respondents before the High Court were raising a serious objection disputing the claim of the writ petitioner. Therefore, an order in the nature of mandatory direction could not have been justified unless the court was in a position to consider the objections and record a finding, prima facie in nature, in favour of the writ petitioner. Besides challenging the claim on merits, the respondent is entitled to raise a plea of no maintainability of a writ application filed for the purpose of executing a decree..."

We do not want to decide any of the controversies between the parties at this stage except holding that the orders passed in the contempt proceeding were not justified, being pre-mature, and must, therefore, be entirely ignored. The High Court should first take up the stay matter in the writ case and dispose it of by an appropriate order. Only thereafter it shall proceed to consider whether the State and its authorities could be accused of being guilty of having committed contempt of court."

By parity of reasoning, we too do not wish to decide on any of the controversies between the parties herein. As to whether there was a justiciable matter before the judge, as to whether there was material non-disclosure on the part of the respondents, as to whether personal liability could attach to the appellants and as to whether the appellants were in breach of the orders of 16th December, 2017, are matters to be determined by the High Court during an inter partes hearing. To this extent, when faced with a scenario such as the one before **Sergon, J**, it is fair and just to hear the application for stay before hearing the contempt application or at the very least, to hear them back to back, more so when the orders complained of emanated from an *ex parte* order.

We say so because there is a possibility of the contempt application being heard and action taken against the contemnors before the court has had the benefit/opportunity of hearing the applicants application seeking an order for stay and before the injunctive application is heard interpartes. This, in our view is good practice and multiplication of applications with different outcomes. For those reasons, we set aside the order of **Sergon, J** made on 13th December, 2017.

Had the Judge taken into consideration the effects, consequences and outcome of the application he proceeded with, he would have arrived at the same decision like ours. The trial Judge respectfully took a dim view of the consequences or outcome of the contempt application, before

hearing and determining the main application, which gave rise to the contempt application. That would have given the appellants an opportunity to respond to the issues in the other application. To prioritise the contempt application in the place of the other application was in our humble view a gross misdirection.

As stated above, we do not wish at this stage to delve into issues in controversy between all parties save to state that the three pending applications are to be heard and determined back to back before any judge of the High Court, other than **Sergon, J.** Costs of this appeal to the appellants as against the respondents, jointly and severally.

It is so ordered.

Dated & Delivered at Nairobi this 6th day of August, 2019.

P. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR