



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MAKHANDIA, M'INOTI & SICHALE, JJA.

CIVIL APPLICATION NO. 137 OF 2017 (UR 100/2017)

BETWEEN

KIRU TEA FACTORY CO. LTD ..... APPLICANT/APPELLANT

AND

STEPHEN MAINA GITHIGA.....1ST RESPONDENT

ESTON GAKUNGU GIKOREH.....2ND RESPONDENT

PETER KINYUA.....3RD RESPONDENT

FRANCIS MACHARIA MARK.....4TH RESPONDENT

LERIONKA TIAMPATI.....5TH RESPONDENT

PETER KANYAGO.....6TH RESPONDENT

PHILIP NG'ETICH.....7TH RESPONDENT

JOSEPH WAKIMANI..... 8TH RESPONDENT

ERASTUS GAKUYA..... 9TH RESPONDENT

BENSON NGARI..... 10TH RESPONDENT

ALFRED NJAGI..... 11TH RESPONDENT

ARTHUR NJAGI..... 12TH RESPONDENT

J. KIPNG'ETICH..... 13TH RESPONDENT

JOHN F. KENNEDY OMANGA.....14TH RESPONDENT

(Application for contempt of court of the orders of the Court of Appeal issued on 6th December, 2017 by GBM Kariuki, Sichale & ole Kantai, JJA in Nyeri CA Nos. 132 of 2017 (UR 97/2017) & 133 of 2017 (UR 98/2017)

\*\*\*\*\*

RULING OF THE COURT

The crisp issue determined by this ruling is whether *the applicant, Kiiru Tea Factory Company Limited*, is represented in these proceedings by *Messrs. Kithinji Marete & Company Advocates* or by *Messrs. Njoroge Regevu & Company Advocates*. Both law firms claim to have instructions to act for the applicant, with the first firm claiming to have instructions to prosecute an application to commit the 14 respondents

to jail for contempt of court, while the second firm claims to have instructions to take over and terminate that application.

When the matter came before us 26th April 2018, we heard learned counsel on the issue and reserved our ruling to today.

By way of background, on 6th December 2017, this Court sitting at Nyeri, heard consolidated applications for injunction taken out under **rule 5(2)(b)** of the Rules of this Court by the applicant and **Mr. Geoffrey Chege Kirundi**, the Chairman of the applicant, against **Kenya Tea Development Agency Holdings Limited (KTDA-HL)** and **Kenya Tea Development Agency Management Services Limited (KTDA-MS)**. In the applications the applicant and Mr. Kirundi prayed that pending the hearing and determination of its appeal, the Court be pleased to issue an injunction restraining KTDA-HL and KTDA-MS, jointly and severally, from convening or conducting a general meeting of the applicant, nominating or causing the nomination or election of any person to the applicant's Board of Directors or Tea Buying Centre Committees, or otherwise interfering with the applicant's Board, shareholders or employees. They also sought an order restraining KTDA-HL from installing any person in the applicant's Board arising from elections of zone 3 of the applicant's electoral zones.

After hearing counsel for the applicant and Mr. Kirundi, (Messrs. Kithinji Marete & Company Advocates) and counsel for KTDA-HL and KTDA-MS (**Messrs. Millimio Mutho & Company Advocates**), the Court reserved its ruling to 22th December 2017. In the interim the Court issued the following

order:

**“Upon hearing learned counsel in this Motion and in Civil Application 133 of 2017, 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.”**

The Court subsequently delivered the ruling on 20th December 2017 and allowed the orders as prayed in both applications until the hearing and determination of the appeal.

On 13th December 2017, the applicant took out a motion on notice to commit the respondents to jail for alleged contempt of court. The applicant contended that in violation of the order of the Court issued on 6th December 2017, the respondents had scheduled an Annual General Meeting and elections of the applicant on 14th December 2017. In subsequent affidavits sworn on 21st December 2017, 22nd January 2018 and 16th April 2018, Mr. Kirundi deposed that the respondents had, in violation of the order of 6th December 2017, purported to hold elections of two new directors of the applicant on 14th December 2017, purported to elect the **1<sup>st</sup> respondent, Stephen Maina Githiga**, chairman of the applicant in lieu of Mr. Kirundi, and committed other acts in contempt of court.

On 1st February 2018, the applicant filed a **notice of change of advocates** pursuant to **rule 23(1)** of the Rules of this Court instructing Messrs. Njoroge Regeru & Company Advocates in lieu of Kithinji Marete & Company Advocates. On the same day, the new advocates filed an application to withdraw the motion for committal of the respondents for contempt of court. The application was based on the grounds that: the earlier motion was filed without the authority of the applicant's Board; Mr. Kirundi had no authority to plead or depose on behalf of the applicant; Messrs. Kithinji Marete & Company Advocates had no instructions or authority to represent the applicant; and that the applicant had passed a resolution to withdraw the proceedings and was not interested in the litigation. The respondents, represented by **Mr. Waweru Gatonye, Benson Millimo** and **Teddy Ochieng**, learned counsel, supported the applicant's position.

For his part, Mr. Kirundi who maintains he is still the Chairman of the applicant opposed the motion to withdraw the contempt application, contending that the respondents, who were behind the motion and the notice of change of advocates had purported to assume office in breach of an order of this Court and therefore all their actions were null and void. It was against that background and context that we heard counsel for the parties on whether the application for committal of the respondents for contempt of court should be heard or ordered withdrawn.

Mr. Regeru urged us to permit withdrawal of the application because it was filed without authority and in any event it was the applicant's wish to withdraw the same. Counsel submitted that his firm was the one properly on record for the applicant because the applicant had complied with rule 23 of the Rules of this Court regarding filing and service of notice of change of advocates. That notice of change of advocates, it was contended, was also backed by a resolution of applicant, passed on 14th December 2017. He added that the effect of the notice of change of advocates was to replace Messrs. Kithinji Marete & Company Advocates with his law firm as the advocates for the applicant. If the notice of change of advocates aggrieved the said advocates, it was submitted, they were obliged to file a formal application under **rule 42** showing the grounds of their grievance, which they had failed to do. Since Messrs. Kithinji Marete & Company Advocates had failed to file a formal application, we were urged to find that they no longer had any business in the dispute.

Lastly counsel dismissed as a forgery a resolution of the applicant purportedly made on 21st February 2018 ratifying an earlier resolution of 11th September 2017 appointing Messrs. Kithinji Marete & Company Advocates and **Mr. Paul, Muite, SC** to act for it.

Mr. Gatonye supported the motion to withdraw the contempt application on the basis that there was a formal notice of change of advocates properly on record and no aggrieved party had applied to set it aside. He added that there was also a formal resolution of the applicant under seal appointing Messrs. Njoroge Regeru & Company Advocates in lieu of Messrs. Kithinji Marete & Company Advocates and that the said resolution could not be revoked by a resolution that did not bear the applicant's seal.

Mr. Muite, learned SC and Mr. Marete, learned counsel, submitted that the 1st respondent had admitted that the applicant had indeed appointed Messrs. Kithinji Marete & Company Advocates to act for it, but claimed that the appointment was a mistake, which in counsels' view was an afterthought. They contended that only a legitimate Board of the applicant could revoke their appointment and appoint a

different firm of advocates. They added that the Board, which had purportedly appointed Messrs. Njoroge Regeru & Company Advocates to act for the applicant, was not validly in office because it had two purported directors elected in blatant breach of the Court order of 6th December 2017, which had in absolute terms prohibited the holding of any elections of the applicant. They added that the withdrawal of the contempt of court application was calculated to abuse the court process and validate the respondents' violation of the Court order. As regards rule 42, counsel were of the view that it was not mandatory to file a formal application and that they were not precluded from demonstrating that the notice of change of advocates was invalid.

In a short rejoinder Mr. Regeru submitted that the applicant's Board that appointed him was lawfully in office and denied that it had been elected in violation of the Court order.

We have anxiously considered the respective submissions by counsel for the parties. Messrs. Njoroge Regeru & Company Advocates contend that they have been validly appointed by the applicant and instructed to withdraw the application to commit the respondents for contempt of court. They rely on the notice of change of advocates on record, which they contend has not been challenged. They also assert a party's undeniable right to withdraw his application or appeal.

On the other hand, Messrs. Kithinji Marete & Company Advocates submit that the Board of the applicant that purported to appoint Messrs. Regeru & Company Advocates is illegitimate and in office by blatant violation of the Court order dated 6th December 2017, which restrained the holding of any elections of the applicant. They contend that to allow withdrawal of the application will legitimize persons in office illegally and compound the contempt of court, which they allege the respondents have committed.

As of now this Court has not found any party or person guilty of contempt of court. That issue is indeed the subject of the application that one side seeks to withdraw and the other to prosecute. We cannot say more on the issue lest we be perceived as preempting the fair hearing and determination of the pending application. On the other hand, this Court takes very seriously allegations of deliberate violation of its orders. In a ruling delivered barely two months ago in *Dr. Fred Matiang'i v. Miguna Miguna & 4 Others* [2018] eKLR, in an application for stay of execution of orders of the High Court, this Court expressed itself thus:

**“Before we go into a determination of the twin principles for grant of stay, we need to make it clear that as a Court we do not take lightly allegations of contempt of court. No court should. When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.”**

More directly on the point that is raised before us, in *Beijing Industrial Designing & Research Institute v. Lagoon Development Ltd* [2015] eKLR, the respondent purported to withdraw a suit in which an application to commit its directors for contempt of court was pending. The withdrawal of the suit had the effect of terminating the contempt of court application. The High Court allowed the respondent to withdraw the appeal and the appellant appealed to this Court. Allowing the appeal, this Court held that although as a general proposition the right of a party to withdraw or discontinue his suit or claim cannot be questioned, that right is circumscribed where it is alleged that the purpose of the withdrawal is to abuse the court process and make it impossible to uphold the dignity of the court and the supremacy of the law. The Court reasoned that the pending contempt of court proceedings were not a straightforward dispute between the parties but rather a vehicle for upholding and protecting the supremacy of the law, which is a fundamental value of society. Relying on the decision of the House of Lords in *Castanho v. Brown & Root (UK) Ltd & Another* [1981] 1 All ER 143, the Court added that it has inherent power to prevent a party from using its right to withdraw a suit so as to abuse the process of the court or to obtain an unjust advantage.

Having carefully 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 purpose 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 and 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 hereby dismiss the application dated 31st January 2018 seeking withdrawal of the contempt of court application. The costs of the application will abide the outcome of the contempt of court application dated 13th December 2017. It is so ordered.

**Dated and delivered at Nairobi this 11th day of May, 2018**

**ASIKE-MAKHANDIA**

-----

**JUDGE OF APPEAL**

**K. M'INOTI**

-----

**JUDGE OF APPEAL**

**F. SICHALE**

-----

**JUDGE OF APPEAL**

I certify that this is a True copy of the original

**DEPUTY REGISTRAR**