



**Githiga & 4 others v Kiru Tea Factory Company Ltd (Application  
12 of 2019) [2020] KESC 27 (KLR) (4 September 2020) (Ruling)**

*Stephen Maina Githiga & 5 others v Kiru Tea Factory Company Ltd [2020] eKLR*

Neutral citation: [2020] KESC 27 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**APPLICATION 12 OF 2019**

**DK MARAGA, CJ & P, MK IBRAHIM, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ**

**SEPTEMBER 4, 2020**

**BETWEEN**

**STEPHEN MAINA GITHIGA ..... 1<sup>ST</sup> APPLICANT**  
**PETER KINYUA ..... 2<sup>ND</sup> APPLICANT**  
**FRANCIS MACHARIA MARK ..... 3<sup>RD</sup> APPLICANT**  
**LERIONKA TIAMPATI ..... 4<sup>TH</sup> APPLICANT**  
**JOHN F KENNEDY OMANGA ..... 5<sup>TH</sup> APPLICANT**

**AND**

**KIRU TEA FACTORY COMPANY LTD ..... RESPONDENT**

*(Being an application to strike out, the initial substantive Application No.12 of 2019)*

**Whether the Supreme Court would allow the amendment of filed pleadings**

*The application sought stay of further proceedings of the contempt application filed by the respondent and leave to amend their application. The case revolved around whether the Supreme Court would allow the amendment of filed pleadings. The court partially allowed the application, to the extent that the applicants were granted leave to amend the application in the terms of the draft annexed to the application.*

Reported by Chelimo Eunice

**Civil Practice and Procedure** – pleadings – amendment of pleadings – application to amend filed pleadings – whether the Supreme Court would allow amendment of filed documents – when could the Supreme Court allow amendment of filed documents – claim that the purpose of the proposed amendment was to define the real question in controversy – whether the application for amendment would be allowed in the circumstances - Supreme Court Rules, 2020, rule 3(5).



**Company Law** – companies – management of companies – bona fide directors of a company – whether CR 12 was conclusive evidence as to the directors of a company – role of the Registrar of Companies in ascertaining the bona fide directors of a company.

### **Brief facts**

The applicants having been convicted and sentenced for contempt of the Court of Appeal's orders, which orders had maintained the *status quo* and stopped any elections to choose and/or replace the respondent's directors from being conducted, filed the instant application to stay further proceedings of the contempt application filed by the respondent. They also sought leave to amend their application dated April 3, 2019.

### **Issues**

- i. Whether the Supreme Court would allow amendment of filed pleadings.
- ii. Whether CR 12 was conclusive evidence as to the directors of a company.

### **Held**

1. From a perusal of the draft amended application sought to be filed, the applicant sought to stay further proceedings of the contempt application filed by the respondent at the Court of Appeal, pending the determination of the appeal. That was in effect the same prayer sought in the instant application. Taking note of that and considering the nature of the dispute, the court was not inclined to consider the merits of the stay application at the instant stage, as considering it would in effect be an *ex parte* process, a practice that rarely carried the essentials of fairness. The respondent was to be accorded an opportunity to reply after a determination of its legal representation. A duplication, by considering the prayer at the instant juncture and again in the amended application was to be averted.
2. There were developments in the case before the Court of Appeal which would be adequately captured in the amended application as proposed. Rule 3(5) of the Supreme Court Rules gave the Supreme Court inherent power to make such orders, or give such directions as could be necessary for the ends of justice. The purpose of the proposed amendment was to define the real question in controversy. The respondents would have an opportunity to respond to the amendment, thereby addressing any potential prejudice that they would have suffered.
3. The issue of the respondent's legal representation was not being raised for the first time. It was the subject of one of the Court of Appeal rulings delivered on February 22, 2019. Since the contest centered upon the management of the respondent, with different factions in strife to grasp full control on behalf of their respective camps, the court, in its judicial service setting, was mindful not to contribute in the furtherance of a popularity contest between the factions, and had to remain steadfast in the path of fidelity to the law.
4. In order to conclusively determine the question of representation, the *bona fide* directors of the respondent had to be established first. Whereas the CR 12 pointed to the directors of the respondent, the same was inconclusive owing to the disputed position awaiting resolution by the companies' registry.
5. It was necessary to ascertain the respondent's *bona fide* directors for yet more uncertainty arose from the fact that the respondent's board elections of December 14, 2017 had been annulled and no less doubt came from the fact that entirely different agencies had managed the appointment of advocates' firms for the respondent.
6. The remit of the Registrar of Companies to ascertain the *bona fide* directors of the respondent was a lawful and legitimate one, bearing validity under the commercial laws at play. Such a critical public office function was to be accorded the necessary leverage, in accordance with the law.
7. After the respondent transitioned to go under the management of the Kenya Tea Development Agency (Agency) and entering into a management agreement with the Agency assigning its responsibilities, rights and duties to KTDA Management Services Limited, a wholly owned subsidiary of the Agency, the respondent's board could only function through the KTDA Management Services. However,



considering the effect of the Court of Appeal ruling, the situation affirming the incumbent as the chair had not changed, hence his pursuit of the contempt proceedings. The court was constrained to proceed on the basis of the existence of the Court of Appeal ruling. The same not having been reviewed or overturned, as evidenced by the appeal filed before the court, it followed that its full tenor and effect remained in force. The fact that the applicants had been convicted for contempt meant that the *status quo* enacted by the Court of Appeal obtained, to wit, no elections, nor change of directors.

8. It was incumbent upon the parties, and especially on the faction led by the 1<sup>st</sup> applicant, to demonstrate that there had been a change of directors subsequent to the Court of Appeal ruling. Without such proof, the court was not persuaded that they were the *bona fide* officials. Moreover, allowing the 1<sup>st</sup> applicant's faction to appoint its preferred advocates through Agency arrangement would compromise the integrity of the proceedings and of the administration of justice for the actual contest between the parties would not, then, be adequately articulated before the court.

*Application partly allowed with costs ordered to be in the cause.*

#### **Orders**

- i. *Application dated July 2, 2019 partially allowed, to the extent that the applicants were granted leave to amend the application dated April 3, 2019, in the terms of the draft annexed to the application.*
- ii. *Applicants ordered to file and serve the amended application, together with written submissions thereon, within ten (10) days from the date of the decision.*
- iii. *The firm of M/s. Kithinji Marete & Company Advocates was allowed to be on record for the respondent, and not the firm of M/s. Triple OK Law.*
- iv. *The respondent was at liberty to file a response, together with written submissions thereon, within seven days of service of the amended application.*

#### **Citations**

##### **Statutes**

None referred to

##### **Advocates**

None mentioned

## **RULING**

1. Because of the nature of the present application, it is important to set out, in extenso, the gist of the dispute now before us and thereafter determine each outstanding matter sequentially.
2. The initial application was filed as a Notice of Motion dated 3rd April, 2019 and filed on even date. It sought the stay of contempt proceedings against the Applicants then before the Court of Appeal. They, at the time were required to appear before the Appellate Court for mitigation and sentence.
3. Subsequently, Kiru Tea Factory, the Respondent, filed a Notice of Motion dated 3rd May 2019 seeking to strike out the above application.
4. Meanwhile, when the said initial and substantive application was mentioned before the Deputy Registrar on 6th May 2019, an issue arose as regards the legal representation of the Respondent, Kiru Tea Factory. This was fuelled by the fact that on 4th April, 2019, the firm of M/s. Triple OK Law had filed a Notice of Appointment of Advocates as the duly appointed advocates for the Respondent by a resolution made by the Respondent on 1st April, 2019. The firm of M/s. Kithinji Marete & Co. Advocates had at all material times been appearing for the Respondent, hence the dispute on representation. Parties were directed to file submissions on that issue for the Court's determination.



5. During the pendency of the above two applications, the Applicants (alleged contemnors) filed a Notice of Motion dated 2nd July 2019 in which they sought leave to amend their substantive application dated 3rd April, 2019 and stay of further proceedings in the Court of Appeal. By this time, the Court of Appeal had already found the Applicants guilty of contempt of Court and sentenced them to a fine of Kshs. 400, 000/- each, in default thereof, seven (7) months imprisonment. Consequently, the initial application had substantively been overtaken by events, hence the need to amend it. Secondly, there was a further contempt of Court application filed at the Court of Appeal which the Applicants were seeking to stay. For the record, the second contempt application at the Court of Appeal is dated 30th May 2019 and was filed on 31st May 2019.
- 6.
- (6) The second contempt application, for avoidance of doubt, seeks the following orders:
- a) That the Court (COA) cite and hold ALL the Respondents jointly and severally in Contempt of its Orders issued on 20th December 2017 as read with those made on 22nd February, 2019.
  - b) That a Disqualification Order be and is hereby issued against Lerionka Tiampati, John F. Kennedy Omanga, Stephen Maina Githiga, Eston Gakungu Gikorreh, Peter Kinyua and Francis Macharia Mark from holding the position of Director/Officer in Public Company for a maximum of 15 years from conviction on 22nd February, 2019.
  - c) A declaration that the actions carried out by the unlawful Board of Directors comprising of Stephen Maina Githiga, Eston Gakungu Gikorech, Peter Kinyua, Francis Macharia Mark, Michael Muchai Kamotho, John Waweru Wandurua, Yvonne Njoki Ndirangu and Francis Chege Kimara including:
    - a) The withdrawal of the Appellant/Applicant's Notice of Appeal dated 16th November, 2017;
    - b) The illegal and unlawful payments and benefits from the Appellant/Applicant to the 24th to 31st Respondents;
    - c) The amendment and extension of the Management Agreement dated 1st July, 2009 between the Appellant/Applicant and the 1st & 2nd Respondents; and
    - d) The invalid and illegal Board Resolutions signed and executed by the 24th to 31st Respondents are null and void.
  - d) That upon citing and holding the Respondents in contempt [the] Court impose a monetary fine and in addition, a custodial sentence. And a Disqualification Order be issued against all Contemnors from holding the position of Director/Officer in a Public Company for a maximum of 15 years.
  - e) Order directed to the Officer-In-Charge, Kiria-ini Police Station, Mathioya Sub-County to provide security to the lawful Board of the Appellant/Applicant to hold its meeting within Kiru Tea Factory premises.
7. All the above matters were placed before this Court and in a ruling delivered on 29th November 2019 the Court found that "... at this stage, only two applications fall due for disposal". These were the application/issue of representation of the Respondent Company; and the application seeking leave to amend the original application.



8. In that ruling, this Court settled the question of representation ordering thus: “The firm of M/s. Kithinji Marete & Company Advocates is allowed to be on record for the Respondent, and not the firm of M/s. Triple OK Law”. It also partially allowed the application for amendment, granting the Applicants leave to amend their application and the Respondent given leave to file a response to the amended application.
9. With leave, the Applicants proceeded to file their amended Notice of Motion dated 2nd December 2019 on 3rd December 2019.
10. While the Respondent had been granted leave to file a response on the amended Notice of Motion, it nevertheless proceeded and filed a separate Notice of Motion dated 20th December 2019 in which it seeks to expunge some portions of the amended application. The Applicants filed a response to that application vide their Replying Affidavit dated 27th February 2020 and filed 4th March 2020.
11. In conclusion therefore, in Supreme Court Application No.12 of 2019, there are 3 live matters:
  - i) The substantive application which is now the amended application dated 2nd December 2019 seeking stay of the further contempt proceedings at the Court of Appeal.
  - ii) The Notice of Motion dated 20th December 2019 seeking to expunge portions of the amended application.
  - iii) The Notice of Motion dated 3rd May 2019 that seeks to strike out the initial substantive Application No.12 of 2019 for want of jurisdiction.

Related to (iii) above is a Preliminary Objection dated 13th August 2019 filed by Kiru Tea Factory to strike out the Petition of appeal for want of jurisdiction.
12. With the above background in mind, we propose, in this ruling, to deal with the Application dated 20th December 2019 by the Respondent to strike out the application dated 3rd May 2019 as later amended and in a separate ruling, we shall deal with the application dated 2nd December 2019 for stay of the pending contempt proceedings at the Court of Appeal as well as the application dated 20th December 2019 by the Respondent seeking expunging of parts of the application for stay orders aforesaid.

## **B. Submissions of Parties on the Application to Strike Out**

### **The Respondent’s/Applicant’s Submissions**

13. In submissions filed on 24th December 2019, the Respondent’s case is straightforward and it is thus; that the allegations of breach of constitutional provisions in the Petition of Appeal is not enough to bring the whole matter within the purview of Article 163(4)(a) of the Constitution and the Petitioners ought to particularise and demonstrate the particular portions of the Court of Appeal Ruling that show the manner of the alleged violation of the Constitution. In arguing so, they rely on the decision of this Court in Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & another, Supreme Court Petition No.3 of 2012; [2012] eKLR.
14. In addition, they submit that mere allegation that Articles 27(1), 50(1) and 159(2)(6) have been violated would not bring their Petition within the purview of Article 163(4)(a) and on that point, they rely on Nasra Ibrahim Ibren v IEBC & 2 others SC Petition No. 19 of 2018; [2018] KLR as well as Annarita Karimi Njeru v. Republic [1976 – 1980] KLR 1272 as reaffirmed in Mumo Matemu v. Trusted Society for Human Rights Alliance & 5 Others Civil Application No. 29 of 2014; [2014] eKLR.



15. On whether the Petition of Appeal raises a jurisprudential moment, it is the Respondent's submission that, following our decision in *Peter Odiwuor Ngoge v. Francis Ole Kaparo & 5 others* [2010] eKLR, no such moment is apparent and so the Petition is irredeemable and ought to be struck out with costs. And having done so, the initial Motion dated 3rd May 2019 as later amended ought also to be struck out for the same reasons.
16. All the above issues are replicated in the Preliminary Objection dated 13th August 2019.

**(ii) The Petitioners'/Respondents' Submissions**

17. In response, the Petitioners/ Respondents have submitted, firstly, that, applying the admissibility test in Article 163(4)(a) as settled in *Lemanken Aramat v. Harun Meitamei Lempaka & 2 others* Petition No. 5 of 2014; [2014] eKLR, the legal threshold has been met because the issues raised are based on a trajectory of constitutional interpretation and application. Furthermore, because there are serious allegations of grave injustice having been committed by the Court of Appeal, this Court has the jurisdiction to interrogate those allegations being also the custodian of constitutional integrity. They cite *Deynes Muriithi & 4 others v. Law Society of Kenya & another* Civil Application No. 12 of 2015; [2016] eKLR in support of that submission.
18. Secondly, the Petitioners allege that their rights to fair hearing and access to justice under Articles 50 and 48 of the Constitution have been infringed and this Court ought to interrogate that allegation.
19. Lastly, the Petitioners submit that their Petition is live as it is premised on real issues that can only be settled by this Court.

**C. Analysis and Determination**

20. We must from the onset state that the Petitioner's appeal is a unique one. We say so because it is premised on both a concluded contempt application and ruling before the Court of Appeal as well as another pending and yet to be determined contempt application.
21. In effect while there is no judgment on the substantive appeal before the Court of Appeal, one contempt application has been determined, conviction meted out, sentence imposed and the Petitioners are in the place of convicted contemnors. They are awaiting their fate in another contempt application.
22. In that context, does the Petition of appeal raise constitutional issues requiring our attention under Article 163(4)(a) of the Constitution? Our jurisdiction under the said Article has been explained and settled in *Lawrence Nduttu*, as well *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others* SC Petition No. 2 "B" of 2014; [2014] eKLR among other authorities on the subject.
23. We have often stated in that regard that a party invoking Article 163(4) must demonstrate that the issues raised on appeal must have been canvassed in the Superior Courts below, progressing through the normal appellate mechanism so as to reach this Court by way of an appeal. Alternatively, or in addition, the question of constitutional interpretation or application must have taken a constitutional trajectory in the Superior Courts' reasoning in their determination of a contested issue or question.
24. In the present instance, we have stated that the issues before us arise from contempt applications and a ruling of the Court of Appeal in that regard. This is a unique appeal as we have stated because by the conviction and sentence, the matter started and ended at the Court of Appeal. One of the questions we must therefore address at the hearing of the appeal is whether there is a right of appeal to this Court, upon conviction for contempt at the Court of Appeal. The question whether the Petitioners were



granted access to justice under Article 48 of the Constitution and whether they were granted a fair hearing under Article 50 of the Constitution are issues that we must interrogate at the same time.

25. The Petitioners have also raised other specific issues which fall within the purview of their submission that their appeal arises from issues that have taken a constitutional trajectory. These issues would in the larger context require interrogation. They are;
- i) Whether a Court presiding over contempt proceedings has a right to ignore deliberately the responses/defences placed before it by the cited contemnors.
  - ii) Whether a Court hearing a contempt application can revive the original un-amended contempt of court application in chambers, prosecute and convict on the same upon striking out the amended contempt application.
  - iii) Whether a Court in presiding over proceedings which have been heard fully on an amended pleading can upon striking out the amended pleading proceed suo moto to determine the original pleading without invitation and participation of either parties in the proceedings.
  - iv) Whether a Court hearing a contempt of Court application can convict the alleged contemnors without affording them a hearing
  - v) Whether a Court hearing a contempt of Court application can overlook a miscarriage of justice to convict for contempt.
26. In our view, all the above issues raise concern as to the right to a fair hearing if they are found to be true. Therefore, the Appeal before us requires that we must find in favour of the Petitioners and proceed to hear parties on merit and settle the issues we have raised above. The Motion before us is one for dismissal in that event. Similarly, the Preliminary Objection dated 13th August 2019 on jurisdiction must be overruled.
27. On costs, we shall exercise discretion and order that each party should bear its costs of the present application and the Preliminary Objection.

#### **D. Disposition and Orders**

- 28.
- i) The Notice of Motion dated 3rd May 2019 is hereby dismissed.
  - ii) The Applicant/Respondent's Preliminary Objection dated 13th August 2019 is hereby overruled.
  - iii) Each Party shall bear its costs.

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF SEPTEMBER, 2020.**

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**D. K. MARAGA**

**CHIEF JUSTICE & PRESIDENT JUSTICE OF THE SUPREME COURT**

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**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

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**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR,**  
**SUPREME COURT OF KENYA**

