



REPUBLIC OF KENYA



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**Kirima v Ruhangi & 8 others; Kirima & 4 others (Interested Parties) (Civil Appeal 350 of 2019) [2024] KECA 1754 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1754 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 350 OF 2019  
DK MUSINGA, SG KAIRU & JM MATIVO, JJA  
DECEMBER 6, 2024**

**BETWEEN**

**TERESIA WAIRIMU KIRIMA ..... APPELLANT**

**AND**

**JOHN PETER KAMAU RUHANGI ..... 1<sup>ST</sup> RESPONDENT**

**JOHN K GAKURE ..... 2<sup>ND</sup> RESPONDENT**

**M J METHU ..... 3<sup>RD</sup> RESPONDENT**

**JOSEPH K MUTHAMBURE ..... 4<sup>TH</sup> RESPONDENT**

**JOSEPH K KIRIGWI ..... 5<sup>TH</sup> RESPONDENT**

**LAZARUS WWAIRAGU & OTHERS ..... 6<sup>TH</sup> RESPONDENT**

**KENDA INVESTMENTS LIMITED ..... 7<sup>TH</sup> RESPONDENT**

**WANAJU KIRIMA ..... 8<sup>TH</sup> RESPONDENT**

**GODFREY KIBUTHU ..... 9<sup>TH</sup> RESPONDENT**

**AND**

**ESTATE OF GERISHON KIRIMA ..... INTERESTED PARTY**

**SUSAN WANGARI KIRIMA ..... INTERESTED PARTY**

**MARGARET WANJIRU KIRIMA ..... INTERESTED PARTY**

**RUTH WANJA KIRIMA ..... INTERESTED PARTY**

**BISHOP JANE KIRIMA ..... INTERESTED PARTY**

*(Being an appeal against the Order of the High Court of Kenya at Nairobi  
(Sewe, J.) made on the 27th of March 2019 in HCCC No. 529 of 2011)*



## JUDGMENT

1. This is an appeal arising from the Order of the High Court of Kenya at Nairobi (Sewe, J.), made on the 27<sup>th</sup> of March 2019.
2. The dispute culminating in this appeal revolves around the running of the affairs of a limited liability company known as Kenda Investments Limited (hereinafter referred to as “the Company”). The parties herein are either directors, existing members or legal representatives to some of the original members of the Company. The genesis of the court dispute between the parties herein can be traced to a suit which was filed at the Milimani High Court Commercial Division, to wit, Civil Suit No. 529 of 2011 by the 1<sup>st</sup> to 6<sup>th</sup> respondents herein against the Company and its existing directors as of then known as Wanjau Kirima (8<sup>th</sup> respondent) and Godfrey Kibuthu (9<sup>th</sup> respondent). The suit was commenced by way of a Complaint dated 23<sup>rd</sup> November 2011.
3. It is apparent from the complaint that the Company was established sometime around 1973 by men and women who resided primarily at the Kanyenyaini area in Murang’a. It had an original membership of about 186 persons, who cumulatively held a total of 740 shares. The gravamen in the said suit was that the shares in the Company had been increased from 740 to 8,000 without the consent of the original members, who included the 1<sup>st</sup> to 6<sup>th</sup> respondents; that the directors of the Company were holding Annual General Meetings without notifying all the members; that the said directors were not filing annual returns as required under the *Companies Act*; and that they were not providing proper accounts of the Company to the members. In addition, it was averred by the 1<sup>st</sup> to 6<sup>th</sup> respondents that the Company had acquired real estate and other assets, whose fate and management could not be ascertained owing to the fraudulent nature in which the two directors, Wanjau Kirima (Wanjau) and Godfrey Kibuthu (Kibuthu) were running the Company. The properties in question were L.R. No. 209/679- Kenda House, and L.R. No. 202/11092 City Park.
4. At the time of filing the suit at the High Court in Milimani, the directors of the Company had notified members of an Annual General Meeting (AGM) that was to take place on 26<sup>th</sup> November 2011. Therefore, contemporaneous to the filing of the complaint dated 23<sup>rd</sup> November 2011, the 1<sup>st</sup> to 6<sup>th</sup> respondents filed an application under certificate of urgency, seeking a temporary injunction restraining the directors from holding and/or convening an AGM on 26<sup>th</sup> November 2011. The grounds in support of the application were, inter alia, that requisite notice had not been issued to members and that the directors had convened the said meeting illegally in order to avoid tabling the Company’s annual returns and accounts in the presence of all the legitimate shareholders. An order of temporary injunction was issued by the trial court on 24<sup>th</sup> November 2011.
5. In a ruling dated 19<sup>th</sup> April 2012, the trial court (Mutava, J.), appreciating that the dispute in court both in the main suit and in the application revolved around the convening of the Company’s AGM, directed that the AGM be convened within 30 days from the date of the ruling; that notice of the said AGM be served upon each member in accordance with Article 53 of the Company’s Articles of Association; that notice of the AGM be advertised in at least two daily newspapers of national circulation and in at least 2 radio stations having reach within the geographical location of the majority of the membership; and that the Registrar of Companies or a representative do supervise the AGM to ensure that its agenda accords with the law and the Articles of the Company.
6. Although the directors gave notice of the AGM pursuant to the orders of the trial court and which was to take place on 26<sup>th</sup> May 2012, it did not take off following an application that was filed by the



- 1<sup>st</sup> to 6<sup>th</sup> respondents, primarily challenging the agenda as contained in the said notice. The 1<sup>st</sup> to 6<sup>th</sup> respondents alleged that they had proposed several agendas for inclusion in the notice given by the directors but which had been ignored.
7. A plethora of other applications were filed in court by different parties, either seeking to be joined in the suit in various different capacities, or challenging the manner in which the directors were running the affairs of the Company. A few of these applications were by persons related to the late Gerishon Kamau Kirima (Kirima), who was, prior to his demise, a director and chairman of the Company and the majority shareholder. It is on the basis of such an application that the appellant herein was joined in the suit as the 7<sup>th</sup> plaintiff in her capacity both as a member of the Company holding about 100 shares, and as the sole surviving widow of Kirima.
  8. The issues surrounding the convening of the AGM were primarily in regards to who had the capacity to convene it; who would chair it; when it could be convened; and who would be in attendance. It is evident from the record that several AGMs had aborted at the last-minute owing to either orders from the trial court following the numerous applications by parties, or from disagreements by members themselves. For instance, the AGM convened on 27<sup>th</sup> August 2013 did not, as per the finding of the court in the ruling dated 26<sup>th</sup> February 2015, proceed as per the law and the Articles of Association of the Company as it was infiltrated by non- members who became rowdy and disrupted the proceedings.
  9. In the above-mentioned ruling dated 26<sup>th</sup> February 2015, the trial court had directed Wanjau and Kibuthu, in their capacity as directors of the Company, to convene an AGM within 35 days from the date of the ruling. In addition, the trial court, appreciating its powers under the provisions of section 135 (1) of the *Companies Act* to order meetings, directed the protagonists to nominate three persons each, of members of the company from which the court was to choose two such persons who would be tasked with the responsibility of convening the meeting. Whereas the 1<sup>st</sup> to 6<sup>th</sup> respondents did submit their three names as directed by the trial court, the directors did not submit their names. The trial court on 5<sup>th</sup> March 2015 appointed James Macharia Methu, the 3<sup>rd</sup> respondent, to constitute the AGM.
  10. The parties would thereafter on 12<sup>th</sup> March 2015 record a consent before the trial court on terms, inter alia, that a Special General Meeting (SGM) of the Company be held within 45 days from the date of the said consent order, and that for purposes of attendance of the SGM, the list of members of the Company used in the last General Meeting held in 2009 on the basis of which dividends were paid for 2008, be used in the SGM for admission and voting.
  11. The consent order gave rise to an application dated 13<sup>th</sup> May 2015 which was brought by the directors of the Company. They sought to review the consent orders, specifically on the issue of the list which was to be used for admissions and voting at the SGM. Whereas the appellant and the 1<sup>st</sup> to 6<sup>th</sup> respondent favoured the use of the list of members of the Company used in the last General Meeting held in 2009, otherwise known as the “Duncan Gateru List”, the directors on their part contended that the Duncan Gateru List was not a list of the shareholders/members of the company contained in the Registry of Companies or in the records maintained by the Company’s Secretary. They proposed the use of the shareholders/members list submitted to the Registrar of Companies during the filing of the Company’s annual returns. It was their contention that relying on the Duncan Gateru List would amount to a subversion of the provisions of Clause 64 of the Company’s Articles of Association as well the relevant provisions of the *Companies Act*.
  12. The review application was resolved by way of orders made by the trial court (Tuiyott, J.) (as he then was), on 7<sup>th</sup> October 2016. The orders made were, inter alia, that the Registrar of Companies or a representative to produce and provide to the parties or their advocates the list of members of the Company used in the last general meeting held in 2009; that the general meeting of the Company be



held within 45 days from the date when Livingstone Registrars shall be formally appointed to chair the meeting; and that the matter be formally mentioned on 14<sup>th</sup> October 2016 to confirm compliance by the Registrar of Companies.

13. It would appear that the list of members of the Company used in the last general meeting held in 2009 was not forthcoming, and in an attempt to unlock the stalemate on the said list, the trial court summoned the Registrar of Companies to appear before it to produce the said list and for cross-examination purposes. On 29<sup>th</sup> January 2019, one Peterson Wachira Kibicho, a Clerical Officer at the Registrar of Companies, appeared before court on behalf of the Registrar of Companies and gave his testimony. The gist of his testimony was that the file for the Company could not be traced and therefore he was not in a position to ascertain membership thereof from the records maintained by the Registrar of Companies. He stated that the only list of members in the Registrar's records was the one availed to the Registrar of Companies on 14<sup>th</sup> August 2017 by the firm of Amolo & Kibanya Advocates, who are on record for the Company and its directors.
14. In a ruling dated 7<sup>th</sup> March 2019 and delivered on 27<sup>th</sup> March 2019, the trial court (Sewe, J.) ordered that the Company's SGM be held within 45 days of the ruling, and that the list of members to be used at the said meeting be the list annexed to the affidavit of Wanjau and not the Duncan Gateru List.
15. The ruling delivered on 27<sup>th</sup> March 2019 precipitated the filing of this appeal, challenging not only the decision itself, but also the proceedings culminating thereto, especially those on the day the representative of the Registrar of Companies testified. In her memorandum of appeal dated 29<sup>th</sup> July 2019, the appellant contends that the learned judge erred in law and in fact: by failing to note that the appellant was not served nor represented in court on 29<sup>th</sup> January 2019 and 30<sup>th</sup> January 2019 when the Registrar of Companies sent Mr. Kibicho to testify regarding the records of the Company held at the Companies Registry; by allowing herself to be misled by counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondents that he had instructions to hold brief for the appellant on 29<sup>th</sup> January 2019 and 30<sup>th</sup> January 2019, which was untrue as the application before court had not been served upon counsel for the appellant; failing to ascertain whether the appellant's advocate had been served with the application before court as well as the hearing notice for 29<sup>th</sup> January 2019 and 30<sup>th</sup> January 2019 as the court had directed; failing to note that the summons issued for attendance to court 29<sup>th</sup> January 2019 was specifically addressed to Ms. Jeremiah Mungai and not Mr. P.K. Kibicho, who attended court on the said day; failing to appreciate that the issue of the number of shares held by the late Kirima was evidential through shares register and other records kept by the Companies Registry; disregarding the evidence produced by Mr. P.K. Kibicho in the absence of any other evidence produced by any other party concerning the shareholding of the Company; failing to appreciate that the admission by the Registrar of Companies that the Company's file was missing at the Registry was ipso facto a manifest confirmation of the existence of fraud; and in allowing prayers that were not sought.
16. When this appeal came up for hearing, learned Counsel Mr. Kyalo Mbobu appeared for the appellant, while Mr. Njengo appeared for the 1<sup>st</sup> to 5<sup>th</sup> respondents. There was no appearance by and/or on behalf of the other respondents, despite service with a hearing notice. Both counsel relied on their respective submissions which they highlighted.
17. The crux of the appellant's submissions were on the issue of the right to fair hearing under Article 50 of *the Constitution*. It was submitted that the right to fair hearing is a cardinal rule of natural justice, and that every person has a right to be heard by an independent and impartial court established by law for that purpose. Counsel cited Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights (ICCPR), and Article 7 (1)(d) of the African Charter on Human and People Rights, all which amplify a person's right to be heard.



18. It was submitted that in interpreting what constitutes a fair trial, this Court ought to be guided by the principles set out under Article 259 (1) of *the Constitution* and that it must ensure that the decision rendered by the trial court aligns with Article 259 (1). In this regard, it was submitted that no evidence was presented before the trial court to show that the appellant had been served with the application giving rise to the ruling, the subject of this appeal. In essence, therefore, it was stated that the appellant was condemned unheard. It was further submitted that the right to a fair hearing requires that no person should be deprived of their rights without first having the opportunity to test the allegations and supporting evidence in a court of law. Reliance for this argument was placed on several court decisions, including *Evans Odhiambo Kidero & 4 Others vs. Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR and *Juma & Others vs. Attorney General* (2003) AHRLR 179 (KeHC 2003).
19. On a closely related issue which is whether advocate Mr. Njengo had instructions to hold brief on behalf of Mr. Mbobu for the appellant on 29<sup>th</sup> January 2019 and 30<sup>th</sup> January 2019 when a representative of the Registrar of Companies testified before court, counsel contended that no such instructions were issued to Mr. Njengo, as no hearing notice had been served upon the appellant or her advocate. Counsel relied on the decision of *Anne Waiguru & Another vs. Martha Wangari Karua & 2 Others* [2019] eKLR, where the Supreme Court set aside a consent judgment procured while counsel held brief without instructions.
20. Regarding the issue of the appellant's right to property under Article 40 of *the Constitution*, it was contended that the right of the estate of the late Kirima to own property was violated by proceeding with the matter without a proper hearing and rendering a decision, the net effect of which was to take away 4,627 shares belonging to the said estate without evidence of any wrongdoing on the part of the estate. Reliance was placed on the decisions in *Musk Deer Limited vs. Benjamin K. Kipkurui & Another* [2018] eKLR and *Super Nova Properties Limited & Another vs. District Land Registrar Mombasa & 2 Others; Kenya Anti-Corruption Commission & 2 Others (Interested Parties)*, for the argument that the impugned decision, which was arrived at without the estate of Kirima having been accorded a hearing, was in violation of their constitutional rights to property under Article 40 of *the Constitution* as the shares belonging to the estate had been taken away from the estate without a hearing.
21. On whether the learned judge gave orders not sought in the application giving rise to the impugned ruling, counsel cited the decision of this Court in *Stephen S. Pareno vs. Judicial Service Commission of Kenya* [2014] eKLR, where it was held that it is not the business of the court to wander off into areas of jurisprudential issues not invited to decide on by either party, their plausibility notwithstanding. It was submitted that the two orders issued in the impugned ruling relating to the holding of the SGM within 45 days of the ruling and on the list for the SGM were orders not sought in the application. Therefore, the learned judge usurped the role and duty of litigants by descending into the arena of conflict.
22. Lastly, regarding the issue of the missing records of the Company from the records maintained by the Registrar of Companies, it was contended that upon the evidence of the Registrar of Companies of crucial records missing, the court ought to have inferred fraud and ought not to have invented a new record as it did, since that is not a function of the court.
23. On his part, counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondents contended that on the day the Registrar of Companies testified, he (Mr. Njengo) was called and instructed by Ms. Kanini from the office of Mr. Mbobu to hold his brief. This Court was asked to take judicial notice of the fact that the appellant was a co-plaintiff and that it was not the first time counsel were holding brief for each other.
24. Regarding the argument that the appellant's right to fair hearing was violated, counsel reiterated that he had instructions to hold brief on 29<sup>th</sup> January 2019 and on 30<sup>th</sup> January 2019 and therefore the trial court did not proceed in absence of the appellant for it to be said that she was not accorded a fair



hearing. Counsel relied on the decision in *Zahira Habitullah Sheikh & Another vs. State of Gujarat & Others*, Criminal Appeal 446-449 of 2004 which was adopted by this Court in *Peter M. Kariuki vs. Attorney General* [2014] eKLR where the following was said regarding fair trial:

“There can be no analytical, or comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz, whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where miscarriage of justice has resulted.”

25. It was submitted that the trial court in proceeding with the hearing on 29<sup>th</sup> and 30<sup>th</sup> January 2019, did not in any way prejudice the appellant’s right to fair trial and that in any case, the discretion to continue with the said hearing was exercised judiciously, hence this appeal has no merit and should be dismissed with costs.
26. Regarding the issue of violation of the appellant’s and of the estate of Kirima’s constitutional right to property, it was contended that the appellant and the said estate had taken away the control of the Company from members and had been misappropriating the Company’s funds; that the said estate had illegally escalated the Company’s shares from 740 to 8,000 without the consent of members; that the shares said to belong to the said estate were illegally and fraudulently acquired; and that this Court, therefore, cannot give a seal of approval to the shares held by either the appellant or the estate of Kirima by dint of their illegal and fraudulent acquisition.
27. It was submitted that the deprivation of the shares belonging to other members by the estate of Kirima was unconstitutional, and further, that the right to property under Article 40(1) cannot be invoked by a party who has acquired the same unlawfully.
28. Lastly, on the issue whether the learned judge granted orders not prayed for, it was submitted that courts are at liberty to make such further orders as they deem fit and appropriate in the circumstances to meet the ends of justice, and that in granting the impugned orders, the learned judge exercised her discretion judiciously.
29. We have considered the record, submissions by counsel and the law. As this is a first appeal, we are enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it, and arrive at our own independent conclusion. See the case of *Selle vs. Associated Motor Boat Company Ltd* [1968] EA 123.
30. This appeal, in our view, turns on twin issues which are: whether the appellant and/or her advocate was served with a mention notice for 29<sup>th</sup> January 2019 and a hearing notice for 30<sup>th</sup> January 2019 respectively; and whether the appellant’s advocate had issued instructions to Mr. Njengo to hold his brief on both days. In effect, therefore, our findings on these two issues will definitively answer the question whether the appellant’s constitutional right to fair hearing was violated by the trial court.
31. The main contention by the appellant is that she was not served with a mention and/or a hearing notice before the trial court proceeded with the matter on 29<sup>th</sup> and 30<sup>th</sup> January 2019 when a representative of the Registrar of Companies testified in court. In other words, what the appellant is saying is that the failure to serve her or her advocate with a hearing notice and the failure by the trial court to ascertain service upon her before proceeding with the hearing was a violation of her rights to fair hearing under Article 50 of *the Constitution* as she was condemned unheard.
32. The answer to this question lies in the proceedings of the trial court. The relevant proceedings are those commencing on 16<sup>th</sup> October 2017 when the trial court made an order that the Registrar of Companies



one Ms. Jemimah Mungai be summoned to attend court to shed light on the contents of a letter dated 25<sup>th</sup> August 2017 and the list attached thereto. It is noted that on the said date, only Mr. Njengo and Mr. Amolo were present in court.

There was no appearance on behalf of all the other parties, including the appellant. Mr. Amolo brought it to the court's attention that he had received a letter dated 25<sup>th</sup> August 2017 from the Registrar of Companies informing him that a list of members of the Company used in the last general meeting held in 2009 was now available. Mr. Njengo on his part confirmed having seen a copy of the said letter but stated that the list attached thereto was disputed. It was on that basis that the trial court gave orders for the Registrar of Companies to be summoned to appear before court.

33. The matter would thereafter come up on 19<sup>th</sup> February 2018, 25<sup>th</sup> April 2018, 6<sup>th</sup> June 2018, and on 26<sup>th</sup> June 2018. On all these dates, counsel present were either Mr. Njengo and Mr. Amolo or persons holding their briefs. However, in the appearances of 19<sup>th</sup> February 2018, learned counsel Mr. Njengo indicated that he was holding brief for Mr. Njage for the 6<sup>th</sup> respondent and Mr. Mbobu for the appellant. The matter would further come up before court on 5<sup>th</sup> December 2018 when only Mr. Amolo was present for the Company and its directors. He informed court that the Registrar of Companies was present in court. However, since counsel for the other parties were not in court, the trial court issued the following directions, which, in our view, are pertinent to the determination of this appeal:

“Since the directions to summon the Registrar were requested by counsel for the 1<sup>st</sup> Plaintiff, this matter will be mentioned on 29<sup>th</sup> January 2019 before Justice Sewe. The summons to the Registrar are extended to that date, notices to issue to all parties.” [Emphasis added]

34. On 29<sup>th</sup> January 2019 when the matter was scheduled for mention, Mr. Amolo was present for the Company and its directors, and he also indicated that he was holding brief for Mr. Njengo. The file was placed aside and at around 9.50 am when the matter was called out again, Mr. Njengo was now present for the 1<sup>st</sup> to 5<sup>th</sup> respondents. He also indicated that he had instructions to hold brief for Mr. Mbaka for the 6<sup>th</sup> respondent and for Mr. Mbobu for the appellant. The record reflects that on 29<sup>th</sup> January 2019, Mr. Peterson Wachira Kibicho, a representative of the Registrar of Companies, appeared in court to testify. He testified and was cross-examined by Mr. Njengo and Mr. Njage, who was now present in court. The matter was thereafter stood over to 12.00pm on 30<sup>th</sup> January 2019 for submissions. On 30<sup>th</sup> January 2019, Mr. Njengo appeared for the 1<sup>st</sup> to 5<sup>th</sup> respondents and also said he was holding brief for Mr. Mbobu for the appellant. Mr. Amolo and Mr. Njage were also present in court. Counsel present proceeded to make their oral submissions, at the end of which the trial court reserved ruling for 14<sup>th</sup> February 2019.
35. It is abundantly clear from the proceedings of the trial court that at no point did learned counsel Mr. Mbobu appear physically in court on behalf of the appellant. The trial court vide its directions given on 5<sup>th</sup> December 2018 directed expressly that notices do issue to all parties. Service as per the court directions was to be effected by counsel for the 1<sup>st</sup> Plaintiff, who had requested for orders to summon the Registrar of Companies. There is no evidence that a mention notice for 29<sup>th</sup> January 2019 and/or a hearing notice for 30<sup>th</sup> January 2019 was ever served upon the appellant or her advocate. Order 5 of the Civil Procedure Rules deals with service of summons. It is our view that the provisions of Order 5 applies mutatis mutandis to service of other court process, which include applications and the related documents. Order 5 rule 15 specifically provides in part that:

“The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an



affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons .” [Emphasis added]

36. There was no affidavit of service filed in the trial court indicating service upon the appellant. In the absence of a return of service in the records of the trial court, the only logical conclusion which we can make is that no service was effected upon the appellant or her advocate. In essence, therefore, the appellant was not aware of the proceedings of 29<sup>th</sup> and 30<sup>th</sup> January 2019. In *Patrick Omondi Opiyo T/A Dallas Pub vs. Shaban Keah & Another* [2018] eKLR, this Court, in a matter where there was no evidence of service of summons stated as follows:

“Service of summons accords the sued party the opportunity to be heard before any orders are issued against him/her. That is the essence of the rules of natural justice which all legal systems applaud. Where therefore judgment is entered against a party who has not been served and hence not been heard, such judgment will be set aside ex debito justitiae.” [Emphasis added]

37. Similarly, in *James Kanyita Nderitu & Another vs. Marios Philotas Ghikas & Another* [2016] eKLR, this Court adopted the holding in *Frigonken Ltd vs. Value Pak Food Ltd, HCCC No. 424 of 2010*, where it was held:

“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.”

38. We adopt the reasoning and holding of this Court in the above matters. We hold the view that the trial court having issued directions as to service, it should have satisfied itself that all parties had been served before proceeding with the hearing on 29<sup>th</sup> and 30<sup>th</sup> January 2019. By proceeding with the said hearing without having ascertained service on all parties, the trial court perpetuated a violation of the appellant’s rights to fair hearing. The appellant was condemned unheard and denied the opportunity to cross-examine the representative from the Registrar’s office.

39. In *Kiai Mbaki & 2 others vs. Gichuhi Macharia & another* [2005] eKLR, this Court held:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard”.

40. We now turn to the issue whether learned counsel Mr. Mbobu had given instructions to Mr. Njengo to hold his brief on 29<sup>th</sup> and 30<sup>th</sup> January 2019. At the hearing hereof, Mr. Njengo stated that an associate of Mr. Mbobu called him to hold his brief. However, no evidence was led to show that indeed such a call was made and/or that such instructions were given to him. Mr. Mbobu strongly argued that he never gave any such instructions to Mr. Njengo or anyone else. Section 109 of the *Evidence Act* provides expressly that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In the circumstances of this appeal, the onus lay squarely on Mr. Njengo to prove that he had instructions from Mr. Mbobu to hold his brief. He did not, in our view, discharge the said burden. We, therefore, agree with the appellant’s view that no such instructions were ever issued to Mr. Njengo by her advocate. In any case, and without prejudice to the foregoing, having held that no





notice was served upon the appellant or her advocate as directed by the trial court, we fail to see how then the appellant's advocate could have issued instructions to Mr. Njengo to hold his brief on 29<sup>th</sup> and 30<sup>th</sup> January 2019 when he was not even aware of the hearing dates.

41. In conclusion, the appellant has satisfied this Court that her rights under Article 50 were violated. Accordingly, this appeal is merited and is hereby allowed. The ruling delivered by the trial court on 27<sup>th</sup> March 2019 and all the consequential orders thereto are hereby set aside. We direct that the matter before the trial court on the issue of the Company's list of members/shareholders be heard afresh. The appellant shall have costs of this appeal.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER, 2024.**

**D. K. MUSINGA (P.)**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb.**

.....

**JUDGE OF APPEAL**

**J. MATIVO**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

