



REPUBLIC OF KENYA



KENYA LAW
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Shaheed Shamshudeen Kashmiri & 2 others v Muoka & another (Miscellaneous Application 242 of 2021) [2023] KEHC 22164 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 22164 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 242 OF 2021**

F WANGARI, J

MAY 25, 2023

BETWEEN

SHAHEED SHAMSHUDEEN KASHMIRI 1ST APPLICANT

SAJJID SHAMSHUDEEN KASHMIRI 2ND APPLICANT

SHAMSHUDEEN KASHMIRI ZAUDDIN 3RD APPLICANT

AND

GRACE MUOKA 1ST RESPONDENT

REGISTRAR OF COMPANIES 2ND RESPONDENT

RULING

1. For determination is the originating summons dated November 9, 2021 and filed on November 11, 2021. It sought for the following orders: -
 - a. That this Honourable Court be pleased to direct that service of the instant application upon the 1st Respondent Grace Muoka be by way of substituted service through advertisement on any newspaper of nationwide circulation in the Republic of Kenya;
 - b. That this Honourable Court be pleased to issue an order compelling the 2nd Respondent to rectify the company records of Nyati Auto Parts Limited by striking out the names of Hussein Bhai Anjarwalla and Grace Muoka as directors and/or shareholders of the aforesaid company.
 - c. That the Honourable Court be pleased to rectify the shareholding of Nyati Auto Parts Limited to be as hereunder



Name	Position	Shares
Shaheed Shamshudeen Kashmiri	Director/Shareholder	33667
Sajjid Shamshudeen Kashmiri	Director/Shareholder	32667
Shamshudeen Kashmiri Zauddin	Director/Shareholder	33666

- d. Any further order the court may deem just and fit to grant.
- e. Costs be in cause
2. On March 3, 2022, prayer (a) was granted and the Applicants proceeded to serve the 1st Respondent by way of substituted service through advertisement which was carried in Daily Nation Newspaper of March 16, 2022.
 3. Despite being served, the 1st Respondent did not file any document to oppose the application. As for the 2nd Respondent, a replying affidavit sworn by Sarah Maina dated July 26, 2022 was filed on even date. Upon service of the 2nd Respondent's response, the Applicants filed a supplementary affidavit dated October 24, 2022 on October 25, 2022.
 4. The Applicants contend that despite having followed due process in change of directorship/ shareholding of company in line with the repealed Company Act, the 2nd Respondent has not effected the changes on the registry records to reflect the current position of the company. This was discovered when the Applicant's Counsel was instructed to obtain the company's CR12. It was the Applicants belief that the 2nd Respondent had lost or misplaced the original counterpart copies of the documents they had supplied. They were thus apprehensive that unless compelled by the Court, the 2nd Respondent may not effect the changes.
 5. The 2nd Respondent deponed that in 2017, the lodging of documents manually was done away with and shifted to electronic lodgment thus all companies were required to update their records. To this end, it has not received any application from the Applicant for rectification of the register through the e-citizen portal. A detailed history of the Applicants' company was given from its incorporation to date. It was deponed that the application offends the provisions of section 863 (3) of the Companies Act and in case the Applicants were desirous of removing the 1st Applicant, there are other ways provided for in law for removal of a director or shareholder.
 6. The Applicants through the 1st Applicant gave *viva voce* evidence. He relied on the affidavit filed together with the supplementary affidavit and produced the annexures as exhibits. He was cross examined by Counsel for the 2nd Respondent and thereafter re-examined. The Applicants closed their case and the 2nd Respondent opted to rely of the affidavit evidence.
 7. Directions were taken that the application be disposed off by way of written submissions. The Applicants duly filed their submissions. For the Respondent, though they had indicated that they were going to file, I have not had sight of the 2nd Respondent's submissions and I shall deem that they were never filed.



Analysis and Determination

8. Having considered the application, the response, written submissions, cited authorities and the law, the following are the issues for determination: -
- a. Whether the Applicants have made out a case to warrant the orders they are seeking;
 - b. What is the order as to costs?
9. The application is anchored on the provisions of sections 863 and 864 of the [Companies Act, 2015](#). Section 863 provides as follows: -

"863.

- (1) The Registrar shall remove from the Register any entry-
 - (a) That derives from anything that the Court has declared invalid or ineffective, or to have been done without the authority of the company; or
 - (b) That the Court has declared factually inaccurate; or to be derived from something that is factually inaccurate or is forged, and that the Court has directed to be removed from the Register.
- (2) The Court shall specify in the order the entry that is to be removed from the Register and indicate where in the Register it is to be found.
- (3) The Court may not make an order for the removal from the Register of any entry the registration of which had legal consequences as mentioned in section 861(3) unless it is satisfied
 - (a) That the presence of the entry in the Register has caused, or may cause, damage to the company concerned; and
 - (b) That the company's interest in removing the entry outweighs the interest (if any) of other persons in the continued appearance of the entry in the Register.
- (4) If, in such a case, the Court makes an order for removal, it may make such consequential orders as appear just with respect to the legal effect (if any) to be accorded to the entry because it has appeared in the Register.
- (5) The Court shall ensure that a copy of its order is sent to the Registrar for registration.
- (6) This section does not apply in respect of any entry in the Register if the Court has other specific powers under this Act to deal with the matter."



10. The title preceding section 863 (1) clearly confirms that rectification of a register can be done through a court order. However before the court issues such an order, it must be satisfied that it does not relate to the things stipulated under section 861 (3) of the *Companies Act*. In the 2nd Respondent's response, there is confirmation that the Applicants submitted the required documentation in the year 2013. However, the 2nd Respondent states that in 2017, the system of lodging documents was changed from manual to electronic. No explanation was given as to what happened between the year 2013 when the documents were lodged and 2017 when the system was changed.
11. The 2nd Respondent is concerned about the 1st Respondent's shares pointing out that if the court were to order rectification, it would be going against the provisions of section 863 (3). I have considered the provisions of section 863 (3) in detail and I note that it has some riders which must be satisfied. First, the court will proceed to make an order for rectification if the presence of the entry in the register has caused or may cause damage to the company concerned. I note that among the complaints raised by the Applicants is their inability to file returns. This is a clear illustration of damage. Secondly, it must be satisfied that the company's interest in removing an entry outweighs the interest of other persons in the continued appearance of the entry in the register.
12. The 1st Respondent was duly served and if indeed she had any reservations to the manner in which the Applicants were proceeding, she ought to have appeared and defended her position. I am alive to the fact that the 1st Respondent has proprietary rights in the form of her shares. In *Mohamed Basbeikh Ali & Another v Peter Ndingila & 2 Others* [2017] eKLR, the court had the following to say: -

“...Once that allotment took place and returns made, there was vested upon the plaintiff's proprietary interests in the shares of the company with the attendant legal and constitutional safeguards. There accrued in their favour title to the shares that is protected as a property and cannot be dealt with in a manner that would be seen to be arbitrary...”
13. However, despite this position, I hold that the continued insistence on retaining the shareholding as currently constituted is prejudicial to the Applicants. There is evidence that Husseinbhai Karimbhai Anjarwalla shares were transferred to the Applicants as shown by the share transfers dated February 26, 2013. His estate has not lodged any complaint to warrant an insistence that his name be returned as was proposed by the 2nd Respondent on April 30, 2021. The Applicants have deponed that they have looked for the 1st Respondent with a view of buying her out to no avail.
14. This being an exercise of discretion, I do proceed to exercise my discretion in favour of the Applicants.
15. Flowing from the foregoing, I proceed to make the following orders: -
 - a. That an order do issue compelling the 2nd Respondent to rectify the Company Records of Nyati Auto Parts Limited by striking out the names of Hussein Bhai Anjarwalla and Grace Muoka as directors and or shareholders of the aforesaid company;
 - b. That the shareholding of Nyati Auto Parts Limited be rectified as sought for in prayer (3) of the application dated November 9, 2021.
 - c. Each party to bear their own costs.

Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 25TH DAY OF MAY, 2023.

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F. WANGARI

JUDGE

In the presence of:

N/A by the Applicants

N/A by the 2nd Respondent

Guyo, Court Assistant

