



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E 1110 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE REGISTRAR OF COMPANIES.....2ND RESPONDENT

EX PARTE:

TERRACE HOTEL LIMITED

RULING

1. The Applicant herein is Terrace Hotel Limited, and it has brought an application by way of a Chamber Summons dated 28th September 2020, seeking leave to apply for orders of Certiorari to remove into the High Court and quash the decision of the Registrar of Companies contained in a letter dated September 2020 purporting to allocate shares of the 22 Shareholders of Terrace Hotel Limited.

2. The application is supported by a statutory statement dated 28th September 2020 and a verifying affidavit sworn on the same date by the Edwin Gachuhi Maina, the Applicant's Managing Director. The Applicant in its pleadings disclosed that there are a number of pending cases on the shareholding of the Applicant, including:

(a) HCCC No. 3194 of 1997 - Terrace Hotel Limited vs Kiai Wambaki & 4 Others.

(b) HCCC NO. 96 OF 1999 - Kia Mbaki & 2 Others vs Gichuhi Macharia and 4 Others.

(c) HCCC WINDING CAUSE NO. 1 OF 2000 - Gichuh[Macharia & Another vs Kiai Mbaki & 2 Others.

(d) HCCC 497 OF 2009 - Titus Thuo Macharia & Another vs Terrace Hotel Limited.

3. This Court consequently directed that the Applicant's application be canvassed *inter partes* to confirm the status of the pending cases, and that the Applicant serves the Respondents with the said application and submissions thereon.

4. Upon perusal of the court's electronic record, I note that there is no evidence of compliance by the Applicant as there are no submissions filed or evidence of service as directed by the Court.

5. The Respondents nevertheless filed Grounds of Opposition dated 16th November 2020, which I find prudent to reproduce verbatim as follows:

(a) "THAT the application offends the provisions of part XI of The Companies Act 2015 which essentially is the principle of instituting derivative actions under the companies Act.

(b) THAT this court has no jurisdiction to handle this matter. The substratum of the application in its entirety is and has been a long outstanding commercial dispute for control of the shareholding, heart and soul of Terrace Hotel limited which squarely falls within the ambit of Companies Act and therefore the right forum should be The Commercial & Admiralty Division of the High Court.

(c) THAT the application is an appeal disguised as a judicial review application yet a judicial review court does not sit as an appellate court so as to substitute its views with that of the respondent which are discretionary.

(d) THAT the matters raised in the application are matters that have historically been factual disputes which have previously been addressed at the Civil or Commercial Division of the High Court, where no restrictions or limitations exist as those that arise in judicial review.

(e) THAT this court is therefore not the right forum as the matters substantively require a merit review a function which the judicial review court cannot embark on as judicial review largely concerns itself with the decision making process.

(f) THAT the applicant has alluded to a number of court cases as pending whereas, Two have already been concluded i.e. HCCC No. 96 of 1999 - Kiai Mbaki & 2 Others Vs Gichuhi Macharia and 4 Others. The matter was dismissed for want of prosecution on 23rd July 2018 and a subsequent application to reinstate the suit was also dismissed on 30th of October 2018 and 28th March 2019. whereas HCC Winding Cause No 1 of 2000 - Gichuhi Macharia & Another vs Kiai Mbaki & 2 others was determined and an application to stay of the execution of the Arbitral Award was dismissed and an award adopted on 4th December 2015.“

6. It is thus evident that the subject matter of the Applicant's application is also pending and has been decided on in other courts of concurrent jurisdiction, and therefore, not only does that Applicant have other adequate alternative remedies that it is already utilizing, there is also the risk of this Court giving conflicting orders. To this extent this application is also in abuse of the Court process. This Court has considered these factors and consequently declines to grant leave to the Applicant to commence judicial review proceedings.

7. I accordingly order as follows:

I. The Applicant's Chamber Summons dated 28th September 2020 is found not to have merit, and is hereby dismissed with no order as to costs.

II. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the Applicant and Respondents by electronic mail by close of business on Thursday, 28th January 2021.

8. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 26th DAY OF JANUARY 2021

P. NYAMWEYA

JUDGE