REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E055 OF 2020

PRAKLA EAST AFRICA LIMITED..APPLICANT

VERSUS

THE REGISTRAR OF COMPANIES……………….……1ST RESPONDENT

THE ATTORNEY GENERAL..2ND RESPONDENT

AND

PRAKLA BOHRTECKNIC GMBH.................................INTERESTED PARTY

RULING

The Application

1. This ruling is on the Applicant’s application by way of a Chamber Summons dated 3rd September 2020, seeking the following outstanding orders:

> **1. THAT the Applicant be granted leave to apply for an order of certiorari directed to the Respondent to quash the decision dated 13/03/ 2020 of the Respondent to dissolve the Applicant's Company name.**
>
> **2. THAT the Applicant be granted leave to apply for an order of Mandamus directed at the Respondent compelling the Respondent to reinstate the Applicant Company as duly registered.**
>
> **3. THAT the leave granted do operate as a stay of proceedings and an order to restrain the 1st Respondent from acting or continuing to take further administrative action against the Applicant pending the hearing and determination of this application.**
>
> **4. THAT costs of the application be in the cause.**

2. The said application is supported by a statement dated 3rd September 2020 and verifying affidavit of even date sworn by Michael Muthee Mwangi, a director of the Applicant. The Applicant states that it is a limited company incorporated and carrying on business in Kenya, and that its directors were informed by the 1st Respondent by way of a letter dated 22nd January 2020 that their Company name 'PRAKLA' is similar to a trademark TM No. 849162 registered on 23/12/2004, and were directed them to change the name of the company by 05/02/2020. Further, that subsequently, the 1st Respondent, through a Gazette Notice No. 2332 published on 13/03/2020 dissolved the Applicant' s Company.

3. The Applicant claims that the action of the 1st Respondent is procedurally improper and tantamount to abuse of office and ought to be stayed in the interests of justice. Further, that the Applicant has been carrying on business under the said company name since 9/09/2014 and has heavily invested in the name as a brand name which has become renowned in its business field.

4. The Respondents filed Grounds of Opposition dated 27th January 2021 in response, wherein it was contended that the instant application offends the provisions of part XI of The Companies Act 2015, and that this court has no jurisdiction to handle this matter. According to the Respondents, the substratum of the application is a commercial dispute which squarely falls within the ambit of Companies Act, and therefore the right forum to hear and determine it should be the Commercial & Admiralty Division of the High Court. Further, that the application is an appeal disguised as a judicial review application, and the matters raised therein are matters that substantively require a merit review , which this court cannot embark on, as judicial review largely concerns itself with the decision making process.

The Determination

5. This Court directed that the instant application be canvassed *inter partes* by way of written submissions. The Applicant's counsel on record, Kaimenyi Mose & Company Advocates, filed submissions dated 3rd September 2020, while Mr. K. Odhiambo, a Senior State Counsel in the Attorney General's Office, filed submissions dated 27th January 2021 on behalf of the Respondents.

6. The Applicant's counsel submitted that the Applicant had demonstrated through its certificate of incorporation that it was validly and legally registered as a Company on 9/09/2014 by the 1st Respondent. Further, that the 1st Respondent acted unprocedurally, as it gave notice of change of name to the Applicant 5 years after the Applicant's Company was incorporated, which notice was clearly beyond the 12 months period since its incorporation against what is envisaged under section 58(2) of the Companies Act, 2015 and without a specified reason for extension of such time by the Registrar of Companies in writing .

7. Therefore, that the Applicant had established a *prima facie* case, for the purpose of leave. Reliance was placed on the decisions in **Republic vs County Council of Kwale & Another ex parte Kondo & 57 others, (1998) eKLR; Re Bivac International SA (Bureau Veritas), (2005) EA. 43; Mirugi Kariuki Vs. Attorney General, [1992) KLR 8** and **Housefarm vs The Registrar Of Companies, (2020) e KLR**, for this proposition. Furthermore, that that due to competing rights and interests between the Applicant and the Interested party over the use of a similar name "PRAKLA", a claim for infringement of trade mark is eminent, and there is thus a need to preserve the current *status quo* until the legality of the Respondent's proceedings and decision is established.

8. The Respondent's counsel on his part submitted that the matter herein is a contest between a registered trademark owner, the regulatory powers by the registrar to maintain an accurate record of the register and an action by an offending party to a registered trademark and the requirements of the companies act. Therefore, that this court is not the right forum to preside over this matter and therefore does not have jurisdiction to preside over this matter. Reliance was placed on the decision in **FRM (EA) Packers Limited v Inspector General of Police & another; Kenya Breweries Limited & Another (Interested Parties) [2019] eKLR** for the submission that there are alternative fora that are more appropriate to resolve the factual disputes raised in this application, such as the Civil or Commercial Division of the High Court, where no restrictions or limitations exist as those that arise in judicial review.

9. In addition, that the Applicant is effectively asking the court to rectify the register of the company under section 863 of the Companies Act by compelling the registrar of companies to accept the registration of its name on the register of companies despite it's similarity with another one which is a registered trademark which situation does not meet the statutory requirements. This is therefore an appeal disguised as a judicial review.

10. I have considered the arguments made by the parties herein, and the applicable law for leave to commence judicial review proceedings, namely *Order 53 Rule 1* of the Civil Procedure Rules. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996,** is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration**.**

11. While in most cases it is self-evident that the matter should proceed to judicial review, there are a number of preliminary factors that a Court considers and addresses at the leave stage. These factors have been enumerated in **Judicial Review: Principles and Procedure** by Jonathan Auburn *et al* at paragraph 26.05 as follows:

> **1. whether the enactment, action, decision, or failure to act that is being challenged is amenable to judicial review;**
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> **2. whether the claimant has capacity to bring a claim for judicial review;**
>
> **3. whether the claimant has a sufficient interest to bring a claim for judicial review;**
>
> **4. whether the particular challenge brought by the claimant is one that may be brought by the judicial review procedure, and whether it is appropriate to bring it by that procedure;**
>
> **5. whether the claim is otherwise an abuse of process;**
>
> **6. whether all or some of the grounds of challenge relied upon by the claimant are sufficiently meritorious to justify the grant of permission;**
>
> **7. whether the claim has been brought promptly;**
>
> **8. whether there are any discretionary grounds that justify the refusal of permission in the exercise of the court's discretion.**

12. It therefore follows that the case must in the first place be one that is amenable to or appropriate for judicial review, and one that does not weigh against the exercise of the Court's discretion. This is for the reason that in judicial review, the Court is being asked to review the lawfulness of an enactment, decision, action or failure to act in the exercise of a public function. Therefore, judicial review concerns the exercise of public duties and not private duties. Some of the grounds that may influence the exercise of the Court's discretion in this regard with respect to the exercise of public duties are the availability of an adequate alternative remedy, prematurity of a claim, delay, and where the claim would cause great prejudice and hardship to third parties or the public interest. Lastly, the extent and limits of this Court's judicial review jurisdiction as set out in Article 165(6) of the Constitution must also be borne in mind.

13. Once a case is found to be amenable to and appropriate for the exercise of the Court's discretion to grant leave, it is trite that the Court then ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the

decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine** **(2007) I WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

14. In the present application, the Respondents claim that this Court is not the appropriate forum to hear and determine the Applicant's dispute, and therefore has no jurisdiction. Under Article 165(6) of the Constitution, this Court is expressly granted supervisory jurisdiction over decisions made by any person exercising judicial or quasi-judicial functions, such as the 1st Respondent in the instant application. The broad grounds for the exercise of this judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others** **[2008] 2 EA 300** at pages 303 to 304 thus:

> **"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
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> **Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality…..**
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> **Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".**
>
> **Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."**

15. After the enactment of the Constitution of 2010 and the provision of the right to fair administrative action in Article 47 thereof, there are now established grounds for judicial review that require Courts to review the substance of a decision, quite apart from the jurisdictional and procedural aspects of decision making. These grounds are now explicitly provided for in section 7 of the Fair Administrative Action Act, and include the grounds of relevant and irrelevant considerations in a decision, the rationality and reasonableness of a decision, its proportionality, whether legitimate expectations have been violated by the decision, and whether the decision was made for proper or improper purposes. These grounds are questions of law on which there are settled applicable principles, and which of necessity also entail a merit review of the impugned decision in the context of the adduced evidence.

16. The Applicant's claim herein is the legality of the 1st Respondent's actions to dissolve its company, which it alleges was done contrary to the provisions of the Companies Act. This claim is therefore within the jurisdiction of this Court. The questions as to whether or not the claim extends to an examination as to who as between the Applicant and Interested Party is entitled to the said company name or trademark, and the propriety thereof, is one that can only be determined at the substantive stage and not at this stage. To this extent, this Court finds that the Applicant has established an arguable case.

17. On the question of whether the said leave can operate as a stay of the summons, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

> **"The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise."**

18. I am guided by the exposition on the purpose of a stay in **R (H). vs Ashworth Special Hospital Authority** **(2003) 1 WLR 127,** where it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review, and to ensure that a party who is eventually successful in his or her challenge is not denied the full benefit of the success.

19. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts. It has in this regard been held that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

20. These positions were also explained in the decisions in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006, Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995. Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR** and **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR.**

21. In the present application, the current status is that the Applicant's company was dissolved on 13th March 2020 by Gazette No. 2332. The

said decision has therefore been fully implemented, and there is nothing left to stay. The stay orders are therefore not merited for this reason.

The Disposition

22. In light of the foregoing observations and findings, the Applicant’s Chamber Summons dated 3rd September 2020 is found to be merited to the extent of the following orders:

> **i. The Applicant is granted leave to apply for an order of certiorari to quash the Respondents’ decision dated 13/03/2020 to dissolve the Applicant's Company name.**
>
> **ii. The Applicant is granted leave to apply for an order of Mandamus compelling the Respondents to reinstate the Applicant Company as duly registered.**
>
> **iii. The costs of the Applicant’s Amended Chamber Summons application dated 3rd September 2020 shall be in the cause.**
>
> **iv. The Applicant shall file and serve the Respondents and Interested Party with the substantive Notice of Motion within twenty-one (21) days from the date of this ruling.**
>
> **v. Further directions on the Applicant’s substantive Notice of Motion shall be given by the Judge seized of this matter.**

23. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF JUNE 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2021

J. NGAAH

JUDGE