



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 422 OF 2015

URBAN PROPERTIES CONSULTANTS &

DEVELOPERS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

HENKAM LIMITED.....1ST DEFENDANT/RESPONDENT

SOPHIE MOTURI.....PROPOSED 2ND DEFENDANT

TOM KAHIGU.....PROPOSED 3RD DEFENDANT

JOHN KAHIGU.....PROPOSED 4TH DEFENDANT

AND

G.T. MATHU.....1ST INTERESTED PARTY/RESPONDENT

WAQAMBO QAMBO.....2ND INTERESTED PARTY/RESPONDENT

SAMUEL KINYANJUI.....3RD INTERESTED PARTY/RESPONDENT

PAUL MACHARIA NJOGU.....4TH INTERESTED PARTY/RESPONDENT

STEPHEN NDIRANGU WAIGWA.....5TH INTERESTED PARTY/RESPONDENT

ELIJAH NGUGI MACHARIA.....6TH INTERESTED PARTY/RESPONDENT

RULING

1. The Plaintiff (herein “the Applicant) has filed a notice of motion application dated 26th February 2019 seeking for the following orders;-

(a) That Henkam Limited a Company dissolved vide Kenya Gazette Notice No. 4077 dated 19th May 2016 be restored to the register;

(b) That in the alternative to prayer (a) above, Cecilia Christitne Makandi Kahigu, Marie Linda Njeri Kahigu and Anne Marie Muthoni Kahigu be joined in this suit as the 5th, 6th and 7th Defendants to take full liability of Kenkam Limited together with the 2nd, 3rd and 4th Defendants as former directors and shareholders of Henkam Limited;

(c) That costs of this application be provided for.

2. The application is based on the provisions of Section 916, 917, 918, 919, 920 and 997 (1) of the Companies Act Articles 22, 23, 40 and 50 of the Constitution of Kenya and all the other enabling provision of the Law.

3. It is supported by the grounds thereto and an affidavit dated 26th February 2019, sworn by Stephen Kamau, described as a director of the Applicant.

4. The Applicant avers that he is a director of the Defendant's company. That when this suit was filed, the 1st Defendant was in existence. However, unknown to him, the 1st Defendant was dissolved on 16th May 2016 vide a Kenya Gazette Notice No. 4077. That dissolution thus took place when the suit herein is pending. As such, it is only fair and just that the dissolution be reversed and the registration of the company be restored to serve the interest of justice. That if the restoration is not done, the Plaintiff will suffer loss of unpaid agents fees.

5. Further, as the 1st to 4th Defendants and the proposed/Interested 5th to 7th Defendants gained immensely from the Plaintiff's work, which has not been paid for, in the sum of Kshs. 200,000,000, the said Defendants will not suffer prejudice if the company is restored.

6. However, the application was opposed vide a replying affidavit dated 12th March 2019, sworn by Sophie Moturi, the 2nd Defendant on her own behalf and on behalf of the 3rd and 4th Defendants. She deposed that, the subject matter of the suit and the dispute, being the commission payment at the rate of 3% of the sale price for L.R. No. 209/1817 Princess Hotel owned by Henkam Limited, the commission was to be paid out of sale proceeds of Princess Hotel by Henkam Limited whose directors and share holders as well were; Cecilia Makandi Kahigu, Linda Marie Njeri Kahigu and John Kahigu Magu. Similarly, the other shareholders were; Sophie Njeru Moturi, Tom Muchiru Kahigu and Anne Marie Muthoni Kahigu.

7. That at no time did the Plaintiff deal with the 2nd to 4th Defendants, and these Defendants did not know who agents were. It is Linda Marie Kahigu, Cecilia Makandi and Christine Kahigu who knew the agents and it is for this reason that the 2nd to 4th Defendants agreed to hand over the money in the sum of Kshs. 6,000,000 for payment of the 3% commission to Linda Njeri Marie Kahigu to pay the agents. That the said Kshs. 6,000,000 was paid vide an TTGS (a copy of which is among the 2nd to 4th Defendants list of documents). As such, the 2nd to 4th Defendants do not owe the Plaintiff any commission and no liability can arise against them.

8. I note from the court record that, the firm of Moses N. Siagi & Company Advocates have filed grounds of opposition dated 12th March 2019 on behalf of the Defendant (presumably the 1st Defendant). The ground is one, and simply states: "The application is incompetent."

9. I have considered the subject application and I find that, the main issue to determine herein is whether the 1st Defendant was dissolved during the pendency of the suit and should be restored to the register. In this regard, I note from the court record that, on the 19th March 2018, the learned counsel Ms. Wangui addressed the court on behalf of the Plaintiff to the effect that, the Plaintiff had information that, the 1st Defendant had been dissolved. She sought for directions on the same.

10. In response, the learned Counsel Mr. Siagi for the 1st Defendant informed the court that, the 1st Defendant was not going to be revived. The Plaintiff then opted to file the current application. It is therefore clear that, the 1st Defendant is not willing to be restored to the register at the company's registry.

11. I have considered the application, the affidavit in support and in opposition thereto, and/or the ground of opposition. I find that, there is no dispute that the 1st Defendant was in existence when the suit herein was filed on 23rd October 2014 vide a plaint dated 22nd October 2014.

12. It is now evident from the copy of the Kenya Gazette Notice No. 4077, (a copy of which has been annexed to the affidavit in support of this application) that the 1st Defendant was dissolved on 16th May 2016; after the suit was commenced. The learned counsel Mr. Siagi for the 1st Defendant confirmed the same.

13. However, although I note that the Applicant has relied on the provisions of Article 22, 23, 40 and 50 and unfortunately the basis of the same has not been explained in the application or the supporting affidavit. Be that as it were, it suffices to note that, Articles 22 and 23 deal with enforcement of the bill of rights and authority of the courts to uphold and enforce the bill of rights respectively. Article 40 deals with the protection of right to property while Article 50 deals with the right to a fair hearing. Whereas I can appreciate the relevance of the provisions of Article 50 to this matter, I am not brought to the relevance of the other provisions.

14. In this matter, I find that, the provisions of Section 916 of the Companies Act of Kenya 2015 (herein "the Act"), deals with the registration of a dissolved company. Sub-section 2(f) thereof, allows a person with a potential legal claim against the company to apply for its restoration of a dissolved company, whereas sub section 2(i) thereof, allows any other person appearing to the court to have an interest in the matter to apply for restoration of the company.

15. The provisions of Section 918 of the Act empowers the court to order a company to be restored to the register if:-

(a) the company was struck off the Register under section 894 or 895 and the company was, at the time of the striking off, carrying on business or was in operation;

(b) the company was struck off the Register under section 897 and a requirement of sections 898 to 903 was not complied with; or

(c) in any other case, the court considers it just to do so.

16. The effect of the court order for restoration to the Register is that, the company is taken to have continued in existence as if it had not been dissolved or struck off the Register. Thus although the legal effect of dissolution of the company, the ceasure of the powers of the

directors as agents thereof. The company remains liable to pay any debts or liabilities incurred before dissolution.

17. Similarly, the company is legally bound to give notice to any interested party, once it has voted that it intends to dissolve. The notice is to be served upon inter alia the creditors, shareholders and owners, customers, employees and any other interested parties.

18. In the instant case, there is no evidence that, the company notified the Plaintiff herein of its resolution to dissolve itself before or after the dissolution. The company was aware that it was under litigation in this matter. Therefore, the dissolution thereof was not done in good faith. I therefore find that, it is proper, just and equitable that I allow the notice of motion in the terms of prayer (1). In that regard, I order that the 1st Defendant herein (Henkam Limited) be and is hereby restored to the Register of companies. I further order that the costs of this application shall be borne by the 1st Defendant/Respondent.

19. It is so ordered.

Dated, delivered and signed in an open court this 24th day of April 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Gichohi for the Plaintiff/Applicant

No appearance for the 1st Defendant/Respondent

Ms. Githongo for Mr. Jaoko for the 2nd, 3rd and 4th Defendants/ Respondent

DennisCourt Assistant