



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**JUDICIAL REVIEW DIVISION**  
**MISC CIVIL APPLICATION NO. 432 OF 2016 (J.R)**  
**IN THE MATTER OF AN APPLICATION FOR ORDERS OF PROHIBITION AND**  
**MANDAMUS**  
**AND**  
**IN THE MATTER OF SECTION 20 OF THE COMPANIES ACT, CHAPTER 486, LAWS OF**  
**KENYA**  
**AND**  
**IN THE MATTER OF MEGASCOPE HEALTH CARE (K) LIMITED AND MEGASCOPE**  
**LABORATORIES LIMITED**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**THE REGISTRAR OF COMPANIES.....RESPONDENT**  
**AND**  
**MEGASCOPE LABORATORIES LIMITED.....INTERESTED PARTY**  
**EX PARTE: MEGASCOPE HEALTHCARE (K) LIMITED**

**JUDGMENT**

**Introduction**

1. By a Notice of Motion dated 21<sup>st</sup> September, 2016, the ex parte applicant herein, **Megascope Healthcare (K) Limited**, seeks the following orders:

1. That this honourable court be pleased to grant an Order of Mandamus to compel the Respondent to direct the Interested Party to change the name in which it is registered being Megascope Laboratories Limited, (C.1125866), to a name that is not strikingly similar to the *ex-parte* applicant's name being Megascope Healthcare (K) Limited.

2. That this honourable court be pleased to grant an Order of Mandamus to compel the Registrar of Companies to remove the Interested Party's name being **Megascope Laboratories Limited** from the register of Companies and issue to it a Certificate of Change of Name for such other name as it shall provide to the Respondent and which is not similar and/or strikingly similar to the *ex-parte* applicant's name being **Megascope Healthcare (K) Limited**.

3. That this honourable court be pleased to grant an Order of Mandamus to compel the Registrar of Companies to deregister and remove **Megascope Laboratories Limited** from the Register of Companies in default of its change of name.

4. That this honourable court be pleased to grant an order of Prohibition to stop the Respondent from registering any company and/or entity in the name of **Megascope Healthcare (K) Limited** and/or any of the derivatives of the name **MEGASCOPE** and which would be strikingly and confusingly similar with the name of the applicant, **Megascope Healthcare (K) Limited**.

5. That costs of this Application be awarded to the Applicant.

### Applicant's Case

2. The Applicant's case was that the Applicant, it was registered as a limited liability company on the 25<sup>th</sup> July 2002 under the provisions of the **Companies Act**, Chapter 486, Laws of Kenya (hereinafter referred to as "the Act") and issued by the Registrar of Companies with a Certificate of Incorporation. Since its registration the Applicant averred that it has been trading under its name **Megascope Healthcare (K) Limited** and undertaking the business of medical supplies to governmental institutions and also private entities within the Republic of Kenya.

3. It was the applicant's case that to further secure its identity and protect its business, the Applicant registered its name **Megascope Healthcare** as a Trademark being Trademark No. 62435 on the 27<sup>th</sup> November 2007 under class 44 that provides for trade in medical services, veterinary services, hygiene and beauty care for human beings, animals, agriculture, horticulture and forestry services.

4. It was averred that the Applicant has over a period of twelve (12) years since it was registered, developed and accrued substantial goodwill and reputation in its name and thereby acquired a distinct identity in the industry, its customers and consumers of its products and the public generally. The applicant's profile facilitates it to source for business and supply contracts for medical supplies including drugs and equipment from the government through the Ministry of Health and other private health care providers and hospitals. It was contended that the Applicant has invested substantially in the development of its name as an acceptable and reputable brand in the industry and continues to invest by way of its standards, quality, mode of business, general application of business ethics and industry best practices and has over the time grown to a major player in the industry. This, it has done through extensive marketing, networking and general publicity to promote its business and build demand for its brand and its products.

5. The applicant has however established that the Registrar of Companies, the Respondent herein, did on the 22<sup>nd</sup> June 2006 proceed to register and incorporate another company in the name of **Megascope Laboratories Limited**, the Interested Party herein, with its directors as **Dr Peter Kibuna Gitau** and **Wamuyu Mwangi Gathinji** both of P.O.Box 8229, 00200 Nairobi. The said company, it was averred was engaging in similar business as the applicant herein being the supply of medical equipment, drugs and related products and had in fact participated in a tender for the supply of the same with the National Public Health Laboratories Services which is a governmental institution under the Ministry of Health. In the applicant's view, the Interested Party was only able to secure the said business by passing off as the applicant who has been a long standing supplier of the same products and medical supplies generally to the said National Public Health Laboratories Services and Ministry of Health generally.

6. It was the applicant's case that the decision of the Registrar of Companies decision to register a

company called **Megascope Laboratories Limited** whereas there existed on record a company called **Megascope Healthcare (K) Limited**, the Applicant, is unlawful, illegal, unreasonable, malicious, capricious and was made in bad faith for the following reasons:

- i. The Applicant Company was registered on the 12<sup>th</sup> July 2002 whereas the subsequent company being the Interested Party was registered on the 22<sup>nd</sup> June 2006.
- ii. The name of the subsequent company is strikingly similar to that of the applicant as to likely cause confusion in the eyes of the public and thereby facilitating the Interested Party to pass off its products and identity as those of the Applicant.
- iii. Section 20 of the **Companies Act** precludes the Registrar of Companies from accepting the registration of a company in a name that is strikingly similar to that of an already existing company and enjoins the said Registrar to direct a subsequent company so registered to change its name so as to avoid causing confusion in the identities of different companies.
- iv. The Registrar of Companies has failed, refused and/or neglected to execute his statutory mandate and direct the Interested Party to change its name from **Megascope Laboratories Limited** to a name that is not similar to that of the applicant as to cause confusion and loss.
- v. The Respondent's registration of the Interested Party is to the extent that the same was taken out in contravention of section 20 of the **Companies Act**, Chapter 486, Laws of Kenya made *ultra vires* and is thus *null and void ab initio*.

iv. The Respondent has a statutory duty to ensure order, clarity and fairness in the administration and maintenance of the Register of Companies and to the extent that he acted irregularly in registering the interested party, then the same is amenable to the jurisdiction of this honourable court on the basis that its actions were unlawful, unfair and unconstitutional.

7. The applicant believed that the Respondent's action to incorporate the interested party under the name **Megascope Laboratories Limited** whereas the applicant **Megascope Healthcare (K) Limited** had already been registered is unreasonable for reasons that:

- i. The said registration facilitated the interested party to pass off its products and identity as that of the Applicant and thereby derive undue advantage from the applicant's goodwill.
- ii. The said registration caused confusion in the market as the applicant's customers and consumers of its products have been misled, confused and otherwise deceived that the Interested Party's products are those of the Applicant which is an established and reputable player in the medical supplies industry.
- iii. The said registration constitutes an unfair administrative action on the part of the Respondent and which contravenes the provisions of Article 47 of the Constitution of Kenya that provides for fairness in all administrative actions.
- iv. The said registration is otherwise an abuse of the process of registration of companies as provided in the **Companies Act**, Chapter 486, Laws of Kenya.

8. This Court, it was argued has the power to supervise the decisions and actions of statutory offices such as the Registrar of Companies, in the exercise of its Judicial Review jurisdiction.

9. Neither the Respondent nor the interested party herein responded to the application despite being served therewith.

### **Determination**

10. It is noteworthy that the only substantive orders being sought in these proceedings are *mandamus* and prohibition. The scope of those remedy was the subject of Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR where it was held by the Court of Appeal that:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”**

11. Section 57 of the *Companies Act*,2015 provides as follows:

***(1) The Registrar shall not register a company under this Act by a name that is the same as another name appearing in the index of company names.***

***(2) The regulations may provide-***

***(a) that registration of a company by a name that would otherwise be prohibited under this section be permitted —***

***(i) in specified circumstances; or***

***(ii) with a specified consent; and***

**(b) that, if those circumstances are existing or that consent is given at the time a company is registered by a name, a subsequent change of circumstances or withdrawal of consent, does not affect the registration.**

12. Section 58 of the said Act provides as follows:

**(1) The Registrar may direct a company to change its name if it has been registered by a name that is the same as or, in the opinion of the Registrar, too similar to -**

**(a) a name appearing at the time of the registration in the Registrar's index of company names; or**

**(b) a name that should have appeared in that index at that time.**

**(2) A direction under subsection (1) may be given only within twelve months after the date on which the company concerned was registered or within such extended period as the Registrar may specify in writing in a particular case.**

**(3) In giving a direction under subsection (1), the Registrar shall specify the period within which the company is required to comply with the direction.**

**(4) The regulations may further provide-**

**(a) that no direction is to be given under this section in respect of a name —**

**(i) in specified circumstances; or**

**(ii) if specified consent is given; and**

**(b) that a subsequent change of circumstances or withdrawal of consent does not give rise to grounds for a direction under this section.**

13. From the foregoing provisions it is clear that the Respondent is expressly barred by law from registering a company under the Act by a name that is the same as another name appearing in the index of company names unless otherwise provided by the Regulations. In this case, the applicant's name and the interested party's name are not the same though the similarity therein cannot escape one's attention. Nevertheless, it is upon the registered company to prohibit the intended registration of a company before the said registration takes effect because as stated hereinabove either *mandamus* nor prohibition has the effect of quashing a decision already made, in this case the registration of a company.

14. However, where such a registration has been made, the Respondent nevertheless has the power under section 58 of the Act to direct the subsequently registered company to change its name. That however is a discretionary power and the Court can only direct the Respondent to exercise its discretion where such a demand is made but cannot direct it to do so in a particular manner. Where the Respondent has exercised its discretion one way or the other the Court cannot intervene unless such exercise of discretion is in the circumstances unlawful or unreasonable.

15. The law however provides that that discretion can only be exercised within twelve months of the registration of the subsequent company. In this case the interested party was registered on 22<sup>nd</sup> June 2006. These proceedings were commenced on 20<sup>th</sup> September, 2016 well outside the prescribed period. To compel the Respondent to exercise its powers under section 58 would amount to compelling the Respondent to act illegally. *Mandamus* being discretionary orders cannot in my respectful view issue if their effect is to compel the carrying out of a duty which is expressly barred by the law since *mandamus* only compels the exercise of a duty imposed by the law and not contrary to the law.

16. In my view, the rationale for providing the limitation period within which the Registrar can direct a

company to change its name is meant to protect both the Company and those who deal with it from being prejudiced by inactions of persons who have slept on their right and misled third parties to believe that there is no imminent risk in dealing with the company in the manner they have dealt with it. Change of names also has repercussions on other financial aspects such as with respect to validity of cheques issued in favour of the Company. Accordingly, the imposition of the limitation period serves as a useful tool in the protection of members of the public and ensures certainty apart from being a reasonable period for gauging whether the similarities in the names has any adverse effects on the existing company. In other words public interest plays a role in the exercise by the Respondent of its discretion to direct a company to change its name.

17. Apart from that the effect of granting the order of *mandamus* as sought would be to quash the decision by the Respondent to register the interested party. But as stated hereinabove, an order of *mandamus* cannot quash what has already been done. Without seeking an order of certiorari, this application is misconceived and is rendered stillborn.

18. Judicial review remedies being discretionary, the Court would not grant them in certain circumstances even if the same are merited. As is appreciated, in *Halsbury's Laws of England 4<sup>th</sup>Edn. Vol. 1(1) para 12 page 270:*

**“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’”**

19. Taking into account the foregoing it is my view and I hereby find that the orders sought in this application are unmerited.

### **Order**

20. In the result, the Notice of Motion dated 21<sup>st</sup> September, 2016 fails and is dismissed but with no order as to costs.

**Dated at Nairobi this 28<sup>th</sup> day of March, 2017**

**G V ODUNGA**

**JUDGE**

***Delivered in the absence of the parties***

**CA Mwangi**