



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**MISCELLANEOUS APPLICATION NO. 208 OF 2016**  
**IN THE MATTER OF THE COMPANIES ACT**  
  
**AND**  
**IN THE MATTER OF AN APPLICATION TO RESTORE MWALIMU MANUNDI AUTO**  
**PARTS LIMITED TO THE COMPANIES REGISTER**

**BETWEEN**

AGNATOR KANINI.....APPLICANT

**AND**

MWALIMU MAMUNDI AUTOPARTS LTD.....1<sup>ST</sup> RESPONDENT

MARTIN MUNDIA.....2<sup>ND</sup> RESPONDENT

**RULING**

[1] The Notice of Motion dated **19 April 2016** was filed herein by **Agnator Kanini Martha** through the law firm of **M/s Webale B. Associates**, for orders that:

[a] the Court be pleased to issue an order restoring the 1<sup>st</sup> Respondent, **Mwalimu Mamundi Autoparts Ltd**, to the Register of Companies;

[b] That the costs of the suit, including the costs of the application, be provided for;

[c] That the Court be pleased to grant any further orders and directions that it deems fit in the interests of justice.

[2] The application was based on the grounds set out on the face thereof, including the averments deposed to in the Supporting Affidavit of the Applicant, **Agnator Kanini Martha**, sworn on the **20 April 2016**. Briefly, it was the Applicant's case that, on the **16 October 2010**, she was a passenger in **Motor Vehicle Registration No. KAW 969J**, that was then owned by the 1<sup>st</sup> Respondent, and which was involved in a road traffic accident; and that to recoup the losses she suffered as a result of the said accident, the Applicant instituted a civil suit against the 1<sup>st</sup> Respondent herein among other parties, at the

**Chief Magistrate's Court in Machakos vide Civil Case No. 618 of 2012.**

[3] It was further averred by the Applicant that the civil suit aforesaid was heard and determined on **4 February 2015**, whereupon she was awarded general damages in the sum of **Kshs. 90,030**; and that subsequently, her Advocates instructed the firm of **Warleen Auctioneers** to extract the decree for execution against the 1<sup>st</sup> Respondent; but that the said firm of Auctioneers returned the warrants unexecuted for the reason that the 1<sup>st</sup> Respondent had been struck off the Companies Register through Gazette Notice dated **2 December 2014** pursuant to the provisions of **Section 339(5) of the Companies Act, Chapter 486 of the Laws of Kenya** (now repealed). It was her contention that as long as the 1<sup>st</sup> Respondent remained struck off the Register of Companies, the Decree dated **22 April 2015** will remain unexecuted, hence the need for its restoration. A copy of the Decree was exhibited as **Annexure AKM4** to the Supporting Affidavit.

[4] As for the 2<sup>nd</sup> Respondent, it was averred by the Applicant that he was a director of the 1<sup>st</sup> Respondent and that it had been established by **Warleen Auctioneers** that he had since incorporated a new company known as **IBIN BATUTA ENTERPRISES LIMITED**, which company was doing business and operating from the same premises as the 1<sup>st</sup> Respondent did, before it was struck off the Register. In support of this assertion, the Applicant opted to rely on the letter by **Warleen Auctioneers** dated **23 June 2015** (marked **AKM5**) as well as the Certificate of Incorporation dated **10 December 2014** (marked **AKM7**). There appears however to be no specific relief sought from the 2<sup>nd</sup> Respondent other than an award of costs. In any event, there is no direct evidence in support of the allegations made herein against the 2<sup>nd</sup> Respondent, or his directorship of the new company.

[5] Accordingly, in his Replying Affidavit filed herein on **19 May 2016**, the 2<sup>nd</sup> Respondent conceded that the 1<sup>st</sup> Respondent was in the business of buying and selling motor vehicles during the years **2009/2010**; and that the company was wound up and struck off the register because it was consistently making losses. The 2<sup>nd</sup> Respondent further conceded that the Plaintiff sued the 1<sup>st</sup> Respondent in **Machakos Civil Case No. 618 of 2012** and was awarded damages for personal injuries suffered in a road traffic accident; but added that by the time of the award, the company had already been wound up. It was thus the contention of the 2<sup>nd</sup> Respondent that to grant the orders sought would be to prejudice the 1<sup>st</sup> Respondent, granted that the company has been wound up and its assets disposed.

[6] The 2<sup>nd</sup> Respondent further averred that, although he was a director of the 1<sup>st</sup> Respondent, he was not a party to the Machakos Suit and therefore has been wrongly sued herein. He further posited that as a director of the 1<sup>st</sup> Respondent, he could not incur personal liability for the wrongs committed by the company or its agents, as the company was a separate legal entity. The 2<sup>nd</sup> Respondent further averred that the suit against him is misconceived for the reason that he is neither a director of the entity known as **IBIN BATUTA ENTERPRISES LIMITED**, nor is the company in any way liable to the Applicant. He accordingly urged the Court to dismiss the application with costs.

[7] The application was filed under Section 917 of the Companies Act, No. 17 of 2015, as read with Section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya was canvassed by way of written submissions which were then briefly highlighted by learned Counsel on **14 February 2017**. On behalf of the Applicant, it was urged that the removal of the 1<sup>st</sup> Respondent from the Register of Companies was a calculated move aimed at evading the payment of the Decree that was obtained against it by the Applicant. The Applicant's Counsel, **Mr. Nakhone**, relied on **Mombasa High Court Misc. Cause No. 6 of 2006: In the Matter of an Application to Restore to the Register Queenway Investment Ltd** in urging the Court to allow the application to enable the Applicant execute the Decree that was issued in her favour on **22 April 2015**.

[8] Counsel for the Respondents, **Ms. Muniyiri**, on the other hand, took the position that the application is not only misconceived, but is also mischievous, given that due process was followed in the removal of the 1<sup>st</sup> Respondent from the Register; and that any interested party ought to have presented their grievances in the course thereof. It was further argued that an application for restoration of a company to

the Register of Companies can only be brought by a former director or member of the company. The Court was further urged by the Respondents to find the application incompetent for the reason that the requirements of the relevant provisions of the law, notably **Sections 912(b) and 913 of the Companies Act, 2015**, had not been complied with. The Respondent relied on the cases of **John Blasious Ogati Mutundura of Gusii Mwalimu Investment vs Attorney General [2016] eKLR**, and **Jackson N. Wachuga Vs. Eastern Kitui Stores Ltd & Others [2008] eKLR** to support their argument that the application is one for dismissal.

[9] I have carefully considered the Applicant's Notice of Motion dated **19 April 2016**, the Supporting and Replying Affidavits sworn in respect thereof, as well as the written and oral submissions made herein by learned Counsel. It is common ground that the 1<sup>st</sup> Respondent, **Mwalimu Mamundi Auto Parts Ltd**, was a limited liability company incorporated as such on **1 December 2005** as per the Certificate of Incorporation No. C. 120884, annexed to the Supporting Affidavit. There is no dispute that the said company was dissolved on **2 December 2014** by the Registrar of Companies pursuant to the provisions of Section 339(5) of **the Companies Act, Chapter 486 of the Laws of Kenya** (now repealed).

[10] It is further not in dispute that the Applicant did file a suit against the 1<sup>st</sup> Respondent on **6 August 2012** claiming general and special damages for injuries that she allegedly sustained in a road traffic accident that occurred on **16 October 2010** while travelling in the 1<sup>st</sup> Respondent's **Motor Vehicle Reg. No. KAW 868J**. Evidence was adduced by the Applicant to demonstrate that the said suit was determined in her favour on **4 February 2015**, whereupon a Decree was issued for execution, in the sum of **Kshs. 92,730** together with costs in the sum of **Kshs. 41,990**. It is therefore evident that by the time the aforementioned Decree was issued, the 1<sup>st</sup> Respondent had already been dissolved; and therefore attempts at execution thereof by **Warleen Auctioneers** were efforts made in vain, as confirmed by their letter of **23 June 2015**. It is therefore understandable that a motion has been filed herein for the restoration of the 1<sup>st</sup> Respondent to the Register of Companies, albeit for execution purposes only. Clearly therefore, there is no basis for the joinder of the 2<sup>nd</sup> Respondent, or reference to the new company **IBIN BATUTA ENTERPRISES LIMITED**.

[11] **Section 916 of the Companies Act, No. 17 of 2015** makes provision for the restoration of a company to the Register in the following terms:

**"(1) An application may be made to the Court to restore to the Register a company--**

**(a) that has been dissolved after being liquidated under the law relating to insolvency;**

**(b) that is taken to have been dissolved following administration under the Act; or**

**(c) that has been struck off the Register--**

**(ii) under section 894 or 895; or**

**(ii) under section 897, whether or not the company has in consequence been dissolved."**

[12] There is no dispute that the 1<sup>st</sup> Respondent was dissolved by the Registrar. The Gazette Notice **No. 8982**, exhibited herein by the Applicant and marked **AKM6**, is explicit that the dissolution was made pursuant to **Section 339** of the repealed Companies Act; which is the equivalent of **Section 894** of the repealing Act, **the Companies Act, 2015**. Accordingly, the application is within the circumscribed bounds of the law and is therefore competent. Indeed, it is not the law that such an application can only be brought by the Attorney General or former directors/members of the company, as urged by Respondents, for it is manifest that on plain construction, Sub-sections (f), (i) and even (l) of **Section 916(2) of the Companies Act, 2015** can and do accommodate the instant application. Moreover, **Section 917(1) of the Companies Act, 2015** specifically provides that:

**"An application to the Court for restoration of a company to the Register may be made at any time for the purpose of bringing proceedings against the company for damages for personal injury."**

To my mind, "bringing proceedings" as envisaged above would, by necessary implication, include execution of a decree arising from such proceedings, as is the case herein. Thus, I find no merit in the Respondents' argument that the application is bad in law or misconceived.

[13] The Court's attention was also drawn by the Respondent's Counsel to the provisions of **Section 913** of the Companies Act, as the provision setting the conditions that must be satisfied before a company can be restored to the Register of Companies, namely that it must be shown that the company was carrying on business or was otherwise in operation at the time of its being struck off the Register. Counsel relied on the cases of **John Blasious Ogati vs. the Attorney General [2016] eKLR** and **Jackson Wachuga vs. Eastern Kitui Stores Ltd [2008] eKLR**, both of which, quite apart from the fact that they are merely persuasive, are distinguishable. In both instances, restoration was sought by shareholders/members pursuant to **Section 339(6) of the repealed Companies Act, Chapter 486**; which provision required that an applicant demonstrates that the company was, at the time of striking off, carrying on business, or was in operation. There is no similar provision in **Section 916** or **Section 917 of the Companies Act, 2015**, under which the Applicant has approached the Court.

[14] Whereas the aforementioned provisions of **Section 339** of the repealed Act have been replicated in **Sections 913(2) and 918 of the Companies Act, 2015**, it is instructive to note that the condition that there be proof that the company was in business appears to be pertinent to applications to the Registrar for administrative restoration, as opposed to restoration by the Court as set out in **Sections 916 and 917** of the Act. Accordingly, the arguments by the Respondents' Counsel that the conditions precedent to restoration have not been satisfied are clearly untenable.

[15] In view of the foregoing, the sole issue that arises for my determination, then, is whether sufficient cause has been shown for the restoration of the 1<sup>st</sup> Respondent to the Register of Companies, as sought by the Applicant, for the specific purpose of execution of the subject Decree, dated **22 April 2015**. Whereas it was the argument of the Respondents that due process was followed in the de-registration of the 1<sup>st</sup> Respondent, and therefore that the Applicant ought to have presented its objection in the course thereof, **Section 917 of the Companies Act, 2015**, does recognize that such an application can be brought at any time, so long as the same is filed in compliance with terms set out in subsections (2) (3) and (4) thereof.

[16] Subsection (2) of Section 917 of the Companies Act, 2015, provides that:

**"An order may not be made on such an application if it appears to the Court that the proceedings would fail because of any written law limiting the time within which proceedings can be brought."**

In the instant matter, evidence was adduced to show that the accident in issue occurred on **16 October 2010**, and that the proceedings for damages were filed by the Applicant on **6 August 2012**, and therefore were in place by **11 December 2014** when the dissolution of the 1<sup>st</sup> Respondent was published in the Kenya Gazette. Thus, the instant application is unaffected by Subsection (2) aforesaid. Indeed, the Applicants' suit was pending when the 1<sup>st</sup> Respondent was struck off the Register. In the same vein, there can be no doubt that the application was timeously brought for purposes of Subsection (4) which stipulates that:

**"...an application to the Court for restoration of a company to the Register may not be made after the expiry of six years from the date of the dissolution of the company..."**

[17] Accordingly, the Court is satisfied that the Applicant, as a holder of a valid Decree against the 1<sup>st</sup> Respondent, is entitled under the applicable law, to seek the restoration of the 1<sup>st</sup> Respondent to the Register of Companies for the purposes of execution of that Decree. It is instructive that the 1<sup>st</sup>

Respondent deliberately failed to disclose the existence of the Applicant's suit to the Registrar in the course of the striking off process; and in this regard, I would be of the same mind as **Njagi, J** and would adopt his observations in **Re Queensway Investments Limited** thus:

**"...The creditor feels aggrieved by Queensway Investments Limited having been struck off the register because the latter owed the creditor a sum of money which, together with costs and interest is more than Kshs. 9.5 million...Even if the company may not have been carrying on business or in operation at the time of the striking off, there was an application pending in the court by which the company's directors may have been ordered to produce the company's books and accounts and disclose the debts owing to the company. Such information would have assisted the petitioner herein into knowing whether the execution against the company was worth the effort. In order that the decree passed by the court in HCCC No. 484 of 1993 does not go to waste without an effort to salvage anything from the judgment debtor, I am satisfied that it is just and equitable that the company should be restored to the register..."**

**[18]** In the result, I would allow the Applicant's Notice of Motion dated **19 April 2016** and grant orders that:

[a] That **M/s Mwalimu Mamundi Auto Parts Limited** be restored to the Register of Companies;

[b] That the costs of the application be and are hereby awarded to the Applicant.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>th</sup> DAY OF MAY 2017.**

**OLGA SEWE**

**JUDGE**