



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS CIVIL APPLICATION NO. 2 OF 2017

CASMIL LUCAS NYANGAU & 9 OTHERS.....PETITIONER

VERSUS

GUSII MWALIMU SACCO LIMITED.....1ST RESPONDENT

ATTORNEY GENERAL(*on behalf of the registrar of companies*).....2NDRESPONDENT

RULING

1. This Ruling is in respect to the application dated 9th January 2017 brought pursuant to Order 5 Rule 3 of the Civil Procedure Rules. In the said application, the applicants seek the following orders:

1. Spent

2. That the honorable court be pleased to grant leave to the applicants to file petition against the respondents out of time.

3. That upon the honorable court upon granting the above orders, the copy of the intended petition attached herein be deemed to be filed upon payment of requisite fees.

4. That the costs for this application abide in the outcome of the petition.

2. The application is supported by the affidavit of CASMIL LUCAS NYANGAU, the 1st applicant, who avers that he is a director of Gusii Mwalimu Investment Company Ltd (Hereinafter “the company”) having been re-elected to office on 30th June 2016 and that he has the consent of the other directors to swear the affidavit on their behalf. He further avers that on 25th November 2016, the applicants went to file a notice of change of directors with the registrar of companies only to be informed that the company had been struck off the register of companies in 1998 and that despite being struck off/dissolved, the company was still trading through some illegal “directors” who called an annual general meeting on 27th August 1999 when a balance sheet was presented after which a liquidator was appointed but after changing the company’s address in order to control communication, the said “directors” secretly dissolved the company and caused the company file No. C20/82 to disappear.

3. He further avers that sometime in November 2015, he filed a name search with the registrar of companies which revealed that the name was not available for registration as the company still existed. He attached a copy of the search marked “CLN005” to his affidavit.

4. He contends that there was no resolution by the company to dissolve it and that no information was relayed to the shareholders that the company had been struck off. He accuses the respondents of

conspiring through underhand means to dissolve the company against the provisions of the law.

5. He further states that because of the concealment and non-disclosure of material facts, it was not easy for them to know that the company had been dissolved until 24th November 2016 when they went to the office of the registrar to file change of directorship and they therefore sought leave to file petition out of time.

6. None of the respondents filed a response or grounds of opposition to the applicants' said application even though Mr. Mose advocate appeared for the 1st respondent during the hearing and subsequently filed written submissions to the application. Ordinarily, applications for leave to file suit out of time, such as the one before the court, are by law filed ex-parte in the first instance and the leave then obtained by the applicant may be challenged by the respondents during the hearing of the suit, if subsequently filed. In the instant case, however, having noted that the advocate for the 1st respondent did not make any response to the application that is the subject of this ruling I find that the written submissions filed by them are properly on record, more so because it raises certain issues of law which this court will consider in the ruling.

7. Turning to the merits of the application dated 9th January 2017, my attention is drawn to the description of the applicants as contained in the body of the application and the affidavit of the 1st applicant in support of the application wherein he states at paragraph 2.

“I am a director of Gusii Mwalimu Investment Co. Ltd after being re-elected to office on 20th June 2016 and have consent of other directors to swear this affidavit on their behalf.”

8. In the same application and affidavit the applicants acknowledge that Gusii Mwalimu Company Ltd, in which they claim they had just last year been re-elected as directors, was dissolved on 9th June 1998 on which date the said company was struck off the register of the registrar of companies.

9. The above scenario raises the first question/issue for determination in this application which is whether, the applicants have the locus standi to file this application as directors of a company which for all intents and purposes is non-existent having been dissolved almost 20 years ago.

10. My response to the above question is that the applicants do not have the legal capacity to institute the application as ideally no elections could have been conducted to elect directors of a company which is not existing.

11. One may still argue that the company, even though dissolved, may still be revived through the orders of this court which is in any case, the basis of this application wherein the applicants seek leave to file a petition as can be seen in the draft attached to the 1st applicants' affidavit wherein they seek orders for, *inter alia*, a declaration that the company be restored to the register.

12. applicants claim is that the company was dissolved at the instance of persons who were not the bona fide directors of the said company and who did not bring the said dissolution to the attention of all the shareholders so as to enable them challenge it at an opportune time. They further claim that they only got to learn about the said dissolution last year when they made attempts to have themselves registered as the new directors of the company. It is for the above reasons that the applicants now seek the leave of this court to file a petition against the respondents out of time. In determining whether this court can grant the applicants the orders that they seek, the court will examine the various provisions of the Companies Act relating to dissolution of companies and the circumstances under which they can be revived.

13. Sections 339(6) and 340 of the Companies Act (herein "the Act") provide:

“339 (6) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register the Court on an application made by the company or members or creditor before the expiration of ten years from the publication in the Gazette of

the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon a certified copy of the order being delivered to the registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.”

“340. Where a company is dissolved, all property and rights whatsoever vested in or held in trust for the company immediately before the dissolution (including leasehold property but not including property held by the company in trust for any other person) shall, subject and without prejudice to any order which may at any time be made by the Court under section 338 or section 339, be deemed to be *bona vacantia*, and shall accordingly belong to the Government.”

14. Under section 339 (6) of the Act, any member of the company has a right to apply to restore the company to the register and court has jurisdiction to make such an order if satisfied that the company was at the time of the striking off carrying on business, or in operation or otherwise that it would be just that company be restored to the register as long as the said application is brought before the expiry of ten (10) years from the date of the publication of the gazette notice dissolving the company.

15. In the instant case, the 10 year window period within which the application to revive the company may be made has long lapsed as it is now 19 years since the company was dissolved and this is the reason why the applicants are now seeking leave to file the company revival petition out of time.

16. The application was expressed to have been brought under Order 5 Rule 3 of the Civil Procedure Rules which stipulates as follows:

Service on a corporation.

3. Subject to any other written law, where the suit is against a corporation the summons may be served —

(a) on the secretary, director or other principal officer of the corporation; or

(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3 (a) —

(i) by leaving it at the registered office of the corporation;

(ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or

(iii) if there is no registered office and no registered postal address of the corporation, by

leaving it at the place where the corporation carries on business; or

(iv) by sending it by registered post to the last known postal address of the corporation.

17. In their submissions before the court, the applicants alluded to the fact that their application was anchored on the provisions of the Limitation of Actions Act cap 22 Laws of Kenya and more specifically sections 26, 27 and 28 of the said Act which stipulates as follows:-

“26. Extension of limitation period in case of fraud or mistake Where, in the case of an action

for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.

(1) Section 4(2) does not afford a defence to an action founded on tort where—

(a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—

(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect—

(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.”

“28. Application for leave of court under section 27

(1) An application for the leave of the court for the purposes of section 27 of this Act shall be made *ex parte*, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.

(2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient—

(a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and

(b) to fulfil the requirements of section 27(2) of this Act in relation to that cause of action.”

(3) Where such an application is made after the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence would in the absence of any evidence to the contrary, be sufficient—

(a) to establish that cause of action, apart from any defence under section

4(2) of this Act; and

(b) to fulfil the requirements of section 27(2) of this Act in relation to that cause of action,

and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as (apart from section 27 of this Act) to afford a defence under section 4(2) of this Act.

(4) In this section, “relevant action” in relation to an application for the leave of the court, means any action in connexion with which the leave sought by the application is required.

(5) In this section and in section 27 of this Act “court”, in relation to an action, means the court in which the action has been or is intended to be brought.

18. The above sections 26 and 27 relate to applications for extension of limitation period in claims of fraud, mistake and in instances of ignorance of material facts in actions of negligence respectively. Section 28 on the other hand provides that leave to apply for extension of time may be made *ex parte* in the first instance. Nowhere in the said Sections of the **Limitation of Actions Act** is the extension of time to revive a dissolved company provided for and in that regard I find that the dissolution of a company and the revival thereof is not one of the instances covered under the limitation of actions act for which extension of time may be sought.

19. It is my further finding that the relevant law relating to the dissolution and revival of companies is the Companies Act sections 339 (6) the provisions of which I have already produced hereinabove in this ruling. In interpreting the provisions of section 339 (6) of the Act this court takes due cognizance of the intendment of the Act itself and the manifest desire of parliament as it is now a settled principle that every section of an Act must be construed as having effect as a substantive enactment. The posting of a gazette

notice *per se* did not connote the instant death of a company as the lawmakers provided window period of 10 years within which a person could apply for the restoration of the company. To my mind therefore, the legislature did not intend the provisions of section 339 (6) to be meaningless and so the phrase "before the expiration of 10 years" means that the legislature bestowed recuperative benefits upon the company which benefits the applicants needed to secure within a time limit of 10 years after which such time logically expires.

20. In any event, even assuming that I am wrong and dissolution of a company falls under the Limitation of Actions Act, my humble view is that the inordinate delay exhibited by the applicants in filing the instant application has not been explained to the satisfaction of the court or at all. The sheer number of years that have lapsed since the dissolution of the company go beyond the limitation period allowed for the applicant to challenge the dissolution of the company. The rationale for the fixing of a limitation period within which certain actions must be done or presented in court is well known and cannot be over emphasized. The fixing of the time limits was meant to fortify the notion that litigation must come to an end and for that reason, a cause of action cannot be allowed to exist for an indefinite period or to eternity. In this case, the implications of the expiry of the 10 years are far reaching and include the property of the company, if any, being taken over by the government.

21. To my mind, a company, just like a natural person is deemed to be dead upon the expiry of ten years after its dissolution in which case a dead person cannot be resurrected through an order of the court. I find it hard to believe that the applicants, being members of the defunct company, as they have claimed they were, could have all this time been in the dark about the goings on in the company including its dissolution and were only woken from their deep slumber last year when they allegedly went to register themselves as the "newly elected directors" of the company. One may also wonder under what circumstances the applicants could have conducted an election for directors in respect of a company that was already legally speaking, dead and buried.

22. I also find that the applicants cannot claim that they were ignorant of the dissolution or that the same was done in secrecy in view of their acknowledgement that the dissolution was posted in the Kenya gazette No. 3586 of 9th June 1998. The publication of the dissolution in the Kenya gazette was in, itself, sufficient notice to all and sundry that the company had been struck off the register of companies and the applicants cannot therefore be seen to feign ignorance of the said dissolution or claim that it was conducted in secrecy. In my humble view, the expiry of the 10 years also marks the death and burial of the company as this court can only make an order for extension of the time for the company's revival within the confines of section 339 (6) of the Act.

23. It is therefore my finding that the instant application has been overtaken by events, is time barred and as I have already stated in this judgment, the applicants have not explained where they have been for almost two decades after the dissolution of the company. This is a case where the applicants can be said to be guilty of laches. Under the circumstances, the order that commends itself to me is the order to dismiss the application dated 9th January 2017 with no orders as to costs since the 1st respondent did not file any response to the application.

**Dated, signed and delivered in open court this 27th day of June,
2017**

HON. W. A.OKWANY

JUDGE

In the presence of:

- Mr. Abobo for the Applicants
- Mr. Begi for the Respondents
- Omwoyo court clerk