



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 100 OF 2016

IN THE MATER OF UNIVERSAL RESOURCES INTERNATIONAL LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015

AND

**IN THE MATER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS
AGAINST THE REGISTRAR OF COMPANIES**

MARK LLOYD STEPHENSON.....1ST APPLICANT

UNIVERSAL RESOURCES INTERNATIONAL LIMITED.....2ND APPLICANT

VERSUS

REGISTRAR OF COMPANIES.....RESPONDENT

JUDGMENT

1. By a notice of motion dated 7th March 2016 the exparte applicants Mark Lloyd Stephenson and Universal Resources International Ltd seek from this court pursuant to leave granted on 2nd March 2016, Judicial Review Orders of Mandamus to compel the Registrar of Companies to receive and register the annual returns of Universal Resources International Ltd the 2nd exparte applicant herein, as submitted by Gaitho A. Mwaniki Certified Public Secretary and Company Secretary thereof, to effect the changes thereof and issue a certificate of Directors and shareholders as stated thereon; That costs of the application be provided for.

2. The notice of motion is supported by the affidavit sworn by Mark Lloyd Stephenson, the statutory statement and verifying affidavit which were filed accompanying the chamber summons seeking leave of court to institute these proceedings on 29th February 2016. The application is also supported by annexed exhibits.

3. It is averred that the first exparte applicant is a director of Universal Resources International Ltd, a private company licensed to engage for minerals in Kenya and have sourced out investments from Australian Nationals to invest money in Kenya and as such, have an obligation to the investors to ensure good returns for their money and not to incur losses through fraud. That the 1st applicant has gone to a

great extent of obtaining all necessary prospecting and exploration licences from the National and County governments, purchasing and acquiring specialized machinery from abroad and locally for the mining purposes and sought funding and investments from foreign investors, to the tune of about 50,000,000.

4. That when it was discovered that some serious fraud and misconduct had been conducted by the directors and members of the company, the company convened an extraordinary meeting on 15th December 2014 at Sirona Hotel with due notice given to the Registrar of Companies and that in the said meeting, in-depth discussions on the welfare of the company was discussed and the dubious activities of some directors.

5. That among the decisions reached in the meeting of the company were the appointment of the 1st applicant as the interim Chairman of the company and Stephen Kimanyi, Jason William Douglas Smith and Arthur Dominic Caruana as directors of the company. That the said meeting also created an executive committee to run the company composed of the 1st applicant, Richard Kariuki Githae and Stephen Kimanyi.

6. That the company convened another meeting on 5th December 2015 in which it divested Samuel Paino, Michael Gerald Lynch and Francis Strange of their Directorships of the company due to gross misconduct and fraud. In addition, that the company also commenced private criminal prosecution proceedings against Michael Gerald Lynch for gross fraud and forgery affecting the company in Kibera PP cr. Case No, 2/2015 and filed HCC 601/2015 seeking to recover from the defendants therein investor's money which they had embezzled from the company. That on several occasions the company had submitted the company's annual returns and resolutions and notification of cessation of Directors of the Registrar of Companies for registration and issuance of form C12 but the Registrar declined to receive the said returns or to effect the changes and instead demanded to be served with a court order. That the Registrar of Companies is partisan and appears to be running the company for the directors and members and that the company is suspicious that the Registrar is assisting in the fraud being perpetuated; and that unless the changes are effected as per the resolutions of 15th December 2014 and 5th December 2015 the company is likely to go under with the investors' funds in it as some of the Directors are extremely fraudulent. The verifying affidavits, and supporting affidavits all mirror the above grounds.

7. The annexures/exhibits in support of the application for Judicial Review are: the 1st applicant's Australian passport No. N7645239; work permit No. 007853 dated 9th May 2014; the 2nd respondent's certificate of incorporation No. CPR/2010/25804 dated 29th June 2010, Memorandum and Articles of Association, notice of extra ordinary meeting dated 19th November 2014 for 15th December 2014; special extra/ordinary resolution passed on 15th December 2014; minutes of the extra ordinary general meeting of 15th December 2014 at Sirona Hotel; email of 18th December 2014 distributing the minutes of the meeting of 15th December 2014 to all directors for private prosecution in Kibera CMCC 2/2015 supported by affidavit of Richard Kariuki Githae sworn on 6th October 2014; plaint in HCC 601/2015; notice of extra ordinary meeting for 5th December 2015 dated 17th November 2015; special extraordinary meeting resolution reached on 5th December 2015; minutes; email distributing notice for the meeting of 5th December 2015; minutes of the meeting of 5th December 2015 at Voi Mine Site wherein it was reported that the Registrar of companies had refused to accept the resolutions and returns saying she required an order from court directing the Registrar to effect the same; email distributing the above minutes; indemnity/letter of undertaking by the company secretary for the 2nd ex parte applicant Mr Gaiho Mwaniki (Certified Public Secretary); notice to shares holders ; notice of cessation of Directors to Registrar of companies; minutes/extra to the registrar for the meeting of 5th December 2015; letter dated 12th February 2016 to Registrar General requesting for list of directors Annual Returns for 2015 as per meeting of 5th December 2015; consent of appointment of Company Secretary dated 27th January 2014; appointment Company Secretary; Notice of appointment of Company Secretary.

8. It is observed that despite service of the notice of motion upon the Registrar of Companies, there was no appearance or response to these Judicial Review proceedings. The court went further and directed the

exparte applicant on 13th July 2016 to serve submissions upon the respondent but as at 22nd July 2016 when this date for judgment was reserved, there was no appearance.

9. The exparte applicants therefore filed their submissions on 20th July 2016 dated 19th July 2016 urging the court to grant Judicial Review Orders of Mandamus compelling the Registrar of Companies to receive returns for the 2nd applicant company herein and effect changes as per the company's annual returns and resolutions.

10. In their submissions the exparte applicants aver that the respondent is mandated by statute – Section 3 and 832 (2) and (3) of the Companies Act No. 17 of 2015 to keep the register of companies and information which information under Section 842(1) is contained in documents lodged or filed and received by the Registrar.

11. Further, that removal of a director of a company is allowed by Section 138 of the Act hence the 2nd applicant company had acted within the law but that the respondent Registrar had abdicated her statutory duty by declining to accept and adopt the resolutions passed by the 2nd applicant company at its meetings and therefore refusing to effect changes of particulars in the company's register of directors and their respective particulars.

12. That under Section 138 of the Act, refusal to comply with the requirements of lodging resolutions and minutes for registration within 14 days after a person is appointed or ceased to hold appointment as a director of a company attracts criminal sanctions hence failure of the respondent to accept the 2nd exparte applicant's returns puts it in conflict with the law.

13. Reliance was placed on the case of **Re Bukoba Gymkhana Club [1963] EA 478** on the principles applicable in application for Judicial Review. Further reliance was placed on **JR Application 344/2015 Republic Vs Commissioner, Co-operative Development Exparte Ng'ati Farmers Co-operative Society Ltd** where it was held that a person seeking mandamus must show that there resides in him a legal right to performance of a legal duty by a party against whom the Mandamus is sought or alternatively that he has a substantial personal interest and the duty must not be permissive but imperative and must be of public nature rather than of private nature.

14. It was submitted that failure by the respondent to perform a public duty of accepting returns of the 2nd applicant and effecting changes in the register infringes on the rights of the applicants who are suffering detriment.

15. On the parameters of Judicial Review, reliance was placed on the decision in **RV KNEC Exparte Gathenji Njoroge & Others CA 266/1996**. It was submitted that the Judicial Review order of mandamus compels the performance of a public duty imposed by statute as in this case where the respondent has failed /refused to perform the said duty.

16. Further, that the Companies Act does not provide for any other procedure to compel the respondent to perform her public duty which she has failed to perform leaving the applicants with no remedy hence the seeking of the court's intervention.

17. On the importance of Fair Administrative Action, reliance was placed on **Judicial Service commission Vs Mbalu Mutava & Another [2015] e KLR CA 52/2014** and on the duty to register an applicant's application for registration of documents lodged and furnish reasons for not registering them in the event that a decision is made not to register them. Reliance was placed on **JR Application No.105/2016 Republic Vs Registrar of Companies Exparte Independent Electoral Board of Kenya National Chamber of Commerce and Industry**. **Professor Sir William Wade's Book on Administrative Law** was also cited on the powers of public authorities being different from those of private persons and the need for public authorities to act in good faith and not to abuse or misuse power. The exparte applicant urged the court to grant the Judicial Review orders of Mandamus as sought.

Determination

18. I have carefully considered the Judicial Review application herein and all the accompanying documents. In my view, the sole question for determination is whether the ex parte applicants are entitled to Judicial Review orders of Mandamus that they seek from this court.

19. The scope of judicial review remedy of mandamus which is the sole prayer sought in this matter was stated by the Court of Appeal in the **KNEC v Republic Ex parte Geoffrey Gathenji Njoroge & Others CA 266 of 1996 [1997] e KLR** wherein the court, while setting out the whole scope of Judicial Review remedies of certiorari, prohibition and mandamus stated that inter alia:

“.....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 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 compels 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 ie that the duty has not been performed according to the law, then mandamus is wrong remedy to apply because , like an order of prohibition, an order of mandamus cannot quash what has already been done.....”

20. From the above most quoted authority on the scope of Judicial Review orders of prohibition, certiorari and mandamus , it is s clear that mandamus cannot be sought to quash a decision. It can also not be sought to compel exercise of a discretion in a specific manner, and where the decision has already made, unless it is quashed, mandamus would not be an effective remedy.

21. In the instant case the ex parte applicant’s case is that the respondent Registrar of Companies is obliged by statute the companies Act No. 17 of 2015 to keep a register of companies, under Section 832(2) of the Act. That under Section 832(3) of the same Act, the register of information relating to companies that is contained in documents lodged or filed with, or delivered to, the Registrar under the Act or any other written law; and that under Section 842(1) of the Act, the documents are not lodged with the Registrar for registration until the Registrar or a member of the Registrar’s staff actually receives the documents.

22. Section 139(1) of the Companies Act Stipulates that a company may by ordinary resolution at a meeting remove a director before the end of the director’s period of office, despite anything to the contrary in any agreement between the company and the director. The provisions of Section 138(1) of the Act also imposes a duty upon the company to ensure that (1) within 14 days (a) after the person is appointed or ceases to hold appointment as a director of a company, or (b) any change occurs in the particulars contained in a company’s register of directors or its register of director’s residential addresses, the company shall give notice to the Registrar of the appointment, cessation of appointment or change of particulars and of the date on which that specific act occurred. The company shall also, in the same circumstances (2) include in a notice of the appointment of a new director of the company a statement of the particulars of that director that are required to be included in the company’s register of directors and its register of directors' residential addresses; and (b) attach to or enclose with a notice a written consent

by that director to act in that capacity; Under Subsection 3 of Section 138 of the Act, if the company fails to comply with Section 1(1) or 1(2) above, the company and each officer of the company continues to fail to comply with the company and each of its officers who is in default, commits a further offence and on conviction each are liable to a fine not exceeding shs 200,000/=. (4) If even after conviction there is continuation of non compliance with the relevant requirement(s), the company and each officer who is in default commit a further offence daily and on which failure continues and on conviction are each liable to a fine not exceeding shs 20,000 for each such offence.

23. From the above clear provisions of the Companies Act, this court, on the affidavit and exhibit evidence adduced in this application, is satisfied that the respondent Registrar of Companies is under a mandatory statutory duty to receive and register particulars or returns filed by a duly incorporated company, whether it is with regard to appointment or cessation of appointment of a company's directors . The law also imposes a duty on the company to file such returns or particulars with the Registrar of Companies for registration, within 14 days of such changes and in default, the company and its defaulting officers commit offences whose penalty is provided.

24. I am also satisfied that with such mandatory provisions of the law in place, failure to register the returns of any such changes would be detrimental to the company which risks being deregistered or being wound up.

25. In the present case, it is clear that the 2nd respondent company did hold its extra ordinary meetings on 15th December 2014 and 5th December 2015 respectively and changes in the directorship of the company were made, through resolution and minutes which are available. There is also evidence that there are serious allegations of fraud and misappropriation of funds belonging to the company against the persons who purport to be the lawful directors of the 2nd applicant company hence the necessity for changes.

26. There is also evidence that the exparte applicants submitted the Annual returns and Resolutions for lodgement and registration by the Registrar of Companies who has refused to effect the changes but has not supplied to the exparte applicants any reasons for such failure. The allegations against the Registrar of Companies that she has demanded for a court order to compel her to do so have not been controverted in any way.

27. This court has no reason in the circumstances of this case, to doubt the ex parte applicants on that aspect as the Registrar has not communicated any reasons for failure to receive and register the returns presented to her for registration by the ex parte applicants. In my view, the Registrar's inactions go a long way in aiding and abetting the commission of offences under Section 138 of the Companies Act. Both the Registrar and the ex parte applicants are under statutory duty to act in the specific manner provided for in the Companies Act and therefore where the Registrar neglects to perform her statutory duty which is mandatory and not discretionary, the ex parte applicants stand to suffer detriment.

28. I am satisfied on the evidence adduced and on the authority of **JR 344 of 2015 Republic Vs Commissioner of Co-operative Development exparte Ngata Farmers Co-operative Society Limited**, that where there is a legal right to performance of a legal duty by a party against whom the mandamus is sought, or where the party seeking mandamus has a substantial personal interest, and the duty is not permissive but imperative and is of public rather than private nature, the order of mandamus will issue.

29. It has not been shown that there is an alternative remedy for the ex parte applicants in this case, whose existence depends on the filing of returns and on the Registrar of Companies accepting and effecting registration of those returns and or resolutions and changes as submitted to her by the applicants.

30. The Registrar of Companies is indeed duty bound to accept these Annual Returns including the Resolutions passed by the 2nd applicant altering the register of the 2nd applicant, to reflect the newly appointed directors of the 2nd applicant company. Directors are the heart beat of any company without which a company being an artificial legal entity cannot function on its own without directors that make decisions for the company's operations. To refuse to register the changes to reflect the status of the company without giving any reason is to abuse power and to act arbitrarily and oppressively to the

detriment of the company and therefore killing it all together.

31. In **JR Application No. 105 of 2016 Republic Vs the Registrar of Companies ex parte Electoral Board of the Kenya National Chamber of Commerce and Industry**, the court stated, and I wholly agree that:

“...it follows that the respondent was duty bound to consider the applicant’s application for registration of the documents lodged by the applicant and furnish the applicant with the reasons for not registering the same in the event that it made a decision not to do so. It is now trite that the circumstances under which the court would be entitled to intervene even in the exercise of discretion. This court is empowered to interfere with the exercise of discretion in the following:

(1) Where there is an abuse of discretion;

(2) Where the decision maker exercise discretion for an improper purpose

(3) Where the decision-maker is in breach of the duty to act fairly

(4) Where the decision-maker has failed to exercise statutory reasonably

(5) Where the decision-maker acts in a manner to frustrate the purpose of the Act donating power;

(6) Where the decision –maker filters the discretion given;

(7) Where the decision-maker fails to exercise discretion

(8) Where the decision maker is irrational and unreasonable”

32. In the instant case, there is evidence that the 2nd applicant is a duly incorporated private limited liability company as shown by certificate of incorporation exhibited dated 29th June 2010. There is also evidence that the 1st applicant is a lawful immigrant into this country, as shown by his passport No. N. 7647239 of Australia expiring 24th August /8/2022 and Work Permit/Resident Permit No. 007853 issued on 9th May 2014.

33. The 2nd applicant company duly registered its Articles and Memorandum of Association dated 7th June 2010. There is also evidence that on 19th November 2014 the company issued notice of extraordinary meeting and minutes and resolutions of that meeting are exhibited, dated 15th December 2014.

34. Further there is evidence that the ex parte applicants in compliance with the statutory provision circulated the notice for another extraordinary meeting of the company that was held on 5th December 2015, on 17th November 2015 and minutes and resolutions of that meeting duly endorsed were sent to the respondent in the required format as returns for acceptance and registration of the changes in the directorship of the 2nd respondent company.

35. There is also a letter by the 2nd ex parte applicant’s Company Secretary dated 12th February 2016 to the Registrar General seeking for a list of directors for the 2nd applicant company as per the Registrar’s records but there is no response to that letter written by Mr. Gaitho Mwaniki (CPS) and neither is there any response or reasons given for the non-registration of the Annual Returns and Resolutions of the 2nd applicant company, in accordance with the statutory provision of the companies Act as set out above.

36. Furthermore, it is clear that the act of registering a company’s annual returns or changes or alternations in the particulars of a company is a statutory duty and not a discretionary power for the only

condition would be the applicant company fulfilling the requirements of such filing for registration. In this case, sadly, the Registrar of Companies has decided to remain silent for two consecutive years that the 2nd applicant has been holding its extraordinary meetings and submitting its Resolutions for adoption/registration by the respondent but the respondent has refused to receive and register those changes.

37. The Registrar of Companies is a public officer and under Article 73 of the Constitution, public authority is not to be exercised through silence. Authority is assigned to state and public officers as a public trust to be exercised in a manner that is consistent with the purposes and objects of the Constitution; demonstrates respect for the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of that office; and that authority vests in the state or public officer the responsibility to serve the people, rather than the power to rule them.

38. From the conduct of the public officer in the name of the Registrar of Companies who is an employee of the state department of Office of the Attorney General and Department of Justice, which is in a public office that exists for the benefit of the people, this court finds that conduct of the Registrar of Companies demonstrates disrespect and contempt for the people; does not bring honour to the nation and dignity of the office, and in the eyes of the exparte applicants herein who have come all the way from beyond our borders to invest in this country. That conduct does not promote public and investor confidence in the integrity of that very important office and the said conduct is a demonstration of the tendency to rule the people rather than to serve them, in accordance with the statutory mandate.

39. Exercise of statutory mandate is not a favour that a public officer will be according to those who seek to invoke the exercise of that statutory mandate. It behoves an office of that statute to ignore persons who seek services that would go a long way in the promotion of economic growth and economic development of our nation to refuse to respond to any correspondences from its external customers key stakeholders that contribute to the existence of the said office. Where there is good reason to refuse to accept the annual returns for the 2nd applicant and register them in accordance with the above cited statutory provisions, nothing prevents the Registrar of Companies from giving those reasons to the exparte applicants. Refusing to register the returns and resolution and saying nothing is evidence of arrogance and abuse of power vested in the public officer to serve the people rather than to rule them. That abuse of power must be checked by this court.

40. On the whole, I find this Judicial Review Notice of Motion dated 7th March 2016 merited on all fours and for that reason, Judicial Review Order of mandamus be and is hereby issued compelling the Registrar of Companies to receive and register the Annual Returns of Universal Resource International Ltd, the 2nd exparte applicant herein submitted by Gaitho A. Mwaniki Certified Public Secretary and Company Resolutions made by the said company reached on 5th December 2015 and issue a certificate of Directors and shareholders as stated in the said Resolutions forthwith upon service of this order.

41. The Exparte applicant shall bear their own costs of these Judicial Review proceedings.

Dated, signed and delivered in open court at Nairobi this 28th day of September, 2016.

R.E. ABURILI

JUDGE

In the presence of:

Mr Kago for the applicant

N/A for the Respondent

CA: Adline