



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC CIVIL APPLICATION NO 467 OF 2014

IN THE MATTER OF THE COMPANIES ACT (CAP 486) LAWS OF KENYA

AND

**IN THE MATTER OF RECTIFICATION OF THE COMPANY REGISTER OF TULSI
CONSTRUCTION LIMITED**

BETWEEN

1. SURYAKANT BHAILALBHAI PATEL

2. KULJI KALYAN KERAI

3. PRAVINCHANDRA JAMNADAS KAKAD.....APPLICANTS

AND

1. MOSES SEKENYA KULUNDU

2. NICHOLAS ONDEKO

3. MUCEMI MWANGI

4. KEPHAS OBWAO OPANY.....RESPONDENTS

AND

THE REGISTRAR OF COMPANIES.....INTERESTED PARTY

RULING

Rectification of Company Register

[1] The Applicants applied through an Originating Notice of Motion dated 26TH September 2014 for two orders. The first one is for leave to serve the Motion through substituted; and the other, that the court directs the Registrar of Companies to rectify the Company Register of Tulsi Construction Limited by

deleting the names of the Respondents as Directors or shareholders of the Company. The register to reflect the following as the shareholding and Directorship of the Company:

Shareholding

1. **Suryakant Bhailalbai Patel.....4000 Shares**
2. **Kulji Kalyan Kerai.....3000 Shares**
3. **Pravinchandra Jamnadas Kakad.....3000 Shares**

- Total.....10,000 Shares**

Directorship

1. **Suryakant Bhailalbai Patel.....Director**
2. **Pravinchandra Jamnadas Kakad.....Director**

[2] The Respondents were served notice of the Originating Notice of Motion through advertisement carried in the Star Newspaper pursuant to an order of the Court. The Registrar of Companies was also served as a necessary party in such proceedings. Affidavit of service for each service was filed to evidence the service.

[3] The Applicants averred that the company is still a going concern doing business in construction industry. They are the promoters and original shareholders and directors of the company. And have traded with the company since 2004 when it was incorporated. They claim that their shares were stolen by the Respondents. They learned the theft of shares through a report by their bankers, M/S Fidelity Bank Ltd-the report was done in the routine due diligence exercise by the bank on the company after granting it facility. The Applicants were prompted to peruse the company file in the Companies Registry and found a series of documents had been lodged whose effect was to transfer shares from the Applicants to the Respondents. They reported the matter to the police as well as the Registrar of Companies. The police investigations are still ongoing. The Registrar of Companies noted that the minutes for the purported meeting of 15.12.2011 which was to resolve the issue of share transfer to the Respondents had not been lodged and so he advised the Applicants to apply in court for rectification of the register. The Applicants launched own investigation through their lawyers and the advocates who were purported to have filed the offending returns, commissioned the affidavits and statutory declaration which were lodged with the Registrar denied the documents and specifically stated that their signatures were forged.

[3] The relevant law on rectification of the company register is section 118 of the Companies Act. The section provides:

(1)If:-

(a) the name of any person is without sufficient cause entered in or omitted from the register of members of a company or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,

the person aggrieved or any member of the company or the company, may apply to the court for rectification of the register.

(2) Where an application is made under this section, the court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved”.

[4] There is ample judicial authorities as well as respected literally works on the scope of jurisdiction and power of court in determining applications for rectification of register of members of a company. First, the jurisdiction to rectify register by court is discretionary albeit the discretion must always be exercised in accordance with the law; not whimsically; not capriciously. Therefore, the first consideration in the exercise of discretion under section 118 of the Companies Act is; the procedure is a summary process and should be invoked only in clearest of cases. See the case of **Prab Hual Tejpa Haria & Another vs. Pravin Chandra Meghji Dodhia & 2 Others [2007] eKLR**, where Warsarme J (as he then was) expressed himself that;

“In my view the summary powers of the court can be invoked in plain and clear cases, where there is no need for a trial..... The powers under section 118 of the company’s Act cannot be invoked when there is a real and complicated dispute as to the real interests of the parties.”

[5] Given the facts of the case, and that those facts have not been controverted and are plainly stated, the case is a clear one where rectification of the company register should be done. It has been shown that there was no reason or legal basis why the names of the Applicants or those of the Respondents were removed from and entered into the register, respectively. The Applicants as shareholder are not able to reap the benefit of their property in the shares; indeed they have been deprived of their property in the shares by the impugned registration of transfer of shares. As directors, their removal denies them the control of the management of the legal entity as Board of Directors. The Respondents, by the offending registration assumed the control of management of the company. And, therefore, in the circumstances, the Applicants have been stripped of their status as shareholders and directors of the company; in law they have been completely incapacitated or disabled to exercise their rights as such shareholder and directors or participate in the business and meetings of the company. There being no valid transfer of shares to the Respondent, the register should and I hereby order the register to be accordingly rectified as prayed in the Motion. For further elucidation see an excerpt from *Halsbury’s Laws of England, (4th Edn.), Vol. 7(1) para 372* on justification of the exercise of discretion by the court to rectify the company register herein:

“372. General jurisdiction to rectify company's register of members

The jurisdiction to rectify a company's register of members is discretionary; and it is not limited by the provisions of the Companies Act 2006. Thus the court will rectify the register, apart from that Act, to enable the members of a company to have a fair and reasonable exercise of their rights.

When the court entertains the application, it is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition and the purpose for which relief is sought.

The power to rectify has been exercised where there has been misrepresentation in the prospectus; where it is expedient to have an order which will bind all the shareholders and effectually bar any subsequent application for restoration of a name struck out by the directors; where shares have been illegally allotted at a discount; where the application for shares has been made in the name of a person, as, for example, an underwriter, without his authority; where there is no valid allotment of shares; or the allotment is not made within a reasonable time, or is irregular; where a transfer of shares has been improperly registered or registration has been refused; where there are joint holders of shares who wish to divide the shares so held into two parts with their names entered in the register in respect of each part in a different order; where the company puts on its register matters which are not required by the statute; in order to set right allotments of shares which have been issued as fully paid without a proper contract being filed; and where an overseas company was entered in the register without the permission of the Treasury, which was at the time required.”

[6] The upshot is that the register shall be rectified by removing the names of the Respondents from the register forthwith, and registering thereto the following particulars on shareholding and directorship of

TULSI CONSTRUCTION LIMITED:

Shareholding

1. Suryakant Bhailalbai Patel.....4000 Shares
 2. Kulji Kalyan Kerai.....3000 Shares
 3. Pravinchandra Jamnadas Kakad.....3000 Shares
- Total.....10,000 Shares**

Directorship

1. Suryakant Bhailalbai Patel.....Director
2. Pravinchandra Jamnadas Kakad.....Director

Dated, signed and delivered in court at Nairobi this 28th November, 2014

F. GIKONYO

JUDGE