



JUDICIAL REVIEW

- Right to be heard.
- Whether Registrar of companies should hear party to dispute.
- Registration of a company by a name too like the name of an existing company
- Whether court has jurisdiction to quash such decision.

Brief rules of natural justice, and legitimate expectation

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Misc Civ Appli 711of 2005**

**REPUBLIC.....APPLICANT**

**THE REGISTRAR OF COMPANIES.....RESPONDENT**

**EX PARTE**

**TRANSGLOBAL FREIGHT LOGISTICS LIMITED.....APPLICANT**

**AND**

**RULING**

**Background**

**Transglobal Freight Logistics Ltd** (the Applicant) was registered by the Registrar of Companies as a Company limited by shares on 7<sup>th</sup> April 2003. The Certificate of Incorporation was issued on that date, and bears the signature of an Assistant Registrar of Companies.

**Global Freight Logistics Limited** (the Interested Party) was registered on **17<sup>th</sup> September 2003**, that is to say some five (5) months and ten (10) days after registration of the Applicant.

The Applicant contended before the Registrar of Companies that the name of the Interested Party so resembles that of the Applicant that it was bound to cause confusion in the market. Both parties are in the same business, **Clearing and Forwarding** and their businesses are in proximity to each other, only three hundred (300) or so metres apart.

Following the Applicant's concern, the Registrar of Companies directed the Interested Party to effect a change of name pursuant to section 20(2) of the Companies Act. The said section says-

“20(1)

**(2) (a) If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name is registered by a name which, in the opinion of the registrar, is too like the name by which a company in existence is previously registered, the first-mentioned company may change its name with the sanction of the registrar and and, if he so directs within six months of its being registered by that name, shall change it within a period of six weeks from the date of the direction or such longer period as the registrar may think fit to allow”.**

The Interested Party rejected the Registrar's direction and contended that there were similar names existing such as **Transnational Bank Limited** and **National Bank Ltd**, and threatened to move the court if the matter was not resolved by the Registrar. The Registrar did not budge.

The Interested Party moved to court under **Miscellaneous Application No. 353 of 2004**, challenging the Registrar's decision of 22<sup>nd</sup> March 2004 requiring the Interested Party to change its name. According to the Replying Affidavit sworn by Peter Wambua Muthoka sworn on 17<sup>th</sup> May, 2005 that application was on 1<sup>st</sup> April 2005 stood over generally and no further action was taken on it.

Upon being threatened by the Registrar with a threat of de-registration, the Interested Party filed **H.C. Misc. Application No. 410 of 2004**, and in which the applicant appeared as an Interested Party. However in the cause of proceedings in **H.C. Misc. Application No. 410 of 2004** the Applicant became aware of the Respondent's i.e. Registrar's decision conveyed to the Interested Party in a letter dated 30<sup>th</sup> November 2004 rescinding its earlier letter of 22<sup>nd</sup> March 2004 requiring the Interested Party to change its name. It is this letter which raised the concern of the Applicant that throughout the year 2004, the Respondent was aware of the Applicants interest in safeguarding its name, and was aware of the previous directive given to the Interested Party. The Applicant was also concerned that the new decision was made without contacting or giving the Applicant a copy of the letter conveying the new decision rescinding the previous one, and while the matter was pending in court.

Being so aggrieved, the applicant sought and was granted leave to bring Judicial Review Proceedings for orders of certiorari and mandamus.

### **THE APPLICATION**

By a Notice of Motion dated and filed on 20<sup>th</sup> June 2005, the Applicant sought two judicial review orders;-

**(1) An order of Certiorari to move into the High Court for purposes of it being quashed the decision and order of the Registrar of Companies dated 30<sup>th</sup> November 2004 whereby the Registrar of Companies has wrongly and unlawfully withdrawn and/or rescinded his decision dated 22<sup>nd</sup> March 2004 wherein he had made a decision to strike off Global Freight Logistics Limited from the Register of Companies.**

**(2) An order of mandamus to compel the Registrar of Companies to strike off Global Freight Logistics Limited from the Register of Companies.**

**(3) An Order for the Respondent to pay the costs of the proceeding.**

The Notice of Motion was supported by the grounds on the face of the Motion, the grounds set out in the statement annexed to the Chamber Summons Application for leave and the Affidavit Verifying the Facts sworn by Peter Wambua Muthoka on 17<sup>th</sup> May 2005. I will revert to these grounds in the course of this Ruling.

### **OPPOSITION TO THE NOTICE OF MOTION.**

As expected the Notice of Motion was vehemently opposed by the Registrar of Companies and by the Interested Party. The Respondent filed a Notice of Preliminary Objection principally on the ground that the court had no jurisdiction to entertain the Notice of Motion under section 20 of the Companies Act and termed the motion as an abuse of the process of court because it lacked merit, and was merely designed to bring disrepute upon the Respondent in her office, and was nothing more than vendetta among the applicant and the interested party. The Respondent filed Skeletal Arguments to the same effect.

On its part, the Interested Party filed a Replying Affidavit sworn by Harbhajan Singh Dhillon On 25<sup>th</sup> July, 2005. On the same day the Interested Party also filed a Notice of Preliminary Objection on points of law very much on similar grounds with those of the Respondent but in addition thereto, stated that the Applicant had no **Locus Standi**, the court lacked jurisdiction, that the Applicant accepted the Order in **H.C Misc. Application No. 410 of 2004**, and had its Bill of- Costs taxed and awarded in the sum of Ksh.46,190.00, and that the application was totally defective (flawed) in that the court cannot order the Registrar to invoke section 20(2) (b) of the Companies Act, and would for this purpose rely on ss 16,17 and 402 of the Companies Act. The Affidavit of Harbhajan Singh Dhillon was very much in the same vein.

It is only the Respondent who prepared and filed skeletal arguments. The Applicant relied upon the various authorities cited and in particular the case of **Republic vs the Attorney General and the Registrar of Societies**, exparte **Smith Khisa Waswa & 2 others HC. Misc Application No. 769 of 2004.**

The Interested Party on his part relied upon the Notice of Preliminary Objection, the Replying Affidavit of Harbhajan Singh Dhillon and no less than sixteen (16) bundle of authorities. The respective arguments will appear in the course of this Ruling.

### **OF THE LACK OF JURISDICTION**

This point was raised by both the Respondent and the Interested Party and it had to do with whether the court could or could not direct the Registrar as to the manner of the exercise of his functions under section 20(2)(b) of the Companies Act.

The long answer to this point is that whereas the court will not direct the Registrar as to the manner in which she will exercise her discretion, (and hence the Applicant abandoned the prayer for an order of mandamus), the court does however retain and has jurisdiction **firstly** to inquire whether the Registrar of Companies has exercised the powers conferred upon her by section 20(2)(b) of the companies Act, and **secondly** whether she has exercised those powers both reasonably and to the legitimate expectation of an applicant.

The short answer is that the jurisdiction of the court is not dependent upon the provisions of section 20(2)(b) of the Companies Act, nor indeed on the effect of registration or the conclusiveness of a certificate of registration (ss.16 or 17 of the Companies Act). The Judicial Review Jurisdiction of the Court is derived from Section 8 and 9 of the Law Reform Act (Cap 26 Laws of Kenya), and rules made thereunder and set out under Order LIII of the Civil Procedure Rules. Hence it is correct to say, as Mr. Gachui learned Counsel for the Applicant argued, that the Preliminary Objection raised by the Respondent and the Interested Party are not true preliminary points of law capable of determining a matter at hand as defined in **MUKISA BISCUITS MANUFACTURING CO. LTD. VS WEST END DISTRIBUTORS LTD [1969] E.A. 696 – 701**, where Sir Charles Newbold said.

**“A Preliminary Objection is in the nature of what used to be a demurrer a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

Sir Charles Newbold – President of the East Africa Court of Appeal cautioned then, and as courts still do today **“that improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse issues”**.

On a different note, but on the question of whether the name of one company was similar to another so as to likely to deceive is a question of evidence. When that issue was raised in the case of **NORTH CHESHIRE BREWERY COMPANY VS MANCHESTER BREWERY COMPANY [1899] AC 83** at pp.84-85, Earl of Halsbury L.C. said-

**“.....But the truth is, that when one comes to see what the real question is this in a single sentence. Is this name so nearly resembling the name of another firm as to be likely to deceive? That is a question upon which evidence of course might be given as to whether or not another brewery either in the one place or in the other, or whether there were several Breweries nearly resembling it in name; what the state of the trade was and whether there was any trade name all those are matters which are proper to be dealt with upon evidence.....”**

The one single issue here is not whether the name was calculated to deceive that is irrelevant for the purpose of Judicial Review. It is also irrelevant whether the decision of the Registrar was right or wrong. It is not also an issue whether the Registrar had jurisdiction or not, whether the Registrar would have arrived at the same decision or not. What is of relevance here and in Judicial Review is not the merits or demerits of the Application. What is of relevance is the manner in which the Registrar went about making her decision the process of decision-making.

The Registrar was aware that parties were already in court as a result of the earlier decision of 22.3.2004. The matter having gone to court, and the Registrar being a party in court and as a public office was required to be neutral and could not argue aside of the court, a case for one of the parties. The Registrar could not engage in correspondence with one party and ignore the other. The Registrar would properly be accused not merely of bias but also of gross abuse of the rules of natural justice. In an on going contest particularly in court, the Registrar would not afford to ignore one party in favour of the

other. It is a legitimate expectation of all parties to the contest or dispute that each of them will inform or notify the other of its intentions in arriving towards the resolution of the contest or dispute.

The principles of legitimate expectation, taking into account irrelevant considerations, fairness and bias, were all considered in the case of **REPUBLIC VS ATTORNEY GENERAL & REGISTRAR OF SOCIETIES**, ex- parte **SMITH KHISA WASWA JOSEPH ACHUODHO & JOSEPH MAINGI**.

At pp 12-13 of their decision in that case Nyamu and Ibrahim JJ dealt very lucidly with the Principles of unreasonableness and bias, abuse of power, bad faith and procedural impropriety all of which principles stand out in assisting the courts in dealing with challenged decisions.

In the case of **COUNCIL OF CIVIL SERVANTS UNIONS VS MINISTER FOR CIVIL SERVICE [1985]3 ALL ER. 935** Diplock gave a preview of Judicial Review and said at 949-

**“Judicial Review, now regulated by RSC order 53 provides the means by which judicial control of administrative action is exercised, the subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the “*decision maker*” or else a refusal by him to make a decision.”**

To qualify as a subject for Judicial Review the decision must have consequences which affect some person (or body of persons) other than the decision – maker, although it may affect him too. It must affect such other person either-

**(a) by altering rights or obligations of that person which are enforceable in or against him in private law, or**

**(b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity or**

**(ii) He has received an assurance from the decision- maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.**

The matter in question here qualifies for Judicial Review. It is a decision of the Registrar of Companies, a public body conveyed to the Interested Party by a letter dated 30<sup>th</sup> November 2004 without reference to the Applicant, a party already in court over a previous decision by the same decision maker, the Registrar. The Applicant is a person who the Registrar knew would be affected by that decision. The letters dubbed “**without prejudice**” and in part said that the Registrar would not insist on the change of name provided the Interested Party withdrew the Application (i.e. **H.C. Misc. Appl. No. 410 of 2004**) then before the court. The letter was not copied to the Applicant as an Interested Party in that Application.

That decision is indicative of both bias, unreasonableness and lack of even-handedness on the part of the Registrar, the decision-maker. As an Interested Party in that Application, the Applicant had a legitimate expectation that it would be informed and given opportunity to respond to the proposed decision.

I therefore hold the view as expressed by Lord Diplock In the **CCSU vs Minister for the Civil Service** (supra), that the matter being already in court, the decision - maker could not isolate one party. It was the Applicant’s legitimate expectation that he would not only be informed of any moves to take away the matter from the court, but that he would also be heard in controverting the proposed decision. It is no answer to that legitimate expectation for the Interested Party, to say that the Applicant was awarded costs upon the termination of the proceedings arising from the impugned decision contained in the said letter of

30<sup>th</sup> November 2004. It is also no answer to say that section 20(2) (b) of the Companies Act does not confer upon the Registrar any power to consult or summon any one before exercising her discretion under that Section.

Just like in section 12 of the Societies Act (Cap 108 Laws of Kenya) which was under consideration in the **Smith Khisa Waswa** (supra) case that, where in respect of any registered society the Registrar is of the opinion that the registration of a society should be cancelled or suspended for any of the stated causes or reasons, the Registrar is bound to give the notice to the Registered Society before exercising that discretion. The reason is that a Society upon registration acquired a protected interest which cannot be taken away without due process as outlined in that Section.

Similarly even though there is no similar provision for notice under Section 20(2)(b) of the Companies Act, the Section by its very words does not preclude the application of the rules of natural justice and in particular the principle of “**audi alteram partem (hear the other party). If through inadvertence or otherwise – a company on its first registration or on its registration by a new name is registered by a name which in the opinion of the registrar, is too like the name by which a company in existence is previously registered, the first mentioned company may change its name with the sanction of the Registrar, and if he so directs within a period of six months of its being registered by that name shall change it within six weeks from the date of the direction**”.

The fact of registration through “**inadvertence or otherwise**” carries with it good faith, but also many sins of commission and omission. How does the Registrar discover that a Company has been registered inadvertently or otherwise? He/she does so by own research on the index of companies, or on notice by an interested Party. Where therefore a question of such inadvertent registration arises and becomes a court dispute, it is incumbent upon the Registrar to have that dispute resolved through the court, that is the only way of ensuring that all the parties are heard.

For the Registrar to circumvent that process by engaging in curious/(counsel called it “**intriguing**”) correspondence with the Interested Party, the Registrar opened herself not merely to accusations of bias and failure to act fairly but also other procedural improprieties breach of the rules of natural justice, and legitimate expectation of the Applicant. Equally important, and much more serious, actual contempt of the court process and thus erode the confidence and trust of the Applicant in due process and the rule of law.

For those reasons the Applicant’s legitimate expectation to vindicate its claim to the disputed name cannot be thwarted by behind the scenes manoeuvres. There shall therefore issue an order of certiorari calling into this court and to quash the decision of the Respondent contained in its letter dated 30<sup>th</sup> November 2004. The Interested Party sought to have the Respondent excused under Section 402 of the Companies Act for negligence, default breach of duty or breach of trust in relation to its decision of 30.11.2004. The “**excuse**” can only be in regard to costs and not flagrant evasion of court process. The Interested Party as a major contributor to that evasion shall pay the costs incurred by the Applicant and incidental to the Notice of Motion, the subject of this Ruling.

There shall be orders accordingly.

Dated and delivered at Meru this 22<sup>nd</sup> day of February 2008

**M.J. Anyara Emukule**

**Judge.**