



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Misc Cause 6 of 2006

**IN THE MATTER OF AN APPLICATION TO RESTORE TO THE REGISTER QUEENSWAY
INVESTMENTS LIMITED**

AND

IN THE MATTER OF THE COMPANIES ACT CAP 486

CORAM : Before Hon. Justice L. Njagi

Mabeya for Petitioner

Queensway Investments Limited for Respondent

Court clerk – Kinyua

J U D G M E N T

The application before the court is brought by way of a petition. It prays for orders that Queensway Investments Limited, a company whose name has been struck off the register, be restored to the Register of Companies; that the costs of this petition be awarded to the petitioner; and that such other order be made in the premises as shall be just.

At the hearing of the petition, Mr. Mabeya appeared for the petitioner. An affidavit by one Samson M. Heho, a court process-server, shows that on 19th August 2006, the directors of Queensway Investment Limited were served with a copy of the petition set down for hearing on 20th September, 2006. They were also served on 12th September, 2006, with a copy of a Notice to produce documents. However, they did not attend court on the hearing date. Being satisfied that they were served in sufficient time for them to attend, the court elected to proceed exparte.

Mr. John Maurice Cleare, the Principal Officer of Malindi Air Services Limited, the petitioner in this matter, gave evidence that Queensway Investments Limited was incorporated in 1987, and produced a copy of its Memorandum and Articles of Association. He also produced a copy of Form No. 203A of the Companies Act, dated 5th March, 1987, showing that with effect from 4th March, 1987, Mr. Azim Jamal Virjee and Mrs. Naseem Azim Virjee resigned as directors of the company, and instead Mr. Caleb Kipkiskei Kipingor and Mrs. Agnes Cheptum Kipingor were appointed as directors of the company. Mrs. Kipingor was at the same time appointed as Company Secretary. The witness further produced another Form 203A dated 28th May, 1987, notifying change of directors and their particulars. It showed that with effect from 4th March, 1987, one share held in the company by Mrs. Naseem Azim Virjee was transferred to Agnes Cheptum Kipingor, and another one share held by Mr. Azim Jamal Virjee was transferred to Mr.

Caleb Kipkoske Kipingor.

The witness further testified that in High Court, Mombasa, Civil Case No. 484 of 1993, Malindi Air Services Limited obtained a decree against Queensway Investments Limited for a sum of Kshs. 5 million. In spite of considerable effort by the decree – holders, the decree was never satisfied as the decree holder did not succeed in execution. This led to the issue on the judgement debtors of a notice to show cause which was dated 20th June, 2002. Subsequent thereto, the decree holder filed an application dated 16th January, 2003, seeking orders that the company directors do produce the company’s books of accounts for scrutiny, and that the two directors be orally examined as to the company’s property and any debts owed to it. This application, however, was never heard and is still pending in court. Before long, by Gazette Notice No. 7576 dated 19th September, 2003 and published in the Kenya Gazette of 24th October, 2003, it was notified that Queensway Investments Limited had been struck off the register of companies and that it was dissolved. Malindi Air Services Limited thereupon filed this petition.

In his very brief but crisp submission, Mr. Mabeya for the petitioner told the court that he relied on Section 339(6) of the Companies Act, and rule 5(h) of the Companies (High Court) Rules. He submitted that the petitioner was a creditor of the company, and that it was fair that the prayers sought be granted so that the decree in HCCC No. 484 of 1993 is not defeated.

Rule 5(h) of the Companies (High Court) Rules states:-

“The following applications shall be made by petition –

(a) - (g) ...

(h) applications to restore a company’s name to the register under Section 339 of the Act . . . “

The application by petition seeking an order that Queensway Investments Limited be restored to the register is therefore properly before the court. Section 339 of the Companies Act, Cap 486, empowers the Registrar of Companies to strike defunct companies off the register. The procedure to be followed is elaborately set out in subsections (1) to (5). It culminates in the name of the company being struck off the register, which is to be followed by publication thereof in the Kenya Gazette. Upon that publication in the Kenya Gazette, the company stands dissolved.

Section 339 (6) of Cap. 486 then provides:-

“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 member 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 . . .”

The petition in the instant case is filed by a creditor, M/S Malindi Air Services Limited. 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. Inasmuch as such applications should be filed within 10 years of the date of the publication of the striking off in the Kenya Gazette, this condition has also been satisfied since the striking off was notified on 24th October, 2003, and this petition was filed on 20th July, 2006, which was less than three years from the date of striking off. 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 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 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. I accordingly make the following orders:-

1. *That Queensway Investments Limited be and is hereby restored to the register of Companies.*
2. *Costs of this petition be and are hereby awarded to the petitioner.*

Dated and delivered at Mombasa this 29th day of September, 2006.

L. NJAGI

JUDGE