



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

Misc Cause 350 of 2005

IN THE MATTER OF THE UASIN GISHU MEMORIAL HOSPITAL LIMITED AND

IN THE MATTER OF THE COMPANIES ACT (CAP 486) AND

IN THE MATTER OF AN APPLICATION TO RESTORE THE COMPANY'S NAME IN THE REGISTER

J U D G E M E N T

Delay in the preparation and delivery of this ruling has been occasioned by the last vacation of the court and my recent illness and hospitalization. The delay is regretted.

This is a petition by Uasin Gishu Memorial Hospital Limited (hereinafter called the Petitioner) seeking the following reliefs-

- 1. That the name of the Petitioner be restored to the Register of Companies under the provisions of section 339 (6) of the Companies Act, Cap 486.***
- 2. That the business, assets and property of the Petitioner do revert and vest in the Petitioner in the same manner and position as they were before the striking off the Petitioner from the Register of Companies.***
- 3. That the costs of this petition be awarded to the Petitioner.***

The petition is supported by a verifying affidavit sworn by one Charles arap Kesse a director of the Petitioner and its Company Secretary. To that verifying affidavit are annexed copies of the following documents, inter alia:-

- (i) Certificate of Incorporation of the Petitioner dated 10th of August, 1961.***
- (ii) Gazette notice no.6623 of 20th August, 2004 of intended dissolution of various companies (including the Petitioner).***
- (iii) Gazette notice No. 815 of 4th February 2005 which is a notification of the striking off of the Register of Companies and dissolution of various companies (including the Petitioner).***

An affidavit of service filed on 11th May, 2005 shows that the Registrar of Companies was served with the petition on 9th May, 2005. He filed a Memorandum of Appearance and Answer to Petition, both dated 23rd May on 26th May, 2005 by which he opposed the petition. A notice of appointment of

advocates dated 14th May, 2005 was filed for Moi Teaching and Referral Hospital(hereinafter called the Interested Party). The Interested Party by chamber summons dated 27th May,2005 sought leave to be joined in these proceedings. As it turned out that application was not prosecuted. The Registrar of Companies, by chamber summons dated 23rd May, 2005 sought an order to strike out the petition. That application was also not prosecuted.

At the hearing of the petition learned counsel for the Registrar of Companies, who came in late and found that the learned counsel for the Petitioner had already presented the petition, nevertheless raised objection to the petition in what amounted to a preliminary objection. That objection was that under Rule 3 of the Companies (High Court) Rules the petition amounted to a suit and not a mere application and that therefore it could not be heard and determined upon affidavit evidence. He further submitted that viva voce evidence would be required and must be tendered in accordance with the provisions of the Civil Procedure Rules. Learned counsel for the Petitioner answered that this is an issue that ought to have been raised on 17th May, 2005 when the court gave directions as to hearing of the petition. Rule 3 aforesaid provides that any proceedings brought under the Companies (High Court) Rules shall be deemed to be a suit within the meaning of the Civil Procedure Act and any Rules made there under, and that the general practice of the Court, including the course of procedure and practice in chambers shall apply so far as may be practicable, except if and so far as the Act or the Rules otherwise provide. "Suit" is defined in section 2 of the Civil Procedure Act, Cap 21 as all civil proceedings commenced in any manner prescribed. The Civil Procedure Rules make provision for the hearing and determination of various proceedings upon affidavit of evidence. It is not necessary, nor is it the law as learned counsel for the Registrar of Companies appears to suggest, that all suits must be heard and determined upon viva voce evidence. To my mind the verifying affidavit and all the documents annexed thereto is sufficient material upon which the Court can effectively and finally determine the present petition. I will therefore overrule the objection by learned counsel for the Registrar of Companies, which objection, as have already noted, was belatedly made.

I will now consider the merits of the petition. Sub-section 6 of Section 339 of the Companies Act provides as follows:-

“(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 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, 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.”

The Court therefore has to be satisfied that at the time the Petitioner was struck off the Register of Companies it was carrying on business or was in operation, or that it is otherwise just that the Petitioner be restored to the register. But before I examine those matters let us see how the Petitioner came to be struck off. Under sub-section (1) of section 339 aforesaid, where the Registrar of Companies has reasonable cause to believe that a company is not carrying on business or in operation he may send to the company by post a letter enquiring whether the company is carrying on business or in operation. It is deponed in paragraph 7 of the verifying affidavit that no such notice was sent to the Petitioner by the Registrar. Indeed there is no evidence that such notice was sent. So there is no evidence that the Registrar had reasonable cause to believe that the Petitioner was not carrying on business or in operation. On the contrary it is deponed in paragraph 8 of the verifying affidavit that the Petitioner had been inactive operation since its incorporation up to the time of dissolution by the Registrar. And what is the nature of that operation? It is deponed in paragraph 3 of the verifying affidavit that the Petitioner has for 43 years been running and continues to run a public medical facility known as Uasin Gishu Memorial Hospital and that it has at all material times fully complied with the requirements of the Ministry of Health and with all

legal In Re the Uasin Gishu Memorial Hospital Limited [2005] eKLR 5 requirements under its own Memorandum and Articles of Association and also under the provisions of the Companies Act. It is also deponed in paragraph 11 of the verifying affidavit that the Petitioner has faithfully filed its annual returns together with its financial accounts in compliance with the requirements of the Companies Act, and copies of such returns and financial statements for the years 1998-2004 are annexed. It is deponed in paragraph 12 of the verifying affidavit that the Petitioner has all the years been licensed by the Medical Practitioners and Dentist Board to operate the Medical Institute aforesaid. Such licence for the year 2004 is annexed. Also annexed is an application for renewal of the licence for the year 2005. With all this evidence of the Petitioner being in active operation and compliance with the law it is no wonder that the Registrar did not send to it any letter under sub-section (1) of section 339. As it is all the above averments of fact have not been controverted in that the Registrar of Companies did not bother to file a replying affidavit. However, as already noted, the Registrar of Companies filed an answer to the petition in which he denied all the material averments of fact contained in the affidavit sworn in support of the petition.

By gazette notice No. 6623 of 20th August, 2004 the registrar published a notice of intended dissolution of a number of companies, including the Petitioner. That was followed by gazette notice No. 815 of 4th February 2005 by which the Petitioner, among other companies, was dissolved. It is deponed in the supporting affidavit that thereafter these two gazette notices were brought to the attention of the Petitioner by persons it did business with, including an insurance company and the Central Bank of Kenya. It was then that it brought this petition.

Learned counsel for the Petitioner cited the case of **Re Murita Coffee Estate Ltd, Kenya Law Reports, page 1**. In this case the Court of Appeal held, inter alia, that in all the circumstances of the case, it was just to order the restoration of the company's name to the register under sub-section (6) of Section 339 aforesaid. More relevant to our present case, Madan J. A. held that the failure to file annual returns does not necessarily connote that the company is not carrying on business or is not in operation. In the present case there is ample evidence that the Petitioner was carrying on business and was in operation at the time that it was dissolved by the registrar. It was also held in that case that the Government ought not normally to dispose of the immovable property of a company acquired by it as bona vacantia under Section 340 of the Companies Act before the expiration of the ten (10) years within which the court might declare the dissolution void. Miller J. A. added that where the legislature has bestowed the recuperative benefits of section 339 (6) with a time limit of ten (10) years in which to seek and secure the same the Government is no more than an interim custodian of the property of the dissolved company under Section 340 until after the passage of that period of ten (10) years.

In the present case I am satisfied from all the material placed before the court that the Petitioner was at the time of dissolution by gazette notice No. 815 of 4th February, 2005 carrying on business and was in operation. Nothing has been placed before the court that indicates the contrary. It appears also from the material before the court that the Petitioner in the many years it had been in operation fully complied with the law in that it filed its annual returns and statements of account and also complied with its own internal laws. I am at a loss to understand why the Registrar of Companies dissolved it without even the courtesy of a letter as provided for under sub-section (1) of Section 339 of the Companies Act.

In the circumstances therefore I will allow the petition and order that the Petitioner be restored to the register of companies. I will also grant prayer No. 2 of the petition to the effect that the business, assets and property of the Petitioner do revert and vest in the Petitioner so as to restore it to the position in which it was just prior to dissolution. The Petitioner shall have the costs of this petition. Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 25TH DAY OF NOVEMBER,
2005**

H.P.G. WAWERU

JUDGE

