



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MISCELLANEOUS APPLICATION NO 63 OF 2001**

**REPUBLIC..... APPLICANT**

**VERSUS**

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

***EX PARTE CHARLES KARIUKI GITHONGO***

**RULING**

The applicant has filed the application dated and filed on 29-1-2001 for judicial review. The application was brought under certificate of urgency and was certified urgent by the duty judge. The applicant then moved the Court for leave to file an application for judicial review and for the leave to operate as a stay.

The application is brought under order 53 rules 1, 2 and 3 of the Civil Procedure Act and the rules made thereunder; the Law Reform Act, the Judicature Act section 3 (2) and all other enabling provisions of the law.

The applicant sought leave to apply for judicial review in respect of the decisions of the Registrar of Companies namely:

- a) Issuing Notice of Intended Dissolution vide a letter dated 5-1-2001 addressed to World Duty Free Company Limited.
- b) Issuing a Notice of Intended Dissolution dated 5-1- 2001 and published in Gazette Notice No 232 of the Kenya Gazette of 12-1-2001.
- c) The Registrar of Companies decision to publish the said Notice of Intended Dissolution as Gazette Notice No 232 of the Kenya Gazette of 12-1-2001 and its publication in the said Kenya Gazette of 12-1-2001.
- d) The dissolution and the striking off of the name of World Duty Free Company Limited – F 22 (90) from the register of companies on 17th January, 2001 and published in Gazette Notice No 498 of the Kenya Gazette of 26-1-2001.
- e) The Registrar of Companies' decision to publish the said Notice of Dissolution and striking off the name of

World Duty Free Company Limited – F 22(90) from the register of companies as Gazette Notice No 498

in the Kenya Gazette of 26-1-2001 and its publication in the said Kenya Gazette dated 26-1-2001. The application is supported by an affidavit sworn by Charles Kariuki Githongo on 29th January, 2001. After considering the contents of this affidavit and the submissions by the learned counsel for the applicant, I was satisfied that the applicant has a case fit for further consideration and that the application is not frivolous, vexatious or hopeless. I therefore granted leave to apply for judicial review.

The applicant further applied for the leave to operate as a stay of the above decisions of the Registrar of Companies and of all further proceedings by the Registrar of Companies in relation to the World Duty Free Company Limited and that such leave do operate as an order restraining the Registrar of Companies from issuing or publishing in the Kenya Gazette any further notice or notices relating to the registration of World Duty Free Company Limited in the companies register or from otherwise interfering with a property which is *custodia legis* or interfering with the Court appointed receiver, the applicant herein.

The acts complained of are that the Registrar by a letter dated the 5<sup>th</sup> January 2001 addressed to World Duty Free Company Limited sent a Notice of Intended Dissolution of the company in pursuance of section 339 of the Companies Act giving the Company 30 days within which the company was to reply whether or not it was carrying on business or was in operation in Kenya. This notice was replied to by a letter dated 10<sup>th</sup> January 2001. By this letter, the Registrar was informed that the company was in operation.

Notwithstanding that reply, the Registrar did issue and publish in the Kenya Gazette of 12-1-2001 a Notice of Intended Dissolution dated 5-1-2001 requiring the company to show cause within 3 months or face dissolution.

On 17th January 2001, the Registrar issued a Notice of Dissolution of the World Duty Free Company Limited under the provisions of section 373

(1) of the Companies Act. This Notice was published in the Kenya Gazette of 20-1-2001, in Kenya Gazette Notice No 498 which cancelled the earlier Gazette Notice No 232 of 12-1-2001.

The applicant contends that he was not served with either of the notices published and that the Registrar in dissolving the company acted in bad faith and outside his jurisdiction as defined by the law.

At this stage it is necessary to examine the sections of the Companies Act under which the notices and the subsequent dissolution were effected to see whether the claims by the applicant are valid in law.

Section 339 (3) of the Companies Act provides;

“339 (1) Where the Registrar has reasonable cause to believe that a company is not carrying on business or in operation, he may send to the company by posting a letter inquiring whether the company is carrying on business or in operation.

(2) If the Registrar does not within thirty days of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the said period of thirty days send to the company by registered post a letter referring to the first letter and stating that no answer thereto has been received, and that if an answer is not received to the second letter within thirty days from the date thereof, a notice will be published in the Gazette with a view to striking the name of the company off the register....”

Section 373 of the Act deals with foreign companies and provides:-

“373 (1) If any foreign company ceases to have a place of business in Kenya, it shall forthwith give notice in writing of the fact to the Registrar for registration and as from the date on which notice is so given the obligation of the company to deliver any document to the Registrar shall cease and the Registrar shall strike the name of the company off the register....”

It will be noted that Gazette Notice No 232 of 2001 which quoted s 339 (3) was cancelled by Gazette

Notice No 498 which relies on section 373 (1) of the Companies Act. This section, as it clearly states, is invoked only when the foreign company has ceased to have a place of business in Kenya and has given notice of that fact to the Registrar. In the instant case there is no evidence that the company has ceased to have a place of business in Kenya neither did it ever give the Registrar notice to that effect.

To the contrary, the letter by the receiver dated 10-1-2001 which was in reply to the Registrar's letter dated 5-1 2001` confirmed that:-

- 1) The World Duty Free Company Limited was registered as a foreign company in accordance with section 366 of the Companies Act under certificate of compliance No F 22/90
- 2) The sompany is still in operation
- 3) Kenya Duty Free Complex was on 14.8.1990 registered under certificate No 153060 as a business name under section 14 of the Registration of Business Names Act cap 499 Laws of Kenya.
- 4) On 24-2-1998, the Kenya Duty Free Complex which is an asset of World Duty Free Company Limited was placed under receivership by the High Court and remains so to date. Thus the company and its assets remain *custodia legis*.

The Registrar had no power in law to dissolve the company under section 373(1) of the Companies Act. This is so for three reasons; in the first place, the company was still in business and had a place of business.

Secondly, the company is still under receivership and the Registrar would have needed to obtain leave of the Court to take such action. He did not do so. When a receiver is in possession, his possession is the possession of the Court. Such possession may not be disturbed by anyone, whoever he may be without leave of the Court. I rely on the authority in *Dixon vs Dixon* (1904) 1Ch 161 where it was held that any deliberate act calculated to interfere with the property under the custody of the Court by means of receiver is an interference with that receiver although it may not induce a breach of contract. The consequences of dissolution specified at section 340 of the Companies Act are that the property of a dissolved company is to be *bona vacatia* and vest in the State. I find that the actions of the Registrar amount to an interference of the property of World Duty Free Company Limited which is currently under receivership and therefore in the possession of this Court.

Thirdly, World Duty Free Company never gave notice to the Registrar of Companies as required by section 373 (1) of the Companies Act. Furthermore, a receivership does not necessarily bring about the termination of the company's activities or its liquidation as has been stated in *Pennington's Company Law* 4th Edition at pages 454-455.

The manner in which these notices were issued, published and gazette before the expiry of the requisite period renders credence to the applicants' contention that the Registrar acted outside his jurisdiction and in bad faith by purporting to dissolve the company under the section. For how else can the haste to dissolve the company without observing the requirements of the law be explained? There was no attempt to show that the company has ceased to do business, or that it has no place of business in Kenya.

The dissolution also makes a mockery of the court orders of this Court and the Court of Appeal enumerated by the receiver in his letter of 16<sup>th</sup> January, 2001 to the Registrar of Companies.

The dissolution of a company at this time in our economy is a serious matter indeed which needs serious consideration. The workers and those having dealings with the Company were worth being considered and at least afforded some consideration which in my view cannot be possible through the course taken by the Registrar.

There is also the property and the trading stock of the company which must be protected for the sake of our image as an economy that protects foreign investment. To have taken such a drastic step without

giving the receiver a chance to be heard on the matter is a recklessness that is not expected of such an office.

The application of the rules of natural justice is so basic that their nonobservance in this case would, in my view vitiate the Registrar's action. One of these rules is the rule that the parties be given adequate notice and opportunity to be heard.

I find that there was no adequate notice to the company contrary to the rule of natural justice. Natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice of what is proposed. In De Smiths *Judicial Review of Administrative Action*, 4th Edition at page 196, the learned author states that in a large majority of reported cases where a breach of *audi alteram partem* rule has been alleged, no notice whatsoever of the action taken, or proposed to be taken has been given to the person claiming to be aggrieved and failure to give such a person prior notice was tantamount to a denial of an opportunity to be heard on that matter. One such case is the case of *Republic Vs Liverpool Corporation Ex-Parte Liverpool Taxi Fleet Operators Association* where it was held on the particular facts that existing licencees should have been given prior notice of an opportunity to be heard against policy decision to increase licences, as well as opportunity to argue against individual applications for new licences. He goes on to state later that seldom will the absence of prior notice leave a person with an adequate opportunity of preparing his own case or his answers.

At page 198 it is stated;

“No service or inadequacy of a notice depriving the applicant of an opportunity to put his case will normally be construed as inflicting substantial prejudice on him”.

I do agree with this author and hold that there being no adequate notice to the company contrary to the rules of natural justice the Registrar acted beyond his powers. At this stage of the proceedings I am required to determine whether the applicant has a case which warrants the leave granted to act as a stay.

Order 53 rule 1(4) provides:

“(4) The grant of leave under this rule to apply for an order of prohibition or an order of *certiorari* shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise”. Grant of a stay under order 53 rule 4 is therefore discretionary. However, in exercising this discretion I must be satisfied that the applicant has *locus standi* which is not an issue here and secondly that the circumstances of the case warrant granting of stay applied for.

The consequences of such dissolution of the company are grave. Assuming that the plight of the employees of the company were of no concern, the Registrar still had to follow the right procedure that arrangements are made in respect of undisposed property and the trading stock of the company. As I found above, the Registrar's actions amount to interference of the property in the custody of the Court. This Court will not allow the possession of its receiver to be interfered with or disturbed by anyone.

I was therefore satisfied that the actions of the Registrar had to be stayed. It is for these reasons that I arrived at the conclusion that the circumstances of this case dictate that the grant of leave granted on 29-1-2001 do operate as a stay.

Dated and delivered at Nairobi this 6<sup>th</sup> day of February, 2001

**J.K MULWA**

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**JUDGE**