



**In re Habo Group of Companies (Miscellaneous Application E030 of 2023) [2023] KEHC 22231 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22231 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E030 OF 2023**

**F WANGARI, J**

**JULY 14, 2023**

**N THE MATTER OF THE COMPANY'S ACT**

**AND**

**IN THE MATTER OF AN APPLICATION TO RESTORE HABO GROUP OF COMPANIES LIMITED TO THE COMPANY REGISTER**

**BETWEEN**

**REPH OPIYO OJWANG ..... APPLICANT**

**AND**

**HABO GROUP OF COMPANIES LIMITED (TO BE RESTORED TO THE REGISTER) ..... 1<sup>ST</sup> RESPONDENT**

**WINFRED OLUGA ..... 2<sup>ND</sup> RESPONDENT**

**HEZRON AWITI BOLLO ..... 3<sup>RD</sup> RESPONDENT**

**THE REGISTRAR OF COMPANIES ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The applicant in his notice of motion dated November 25, 2022 sought for eleven (11) orders. Prayer 1 and 2 are as follows;
  - a. That this honourable court be pleased to issue an order restoring the 1<sup>st</sup> respondent, HABO Group of Companies Limited to the Register of Companies.
  - b. That this honourable court do issue a mandatory injunction compelling the 4<sup>th</sup> respondent to restore the 1<sup>st</sup> respondent, HABO Group of Companies Limited to the Register of Companies.



2. The application is supported by the annexed affidavit of Reph Opiyo Ojwang. The said application was served on the defendants and an affidavit of service dated February 17, 2023 filed. I am satisfied with service. Even though the application was not opposed, this court being a court of record, the court cannot just allow the application as drawn.
3. The first part, that is prayers 1 and 2 are distinct from prayers 3-11 which deals with the satisfaction of a decree emanating from a consent judgment dated October 9, 2019 in Mombasa ELRC Cause No 526 of 2016. For good order, I will address prayers 1 and 2 at the tail end of this ruling.
4. Regarding prayers 3-11, the first part of the prayers relates to an existing case and questions related to the execution thereof. Assuming for a moment, there are no other issues, the same is non suited by dint of section 34 of the *Civil Procedure Act* which states;

“(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.”

5. In the case of *Nazir Jinnah v Asmahan Peterson & 2 others* [2013] eKLR, the court, J. B. Havelock , J. as then he was, stated as doth: -

“I have considered the provisions of section 34 (1) of the *Civil Procedure Act* which are very clear. It reads:

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

To my mind therefore, any questions as to the value of the suit motor vehicle, the legality of the auction sale or the execution process should be addressed to the court executing the decree. In this instance, it is the Chief Magistrate’s Court at Milimani. As I read section 34 (1) this court has no jurisdiction in relation to such matters and on that ground alone...”

6. This was also reiterated in the case of *DML v ML* [2016] eKLR, where the court stated as follows: -

“As stated above, there is no stay of execution, a fact admitted by the defendant.



Section 34(1) of *Civil Procedure Act* states:

“All questions arising between parties to the suit in which the decree was passed.....and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit.”

From the above, it is evident that questions touching on execution of decrees are within this court's jurisdiction. The law prohibits filing of a separate suit for execution purposes – as held in the case *Eutyachus Mwangi Karanja & other v KTDA and Another* [2014] e KLR and also *Kepue Ole Ngweta and another v Sarah Njoki Munge* [2015] e KLR.

7. It therefore follows that the court that deals with questions 3-11 is the trial court. The same prayers, however have other issues. In their wisdom the drafters of the *constitution* found it wise to insert article 165(5) into *the Constitution*. It states as follows: -

“The High Court shall not have jurisdiction in respect of matters: -

- a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- b. falling within the jurisdiction of the courts contemplated in article 162 (2).

8. As a corollary, the High Court cannot hear matters that are in the Employment and Labour Court. Indeed, Article 165(6) of the *Constitution* is more explicit: -

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a Superior Court’

9. Article 162 of the *Constitution*, explains what the superior courts are, that is: -

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
  - a. employment and labour relations; and
  - b. the environment and the use and occupation of, and title to, land

10. There are various provisions of the *Companies Act* that govern the process of striking out of a company. It is to be recalled that section 916 of the *Companies Act* provides as follows: -

Application to court for restoration to the Register

- (1) An application may be made to the court to restore to the register a company—
  - (a) that has been dissolved after being liquidated under the law relating to insolvency;
  - (b) that is taken to have been dissolved following administration under that Act; or
  - (c) that has been struck off the Register— (i) under section 894 or 895; or (ii) under section 897, whether or not the company has in consequence been dissolved.
- (2) Such an application may be made by—
  - (a) the Attorney General;



- (b) a former director of the company;
- (c) a person having an interest in land in which the company had a superior or derivative interest;
- (d) a person who has an interest in land or other property—
  - (i) that was subject to rights vested in the company; or
  - (ii) that was benefited by obligations owed by the company;
- (e) a person who, but for the dissolution of the company, would have a contractual relationship with it;
- (f) a person with a potential legal claim against the company;
- (g) manager or trustee of a pension fund established for the benefit of employees of the company;
- (h) a former member of the company, or the executor or administrator of such a person;
- (i) a person who was a creditor of the company at the time of its being struck off the Register or dissolved;
- (j) a former liquidator of the company;
- (k) if the company was struck off the register under section 897— a person of a description specified by regulations referred to in section 900(1)(f) or 901(2)(f); or (l) any other person appearing to the court to have an interest in the matter

11. In this case the applicant was an employee who sued the 1<sup>st</sup> respondent in Mombasa ELRC cause No 526 of 2016. He therefore falls within the descriptions given, having interest in the company and who has rights that are vested in him by the company. He is an employee.

12. On having the company restored to the Company Register, Section 917 of the [Companies Act](#), give various steps and safeguards that need to be taken. The section provides as follows: -

When application to the court may be made

- (1) An application to the court for restoration of a company to the Register may be made at any time for the purpose of bringing proceedings against the company for damages for personal injury.
- 2) An order may not be made on such an application if it appears to the court that the proceedings would fail because of any written law limiting the time within which proceedings can be brought.
- (3) In making that decision, the court is required to have regard to its power under section 919 to direct that the period between the dissolution (or striking off) of the company and the making of the order is not to count for the purposes of any such enactment.
- (4) In any other case an application to the court for restoration of a company to the register may not be made after the expiry of six years from the date of the dissolution of the company, but this subsection is subject to subsection (5).
- (5) If—



- (a) the company has been struck off the Register under section 894 or 895;
  - (b) an application to the Registrar has been made under section 912 before the deadline for making such an application; and
  - (c) the Registrar has refused the application, an application to the court under this section may be made within twenty-eight days after notice of the Registrar's decision is issued. This subsection has effect even if the period of six years referred to in subsection (4) has expired.
6. For the purposes of this section— (a) “personal injury” includes any disease and any impairment of a person's physical or mental condition; and
- (b) references to damages for personal injury include—
    - (i) any amount claimed under section 2 of the *Law Reform Act* (cap 26); and
    - (ii) damages under the *Fatal Accidents Act* (cap 32).
13. Section 918 of the *Companies Act* empowers the court to make the decision on application for restoration by the court. Section 919 provides for the effect of the court order for restoration to the Register.
14. In the case of *Christopher Dennis Wilson v Registrar of Companies & 2 others* [2019] eKLR, the court, P.J.O. Otieno stated as follows: -
- ‘In this matter it is demonstrated without rebuttal that the company continue to be the registered owner of landed property, on which it has granted long term leases to the interested parties and others. The existence of such property rights which will inevitably be dissipated, unless the restoration is ordered, is strong enough for the court to order restoration so that the company and interested parties conclude the process to have the leases registered and certificates thereof issued. In coming to this conclusion even if there was no express remedy under the Company's Act, the court would always resort to its reserve power called the inherent powers, which vest in it at all times by its own mature to do justice. That power otherwise called the intrinsic and naturally occurring power of the court has been succinctly captured by the authors of *Halsbury's Laws of England*, 4<sup>th</sup> Edition Vol 37 paragraph 14 in the following honouring words:
- “..it is exercised by summary process, without plenary trial; it may be invoked not only in relation to in the pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ...in sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers’
15. In a nutshell, I am convinced that the applicant has proved his case on a balance of probability. On costs, section 27 of the *Civil Procedure Act* decrees that the same follows the event. However, the court retains its discretion to either award or not to award costs. In this case, each party is to bear its own costs.



16. Following the foregone discourse, the upshot is that the following orders do hereby issue;
- a. The application dated November 25, 2022 is allowed in terms of prayer 2.
  - b. The prayers as set out in 3-11 are hereby struck out
  - c. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14TH DAY OF JULY, 2023.**

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**F. WANGARI**

**JUDGE**

**In the presence of;**

**Kaczeda Advocate h/b for Owaga Advocate for Applicant**

**N/A for the Respondent**

**Abdullahi, Court Assistant**

