



Republic v Registrar of Companies (Business Registration Service); Rotich & 4 others (Exparte Applicants); Komen (Interested Party) (Judicial Review Miscellaneous Application E024 of 2023) [2024] KEHC 11990 (KLR) (3 October 2024) (Judgment)

Neutral citation: [2024] KEHC 11990 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E024 OF 2023

SM MOHOCHI, J

OCTOBER 3, 2024

IN THE MATTER OF SECTION 852 OF THE COMPANIES ACT 2015

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION ON FAIR ADMINISTRATION ACTION

AND

IN THE MATTER OF ARTICLE 22(1) AND 23(1),(3) ON ENFORCEMENT OF BILL OF RIGHTS BY THE COURT AND THE AVAILBALE RELIEFS INCLUDING AN ORDER OF JUDICIAL REVIEW

AND

IN THE MATTER OF SECTIONS 7(1) (2) (E,F,G,H,K,M,N,O) AND OF THE FAIR ADMINISTRATIVE ACTION NO 4 OF 2015

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI UNDER SECTIONS 7 AND 8 OF THE LAW REFORM ACT AND ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF A DECISION OF THE ASSISTANT REGISTRAR OF COMPANIES TO RECTIFY SHAREHOLDEING OF BARKAPCHIES & ECHES LIMITED

AND

IN THE MATTER OF AN APPLICATION BY

BETWEEN

REPUBLIC APPLICANT



AND

REGISTRAR OF COMPANIES (BUSINESS REGISTRATION SERVICE) RESPONDENT

AND

JOSEPHINE JEPKORIR ROTICH EXPARTE APPLICANT

LINDA JELIMO KIPKULEI EXPARTE APPLICANT

EMMANUEL CHEPKIYENG KOMEN EXPARTE APPLICANT

DAIRUS CHESIRE KIPKULEI EXPARTE APPLICANT

CYRUS KIPKULEI KOMEN EXPARTE APPLICANT

AND

EZEKIEL KIPKULEI KOMEN INTERESTED PARTY

JUDGMENT

1. The Chamber Summons Application seeking leave to institute judicial review proceedings was filed on December 8, 2023. The Application was considered and leave was granted to file the substantive judicial review application pursuant to the orders of 12th March, 2024. In compliance the directions, the Ex-Parte Applicants filed the application before court for determination dated 18th March, 2024 seeking the following reliefs;
 - a. That this Honourable Court be pleased to grant/issue orders of Judicial Review in the nature of Certiorari to remove into this and quash the proceedings decision of the assistant Registrar of Companies given on the 9th of June, 2023 whose effect was to change the directorship and shareholding of Barkapches & Echep Limited
 - b. That the Ex-Parte Applicants be at liberty to apply to the Honourable Court for all necessary and/or consequential orders that the Honourable Court may deem fit and just to grant ; and
 - c. That the costs of this Application be provided and the same be borne by the Respondent.

Ex- Parte Applicants' Case;

2. The application is predicated on the Statutory statement sworn on 8th December, 2023, the Supporting Affidavit and Verifying Affidavit both sworn on 18th March, 2024 and all sworn by Josephine Jepkorir Rotich, the 1st Ex-Parte Applicant on behalf of the other Ex-Parte Applicants. the core grounds are that:-
 - i. The case for the Ex- Parte Applicants is that the 1st Ex-Parte Applicant and the Interested Party by virtue of being husband and wife incorporated Barkapches & Echep Limited with the Interested Party having nine (9) shares and her one (1) share. In January 2019, as the only two directors, the two changed the shareholding to each having 500 shares.
 - ii. On 20th December, 2018 the company purchased and obtained a Certificate of lease over LR Nakuru Municipality Bock 21/931. On 17th November, 2021 they opted to bring on board as directors and shareholders their children and themselves as follows; 1st Ex-Parte Applicant



600; 2nd Ex-Parte Applicant 50; 3rd Ex-Parte Applicant 100; 4th Ex-Parte Applicant 200; 5th Ex-Parte Applicant 100; and Interested Party, 100

- iii. That towards the end of the year 2021 the Interested Party was taken away forcefully from their home under the pretext that he was going to receive treatment and was confined at the resident of his first wife Miriam Jebor Komen. That there was an attempt at denying the 1st Ex-Parte Applicant access to him.
- iv. That on 28th February, 2022 a letter from the firm of Ochanda Onguru & Company advocates to the Respondent on the alleged instructions of the Interested Party complaining that on 24th February, 2022 changes were made to the shareholding and directorship of the company and new directors/shareholders were brought on board to take his 500 shares in the company and that the interested Party did not transfer and or execute any transfer documents.
- v. The Respondent vide a letter dated 7th April, 2022 to the 2nd to 5th Ex-Parte Applicants required them to respond to the complaint on changes made on 21st November, 2021 regarding their appointment as directors and shareholders and further the transfer of the shares without the consent of the Interested Party failure to which Section 862 of the Companies Act would be invoked.
- vi. That the advocates letter complained of changes to the 500 shares the letter from the Respondent unilaterally referred to changes lodged in the company registry on 21st November, 2021 a clear demonstration that the Respondent was not acting objectively in handling the complaint but being influenced by external forces to deliver a desired result.
- vii. That the 2nd to 5th Ex-Parte Applicants responded to the effect that the changes were effected through Nakunet Online Centre on the Instructions of the Interested Party. That there was no acknowledgement of receipt of the letter.
- viii. That on 4th May, 2022 the firm Ochanda Onguru & Company advocates wrote to them alleging that the transfer documents were a forgery as the Interested Party did not appear before a commission of oaths at Nairobi on 17th November, 2021 to execute the transfer documents.
- ix. That on 9th June, 2023, the Respondent rendered a verdict on the complaint without informing her or her advocates of the verdict reverting the company's ownership back to the position before the disputed changes.
- x. That she got to know of the verdict on 4th December, 2023 when her advocates were served documents filed pertaining Nakuru CM.ELC No. E067 of 2022 Josephine Chepkorir Rotich vs Miriam Jebor Komen & Other and amongst the documents filed was the Respondents verdict of 9th June, 2023.
- xi. That from the sentiments on paragraph 24 of the Respondent's verdict, that it was clear that the Respondent purported to have had a meeting with the Interested Party in the absence of the Ex-Parte Applicants and without inviting them. That the same was an indication that the Respondent was devoid of objectivity in handling the complaint.
- xii. That there are currently five pending cases in various courts involving the Ex-Parte Applicants and the first wife of the interested Party and her children. That specifically Eldoret Petition No.3 of 2023 filed on 28th February, 2023 by Miriam Jebor Komen under the Mental Health Act which sought to appoint Miriam as the guardian over the affairs of the Interested Party and to manage his estate on grounds of mental incapacity. The Petition was filed 3 months after



the Interested Party appeared before the Respondent and the verdict 4 months after filing the petition.

- xiii. That in the meantime the Interested Party continues to be held forcefully and it would be imperative for the Interested Party to be presented in Court to confirm the veracity or otherwise that the changes were lodged freely or under duress.
 - xiv. That the complaint targeted the only asset of the company Nakuru Municipality Block21/931 and the decision of the Respondent is wrong and unfair as it purports to revert the shareholding of the company prior to 2019 whereas the dispute related to the changes were effected on 24th November, 2021 as per the letter of 7th April, 2021 or effected on 24th February, 2022 as per the letter of complaint from the firm of Ochanda Onguru & Company Advocates.
 - xv. That there was no justification by the Respondent to purport to revert the shareholding of the company to revert the shareholding of the company at the time of the incorporation.
3. The Application was duly served on all parties on the Respondent on 3rd of April 2024 and on behalf of the Interested Party, his wife and his son Duncan Komen on 4th April, 2024 at the Interested Party's home in Eldoret. The return of service was filed on 30th April, 2024. Neither of the parties filed any pleadings in opposition of the application and the Court proceeded to give directions regarding the disposal of the same on the Application 11th June, 2024. The Ex-Parte Applicants filed their written submissions on the 1st July, 2024.

Ex-Parte Applicants' submissions

4. On behalf of the Ex-Parte Applicants' counsel submitted on one (1) issue as to whether the Application met the threshold to grants the Judicial Review orders sought. It was submitted that the orders in the nature of Certiorari should issue as due process for coming with its decision was not followed by the Respondent neither were the Ex-Parte Applicants accorded a fair hearing.
5. It was also submitted that the process was tainted by illegality as the verdict the refers to different dates of the changes effected. It was also the counsels' argument that the Respondent acted ultra vires in inviting the Interested Party for a meeting in the absence of all the parties involved a clear connotation of bias.
6. The authorities relied upon were; Republic vs *Kenya National Examination Council Ex-Parte Gatbenji and Others Civil Appeal No 266 of 1996*; Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd [2002] eKLR ; Zachary Wagunza & another v Office of the Registrar Academic Kenyatta University & 2 Others (2013) eKLR; Republic vs Public Procurement Administrative Review Board & 2 Others [2019] eKLR;

Interested Party's Submissions

7. The Interested Party entered Appearance on 24th May, 2024 but there is no response on Record. The Interested Party nevertheless filed submissions dated 22nd July, 2024 on 23rd July, 2024 and submitted on the two (2) issues.
8. As regards whether the leave granted on 14th December, 2023 should operate as stay, it was submitted that leave cannot act as stay as the decision to revert the shareholding had already been implemented and relied on the case of Republic vs Nairobi City County Assembly Service Board Ex Parte Applicant Pauline Sarah Akuku [2022] eKLR



9. Secondly on whether the threshold for grant of Judicial Review orders of Certiorari has been met, the Interested Party relied on the decision in *Republic vs National Land Commission & Another Ex-Parte: Farmers Choice LT* [2020] eKLR to submit that relevant matters were considered in arriving at the decision and that the Ex-Parte Applicant has not demonstrated the illegality irrationality and procedural impropriety on the part of the Respondent in arriving at its decision.

Determination

10. The Court has carefully read and considered the pleadings on record. The Application was not opposed since the Respondent did not file any documents in opposition. The Court nevertheless has to ensure the Ex-Parte Applicants have proved their case to the required standards. The root of the Ex-Parte Applicants' grievances was the Respondents decision made vide the letter dated 9th June, 2023 by which the Respondent reverted shareholding to the point of incorporation at the same time vacating the searches issued on diverse dates. The issue for determination is therefore:-

i. whether the Ex Parte Applicant is entitled to the Judicial Review Orders sought

11. The Court of Appeal in *Municipal Council of Mombasa vs Republic: Ex-Parte Umoja Consultants Ltd* [2002] eKLR, set out the purpose of Judicial Review to state that:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.

12. The Court of Appeal set out the principles of Judicial Review in the case of case of; *Republic vs Kenya National Examination Council Ex parte Gathenji and others Civil Appeal No.266 of 1996* stated inter alia:-

“...that an order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause”

13. Justice Kasule in the Ugandan case of *Pastoli vs Kabale District Local Government Canal & Others* [2008] 2EA 300 at pages 300-304 as cited in *Republic vs Registrar of Companies & another Ex parte Golden Africa Kenya Limited* [2019] eKLR set out the circumstances that a Court can issue Judicial Review orders: _

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality----



Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety, is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehidswi...Vs...Secretary of State for the Housing Department (1990) AC 876”.

14. With the preceding authorities in mind, the Ex-Parte Applicant has sought for orders of Certiorari to quash the decision of the Respondent dated 9th June, 2023 in that the said decision was made ultra vires and due process was not followed. Despite those allegation being uncontroverted, the Ex-Parte applicants have to demonstrate to this Court that the Respondent did not follow due process and that the impugned decision was illegal and ultra vires. The Court is only concerned with the process of arriving at the decision and not the decision itself
15. The Respondent sent a letter dated 7th April, 2022 pertaining to a complaint by regarding the changes made to the company on 21st November, 2021. The parties were required to respond withing a given period. It is evident that all parties to this point, including the Ex-Parte Applicants were afforded an opportunity by the Respondent to present their respective cases. As to what was to happen next, the Respondent did not advise and only a decision was presented affecting the shareholding.
16. From the record, there have been two changes in the shareholding of the subject company. Firstly, in January of 2019 where the shares were increased from 10 to 1000 and secondly on 24th November, 2021 where the children of the Interested Party were brought on board. The letter from the Respondent dated 7th April 2022 referred to the complaint in the letter dated 28th February, 2022 which was in relation to the changes made on 24th November, 2021. The decision of the Respondent dated 9th June, 2023 reverted the shareholding to the original position at incorporation in the year 2000.
17. The question that begs is why did the Respondent revert the shareholding to its initial position at incorporation yet the complaint was in relation to the changes made on 24th November, 2021 and not prior. The Respondent did not enter appearance or respond to these proceedings which spawned from the impugned decision.
18. Without going into the merits of the decision, it appears that the Respondent acted outside the complaint and has not explained the basis on which the shareholding was reverted back to the point of incorporation. the Respondent further based the decision on the testimony of the Interested Party without affording the Ex-Parte Applicants an opportunity to challenge the testimony or allegations of forgery.
19. By reverting the shareholding, the impugned decision fails the test of a fair administrative action and rules of natural justice. It also stripped the 1st Ex-Parte Applicant of her shares without affording her an opportunity to be heard and no reasons were given for the action.
20. Although the Respondent was within its mandate as empowered under Section 862 (1) of the Companies Act to alter the changes to the registrar based on its findings pursuant to an application, the decision is irrational. Section 862 (3) expressly lays down the requirements for such an application to



qualify an entry to be removed from the register. The Respondent clearly went beyond what was in the complaint. The Court will not go into the merits of the decision or evidence presented but reverting the shareholding to the time of incorporation is condemning the 1st Ex-Parte Applicant unheard and in excess of its power.

21. The Court in *Republic v Registrar of Companies & another Ex parte Golden Africa Kenya Limited* [2019] eKLR referenced Halsbury's Laws of England, 4th Edition at paragraph 77 which states as follows:

“... A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power.”

22. In the present case, the impugned decision of the Respondent, has been found to have been procedural, the decision contravened the rules of natural justice and denied the 1st Ex-Parted applicant the right to be heard, right to be given reasons and the right to present her case. The Court also finds that the Respondent acted outside the scope of what was expected and went beyond the complaint and addressed irrelevant factors not in dispute and therefore the prayer for certiorari to the extent of the decision is merited.

23. Accordingly, this Court finds that Applicant's Notice of Motion dated is merited to the extent of the following orders

- a. An order of judicial review of certiorari is hereby issued quashing the decision of the assistant Registrar of Companies given on the 9th of June, 2023 whose effect was to change the directorship and shareholding of Barkapches & Echef Limited:
- b. There shall be no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 3RD DAY OF OCTOBER, 2024.

MOHOCHI SM.

JUDGE

