



**Waiganjo v Registrar of Companies & another (Civil Case 333 of 2015)  
[2024] KEHC 12163 (KLR) (Commercial and Tax) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12163 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 333 OF 2015  
FG MUGAMBI, J  
OCTOBER 11, 2024**

**BETWEEN**

**ANNE WAIGANJO ..... PLAINTIFF**

**AND**

**THE REGISTRAR OF COMPANIES ..... 1<sup>ST</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 8/7/2015 and amended on 28/7/2021 and 28/7/2022, the plaintiff filed this suit against the defendants claiming inter alia special damages of Kshs. 28,786,459.79 and general damages. She states that on or about August 2014, she conducted a search at the 1<sup>st</sup> defendant's registry which search confirmed the availability of "The Serenity Spa Limited" as a name available for registration. The plaintiff consequently lodged all the relevant documentation which she claims were verified for compliance and thereafter she paid all the requisite fees including registration fees and stamp duty. That upon complying with all the requirements and pre-conditions for registration by the 1<sup>st</sup> defendant, on or about 20/8/2014, she was issued with a Certificate of Incorporation No. CPR/2014/156723 confirming that she now owned a company under the name "The Serenity Spa Limited" under the repealed *Companies Act*.
2. The Plaintiff contends that upon registration, she started her business operations of offering a wide range of services including salon, barber shop, massage, health and beauty care in accordance with its Memorandum of Association and which business operations were based at Ridgeways Mall along Kiambu Road. That in compliance with all the relevant laws she at all material times took out and had a valid business permit issued by the Nairobi City County approving its operations.



3. She contends that on or about 12/2/2015, she was surprised to receive a letter from a company by the same name and style of 'Serenity Spa Limited' informing her about its existence. The company alleged to have been incorporated before the plaintiff's company therefore demanding that the plaintiff ceases from using the name.
4. The plaintiff states that on or about 19/3/2015, she wrote a letter to the 1<sup>st</sup> defendant seeking clarification on the issue of its registration and the alleged similarity in names. On 3/3/2015, the 1<sup>st</sup> defendant confirmed the existence of 'Serenity Spa Limited' as a company that is alleged to have been registered on 28/10/2010. That the 1<sup>st</sup> defendant admitted fault on its part.
5. The plaintiff avers that the 1<sup>st</sup> defendant failed and or neglected to conduct a proper name search before registration and recklessly and negligently proceeded with the registration of the plaintiff's company with the full knowledge of the existence of another with a similar name. That the 1<sup>st</sup> defendant failed to detect and advise the plaintiff on the similarity in names with 'Serenity Spa Limited' to enable the plaintiff to use another name.
6. The plaintiff contends that she has made huge financial investments running into millions of shillings including the various public advertisements on television including KTN in order to promote her business brand in the market. She further contends that these promotions have largely been successful and a sudden change of name would lead to the plaintiff suffering damage. The plaintiff holds the defendants liable for the loss and damages. She particularizes the special damages as follows; Décor-Kshs. 4,500,000/=, Registration – Kshs. 12,500/=, Advertising – Kshs. 21,660,800/= and other related expenses – Kshs. 2,613,159.79 all totaling Kshs. 28,786,459.79.
7. In response, the defendants filed a statement of defence dated 31/10/2022. They assail the suit on the preliminary ground that the dispute as framed has been commenced in violation of Part XI of the *Companies Act* (Chapter 486 of the Laws of Kenya) and that the suit is therefore incompetent before the Court and is liable to be struck out.
8. Without prejudice to the foregoing, the defendants state that the suit as framed and filed is characterized by material non-disclosure, vexatious and there is no reasonable cause of action directly or indirectly framed against the 1<sup>st</sup> defendant. That on account of the vexatious nature of these proceedings as commenced against the said defendants, they seek security for the costs that they have been compelled to incur to defend these proceedings.
9. The defendants contend that from its records, the search was not conducted by the plaintiff as alleged but lodged by one Lydia Kibunja on 15/7/2014 seeking to register The Serenity Spa Limited, Serene Spa & Salon Limited & AJ's Spa & Salon Limited. That the applicant Lydia Kibunja was given a name reservation and an option of two names being The Serenity Spa Limited and Serene Spa & Salon Limited. The defendants acknowledge that any such confirmation of availability of names and subsequent registration was issued inadvertently, a situation contemplated by section 20 of the repealed *Companies Act*.
10. That the decision by the plaintiff to elect to register the company with a name similar to the company registered as first in time on 28/10/2010 while leaving out the option of Serene Spa & Salon Limited was characterized with deceptive intentions contrary to the provisions of section 20 of the repealed *Companies Act*. The defendants state that the name reservation and subsequent registration contravenes the provisions of Regulation 12(f) of the Companies (General) Regulations, 2015 on the criteria for determining offensive or undesirable names for being identical and confusingly similar to a registered trademark without its consent.



11. The defendants plead that an inadvertent error occurred during the name reservation and registration that occasioned the registration of the plaintiff's "The Serenity Spa Limited" on 20/8/2014, as CPR/2014/156723. The same was the second company in time after the incorporation of Serenity Spa Limited on 28/10/2010. The 1<sup>st</sup> defendant acknowledges that the implication of the foregoing was that there existed two companies with almost similar names, a situation which the Companies Act frowns upon.
12. Consequently, the 1<sup>st</sup> despondent reached a conclusion that the name reservation on 16/7/2014 and registration of "The Serenity Spa Limited on 20/8/2014 had been done inadvertently and was no longer tenable. This is within the meaning of section 20 of the repealed Companies Act which section corresponds with section 58 of the current Companies Act as read with Regulation 11(a), (b) (c) & Regulation 13 of the Companies (General) Regulations, 2015 made pursuant to section 59 of the Companies Act.
13. The defendants state that in its letter of 3/3/2015, it indeed notified the plaintiff of its inadvertent registration and directed the plaintiff to change its name. The plaintiff had an option of changing its name to Serene Spa & Salon Limited having received a confirmation of availability of the name from the 1<sup>st</sup> defendant vide the name reservation letter dated 15/7/2014. The defendants state that this letter was issued in exercise of statutory duty under the Companies Act and does not constitute an admission of fault or negligence on their part.
14. The defendants assert that the plaintiff's business name infringes on the first company's registered trademark for being identical and confusingly similar to a registered trademark without its consent. That as per the Companies Act, the 1<sup>st</sup> defendant is mandated to strike off from its register the name of a company which has failed to comply with the issued directive for the change of name within 14 days. In this case, it was clear that the plaintiff's company name was infringing on a registered trademark as he was notified by the demand letter from M/s Walker Kontos Advocates.
15. The 1<sup>st</sup> defendant contends that the Companies Act and the Regulations thereunder enjoy a presumption of legality and that the plaintiff has not satisfactorily demonstrated how the implementation of the said provisions has been done negligently by the defendants. That in any event, it would be prudent for the plaintiff to read the provisions of section 58 of the Companies Act together with the provisions of the Regulations made pursuant to section 59 of the Companies Act.
16. The defendants further plead that considering that the process of name search and registration was manual, the plaintiff was under an obligation and duty to conduct due diligence as the 1<sup>st</sup> defendant has no custody of the register of trademarks. The defendants denied the damages and loss pleaded by the plaintiff.
17. They state that the suit brought by the plaintiff is occasioned by mischief, ill-will and is an utter abuse of the process of the court. They note that the plaintiff filed this matter in 2015 seeking a sum of Kshs. 93,000,000/= and voluntarily withdrew it on 20/9/2018. She then filed another one being CMCC 8696 of 2018 seeking a sum of Kshs.12,500,000/= only to withdraw it upon being faced with a notice of preliminary objection on or about 29/3/2019. She then filed an application dated 25/3/2019 seeking to reinstate the instant suit thereby abusing the court process and the application was allowed on 6/6/2019.
18. The defendants further state that the plaintiff is not certain about her claim considering the shifting positions as per the numerous amended plaints and the sum being sought as damages which oscillates between Kshs.93,512,500/= as at 8/7/2015 to Kshs.12,500,000/= on 17/9/2018 and Kshs.



28,786,459.79 as at 4/7/2022. The defendants therefore reiterate that the reliefs sought by the plaintiff have no basis in law and/or fact and should be dismissed and/or struck out.

19. During hearing the plaintiff testified on her own behalf as PW 1. She adopted her witness statement and also produced the List and Bundle of Documents dated 28/7/2021 - PExhibit 1-9. On their part, the defendants called Ann Kanake, a Senior Assistant Registrar of Companies in the office of the 1<sup>st</sup> defendant who testified as DW1. She equally adopted her witness statement dated 31/10/2022 and produced the defendants' Bundle of Documents of the same date -DExhibit 1-6.
20. After the hearing, the parties were directed to file written submissions. Since the parties gave evidence along the lines I have already highlighted above, I do not wish to rehash the same but I will make relevant references in my analysis and determination below.

### **Analysis and Determination**

21. I have carefully considered the pleadings, submissions, evidence and authorities cited by both parties in support of their cases. In my opinion, the following issues arise for determination:
  - i. Whether the 1<sup>st</sup> defendant was negligent;
  - ii. Whether the plaintiff is entitled to the remedies as sought.
22. Since the parties have engaged with the substantive issues in this matter, and for closure and finality, I will determine the same. I say so notwithstanding the preliminary observations raised by the 1<sup>st</sup> respondent and further noting that there is now an abundance of judicial pronouncements against giving priority to technicality over substance.
23. The Black's Law Dictionary 8<sup>th</sup> edition defines inadvertence as an accidental oversight; a result of carelessness. It further defines negligence as the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. This definition of negligence mirrors the definition as held in the decision of *Blyth v Birmingham Waterworks Co*, [1856] 11 Exch 781 as the omission to do something which a reasonable man, grieved upon those considerations which ordinarily regulate the conduct of human affairs, would do or something which a prudent and reasonable man could not do.
24. Notably, negligence can arise from inadvertence, as Black's Law Dictionary further explains, "Negligence in law ranges from inadvertence that is hardly more than accidental to sinful disregard of the safety of others." The key issue in determining whether the 1<sup>st</sup> defendant was negligent is whether the error was a mistake made in good faith or whether it amounted to a reckless or intentional disregard of the plaintiff's rights.
25. I would therefore align myself with the observation of the court in *Republic V Registrar of Companies, Ex Parte Transglobal Freight Logistics Limited and Global Freight Logistics Limited*, (Misc. Application No. 711 of 2005). The court said:

"The fact of registration through "inadvertence or otherwise", carries with it good faith, but also many sins of commission and omission. How does the Registrar discover that a company has been registered inadvertently or otherwise? He or she does so by own research on the index of companies, or on notice by an Interested Party."
26. The issue in this case is whether the 1<sup>st</sup> defendant's failure to identify the conflict between the plaintiff's proposed company name and the earlier registration was an innocent mistake made in good faith and therefore inadvertent or it amounted to a breach of the duty of care owed to the plaintiff.



27. While the 1<sup>st</sup> defendant argues that the registration error was inadvertent, the court must still assess whether the 1<sup>st</sup> defendant acted with reasonable care in the process of confirming the availability of the company name. The 1<sup>st</sup> defendant's defense points out that the registration system at the time was manual, a fact that is not contested by the plaintiff. The court appreciates that manual systems may be more prone to human error, which may explain why the 1<sup>st</sup> defendant failed to detect the similarity in company names. However, the question remains whether the 1<sup>st</sup> defendant exercised the level of care expected, even within the limitations of a manual system.
28. The case of *Ex Parte Transglobal Freight Logistics Limited* and another [supra] highlights that registration through "inadvertence or otherwise" carries with it both good faith and potential errors of omission. This implies that inadvertent errors do not automatically equate to negligence unless there is a failure to meet the standard of care required by law.
29. In this case, the court finds that the 1<sup>st</sup> defendant's failure to detect the name conflict, although inadvertent, does not amount to negligence. The 1<sup>st</sup> defendant had a duty to check for conflicting names, but the existence of a manual process presents a plausible explanation for the oversight. The absence of any evidence indicating bad faith or intentional disregard for the plaintiff's rights further weakens the negligence claim. As such, while the error is acknowledged, it does not rise to the level of negligence.
30. The defendants argue that the plaintiff should have conducted her own name search before applying for registration. However, while it is prudent for a businessperson to exercise due diligence, the law places the primary duty of confirming name availability on the 1<sup>st</sup> defendant. The plaintiff reasonably relied on the Registrar's confirmation of the name's availability, as it is the statutory role of the 1<sup>st</sup> defendant to approve or reject names based on potential conflicts.
31. Therefore, the plaintiff's reliance on the Registrar's processes is justified. In the absence of any legal requirement for the plaintiff to conduct an independent name search, the court does not find the plaintiff at fault for failing to do so. The 1<sup>st</sup> defendant's argument that the plaintiff should have conducted due diligence is not compelling in this context, as the Registrar's statutory duty to verify the uniqueness of names takes precedence.
32. The 1<sup>st</sup> defendant in its defense relies on section 20 of the repealed *Companies Act* more so subsection (1) which provided that;
- "If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name is registered by a name which, in the opinion of the registrar, is too like the name by which a company in existence is previously registered, the first-mentioned company may change its name with the sanction of the registrar and, if he so directs within six months of its being registered by that name, shall change it within a period of six weeks from the date of the direction or such longer period as the registrar may think fit to allow."
33. This provision mirrors section 58(1) and (2) of the current *Companies Act*. The notable difference between the two legislations is that the *Companies Act* 2015 expands the timelines within which the Registrar may instruct a company to change its name from six to twelve months.
34. The rationale for the six-month period under the repealed *Companies Act* which is applicable to this case, is to protect businesses from undue disruption and provide certainty to third parties dealing with the company. The time limit ensures that any necessary corrections to the company name are made early enough to avoid significant prejudice. Allowing name changes after a prolonged period would



otherwise undermine the stability and trust that businesses and the public place in the company's registered identity.

35. This was reiterated by the court in *Republic of Kenya v Companies Registrar, Registrar General Dept & 3 Others v ex Parte Bactlab Limited*, [2015] eKLR (as he was then) explained the rationale for this limitation as follows:

“In my view, the rationale for providing the limitation period within which the Registrar can direct a company to change its name is meant to protect both the Company and those who deal with it from being prejudiced by inactions of persons who have slept on their right and misled third parties to believe that there is no imminent risk in dealing with the company in the manner they have dealt with it. Change of names also has repercussions on other financial aspects such as with respect to validity of cheques issued in favour of the Company. Accordingly, the imposition of the limitation period serves as a useful tool in the protection of members of the public and ensures certainty apart from being a reasonable period for gauging whether the similarities in the names has any adverse effects on the existing company.”

36. It is common ground that the plaintiff caused to be registered with the 1<sup>st</sup> defendant a company, The Serenity Spa Limited on or about 20/8/2014 as evidenced by its Certificate of Incorporation (PEXhibit 1). Upon receiving a ‘cease and desist’ letter dated 12/2/2015 (PEXhibit 2) from the advocates of The Serenity Spa Limited, the plaintiff wrote to the 1<sup>st</sup> defendant on 23/2/2015, (PEXhibit 3) enquiring about the registration of the plaintiff's name.
37. The 1<sup>st</sup> defendant, through the letter dated 3/3/2015 (PEXhibit 4) confirmed to the plaintiff that indeed, Serenity Spa Limited (CPR/2010/34482) was registered on 28/10/2010 before the plaintiff sought registration of The Serenity Spa Limited (CPR/2014/156723) on 20/8/2014.
38. The letter from the 1<sup>st</sup> defendant states as follows in part:

“... The two companies bear similar names and cannot exist concurrently in our register as they are likely to cause confusion to members of the public. The allocation of the name The Serenity Spa Ltd to your client was inadvertently done and the same is no longer tenable within the meaning of section 20 of the *Companies Act*, Chapter 486 Laws of Kenya. The Registrar is not aware of the registration of ‘Serenity Spa’ as a trade mark, kindly confirm the status with the Registrar of Trade Marks. We therefore call upon your client to undertake the necessary steps to change the name as provided for under Section 20 of the *Companies Act*. ...”

39. In my view, the Registrar acted promptly once the issue was brought to their attention. The minor delay of one week outside the six months in sending out the notification should not be viewed as evidence of negligence or bad faith on the part of the Registrar. The court, however, acknowledges that the statutory timeframe is strict, and the Registrar's failure to act within the six-month period technically limits their authority to compel a name change. Nevertheless, the court finds that the slight delay was not material enough to warrant a finding of negligence or bad faith, especially given the prompt action taken once the issue was identified.
40. The court further finds that all was not lost for the plaintiff's business as she was given two other options on which she could continue to trade.



### **Conclusion and Disposition**

41. In light of the court's finding that the 1<sup>st</sup> defendant's actions were not negligent, the plaintiff's suit is devoid of merit and the same is dismissed. Each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI**

**THIS 11TH DAY OF OCTOBER 2024.**

**F. MUGAMBI**

**JUDGE**

