REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 217 OF 2019

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI AND PROHIBITION.

BETWEEN

REPUBLIC..APPLICANT

VERSUS

THE ATTORNEY-GENERAL..1ST RESPONDENT

THE REGISTRAR OF COMPANIES...2ND RESPONDENT

AND

BAPS INTERNATIONAL LIMITED....................................INTERESTED PARTY

EX PARTE:BAPS LIMITED

JUDGMENT

The Application

1. The application that is before this Court for determination is the Notice of Motion dated 12th July 2019, filed by BAPS Limited, a limited liability company incorporated in Kenya, and the *ex parte* Applicant herein (hereinafter referred to as “the Applicant”). The 1st Respondent is the Attorney General, who is sued in his capacity as the principal legal advisor to, and legal representative of the national Government. The Registrar of Companies, which is a statutory office established under the Companies Act and is in charge of registration of companies, is sued as the 2nd Respondent. BAPS International Limited, a limited liability company registered under the Companies Act, has been joined by the Applicant as an Interested Party.

2. The Applicant is seeking the following orders in the subject Notice of Motion:

(a) An Order of Certiorari to remove into this Court and quash the decision and/or directions of the 2nd Respondent contained in a letter address by the 2nd Respondent to the Directors of the Applicant and dated 17th June 2019, in which the 2nd Respondent is directing the Applicant to change its name within thirty (30) days from the date of the said letter.

(b) An order of Prohibition prohibiting the 2nd Respondent whether by itself, its agents, employees or whomsoever from taking any steps, actions and/or measures to enforce and/or implement the directives contained in the letter dated the 17th June, 2019 addressed by the 2nd Respondent to the Directors of the Applicant.

(c) That costs of the application be provided for.

3. The facts and grounds giving rise to the application are stated in a statement filed by the Applicant’s Advocates dated 8th July 2019, and a verifying affidavit sworn on the same dated by Dr. Shashikant Vithaldas Badiani, the Applicant’s Managing Director. The said deponent

annexed a copy of the authority by the Applicant's Board of Directors to make and swear the affidavit. In summary, the Applicant's case is that it received a notice from the Registrar of Companies dated 17th June 2019, asking it to change its name within thirty (30) days from the date of the said notice, failing which the Registrar of Companies would invoke the provisions of section 58 (5) (6) and (7) of the Companies (Amendment) Act No. 28 of 2017 to strike it out of the register of companies.

4. The Applicant contended that the said letter did not specifically state the reasons why it is being directed to change its name. Furthermore, that the Applicant was registered after the 2nd Respondent confirmed in writing that its name was available for registration, and reserved it by a letter dated 7th March, 2011. That, the 2nd Respondent thereafter registered the Applicant as a private limited liability company on 24th May, 2011, issued it with a Certificate of Incorporation Number CPR/2011/47997, and has been receiving its annual returns for the last eight (8) years. In addition, that no reasonable explanation has been offered as to why the 2nd Respondent did not give directions within twelve (12) months after the date on which the company was registered yet it's the 2nd Respondent who approved and reserved the name for registration by the Applicant. The Applicant annexed copies of various documents in support of its averments.

5. The Applicant averred that its Advocates, to reply to the notice issued by the 2nd Respondent, wrote a letter dated 2nd July, 2019 in which the directive was contested. However, that the 2nd Respondent has not responded to the said letter, and the Applicant is therefore apprehensive that the 2nd Respondent will proceed to implement its directive on expiration of thirty (30) days from 17th June, 2019. According to the Applicant, the 2nd Respondent's decision and or actions in relation to the change of name of the Applicant, and the deliberate refusal to respond to the Applicant's letter of 2nd July, 2019, fly on the face of the principles of fair administrative action set out in Article 47 of the Constitution.

6. The Applicant further averred that it is an investment company having various properties in Kenya, and the demanded change of name will entail massive legalities to change the name in title deeds and government offices and otherwise result in total disruption of the company's management. Therefore, that the said notice is unreasonable, unconstitutional, oppressive, unlawful and is issued in bad faith.

The Response

7. The 2nd Respondent filed a replying affidavit sworn on 18th December 2019 by Alice Mwendwa, an Assistant Registrar of Companies, in response to the application. According to the 2nd Respondent, its statutory duty is to be the regulator and custodian of the all companies' records and to implement the Companies Act 2015. That from the records available at its registry, the Interested Party was incorporated on 28th May 2009, while the Applicant was registered on 24th May 2011, and that the 2nd Respondent has discovered that an inadvertent error occurred during name reservation. The implication therefore, is that there exist two companies with almost similar names, a situation which the Companies Act frowns upon.

8. Consequently, that the 2nd Respondent reached a conclusion that the name reservation and registration of the Applicant was no longer tenable within the meaning of section 58 of the Companies Act, as read with Regulation 11(a), (b), (c) and Regulation 13 of the Companies (General) Regulations, 2015. Therefore, that in consideration of the provisions on fair administrative action in the Constitution and the Fair Administrative Action Act, the 2nd Respondent by a letter dated 17th June 2019, issued a directive pursuant to section 58(2) of the Companies Act to the Applicant to change their company name within 30 days, failure to which the 2nd Respondent would invoke the provisions of Section 58(5),(6) and (7) of the Companies (Amendment) Act No. 28 of 2017 and strike off the said registration from its register.

9. The 2nd Respondent confirmed receiving the letter from the Applicant's Advocates, and averred that the Applicant had disclosed that at the time of its name reservation it still had the option of another name being PABS LIMITED. The 2nd Respondent also referred to various sections of the Companies Act that provide for the power of the Registrar of Companies to direct change of name of a company in case of similarity to an existing name, and to strike from the Register the name of a company which has failed to comply with directives for change of name. It was contended that the Companies Act and the Regulations thereunder enjoy a presumption of legality, and the Applicant has not satisfactorily demonstrated how the implementation of the said provisions is illegal, unreasonable, irrational, made in bad faith or an abuse of power.

10. Lastly, the 2nd Respondent averred that granting the orders sought of certiorari and prohibition would amount to compelling it to undertake an illegal action, whereas the Applicant still has an option of taking up the name of PABS LIMITED.

11. The interested Party did not file any responses despite being served with the application.

The Determination

12. This Court directed that the instant application be canvassed by way of written submissions. The Applicant's Advocates on record, Bowry & Co. Advocates, filed two sets of submissions dated 30th October 2019 and 20th December 2019 respectively. Mr. Kevin Odhiambo, a Senior State Counsel in the Attorney General's office, filed submissions dated 20th December 2019 on behalf of the Respondents.

13. I have considered the pleadings and arguments made by the Applicant and Respondents, and there are five issues for determination that arise as follows:

> ***(a) Whether the Registrar of Companies acted unlawfully in making the decision and directives in the letter dated 17th June 2019.***

(b) Whether the Registrar of Companies acted with procedural unfairness in making the said decision and directives.

(c) Whether the decision and directives made by the Registrar of Companies in the letter dated 17th June 2019 was unreasonable.

(d) Whether there was a violation of the Applicant's legitimate expectations arising from the decision and directives made by the Registrar of Companies in the letter dated 17th June 2019.

(e) Whether the remedies sought are merited.

14. I am guided in my determination by the broad grounds for the exercise of judicial review jurisdiction stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 as follows:

> **"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: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
>
> **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 provisions 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: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".**
>
> **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 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 legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."**

15. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that while** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveal an implicit shift of judicial review to include aspects of merit review of administrative actions,** *a* **reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. I will accordingly proceed with the consideration of the issues herein with these principles in mind.**

Whether the Registrar of Companies acted unlawfully.

16. The Applicant cited section 58 of the Company Act, 2015 as the law on the matter of change of name of a limited liability company. The Applicant also relied on sections 7 (1) (a) and 7 (2) (j) of the Fair Administrative Action Act, 2015 for the position that this Court has jurisdiction to review an administrative action or decision if it can be shown that there was an abuse of discretion or unreasonable delay in the discharge of a duty imposed under any written law.

17. The Applicant contended that from the documentary evidence it had annexed, it is manifestly clear that the Applicant was incorporated on 24th May, 2011 and was eight (8) years and one (1) month old when the 2nd Respondent wrote to the directors of the Applicant demanding the change of the Applicant's name. Further, that this notice is ineffective because it was not given within one year (12 months) after the date the Applicant was registered, as required by section 58 (2) of the Companies Act.

18. The Applicant urged this Court to consider the importance of, and give effect to statutory time limits set by legislation. In particular, that this Court must ensure that the Registrar of Companies complies with the twelve months' rule stipulated under Section 58 (2) of the Companies Act, and only departs from that rule in exceptional and justifiable circumstances whose effect will not occasion an injustice or prejudice to a party affected by the said decision.

19. It is further submitted that even though section 58 (2) of the Companies Act allows the 2nd Respondent to direct a company to change its name within one year or within an extended period as the he or she may specify in writing in a particular case, the impugned decision did not specify the period of the extension and even if it did, no written reasons for that extension were provided.

20. In addition, that such an extension must be reasonable and not inordinate, and that an extension of eight (8) years for an action the law requires to be undertaken within one (1) year cannot be said to be reasonable. Therefore, that the 2nd Respondent in issuing its direction, is guilty of unreasonable delay. The Applicant also submitted that the power conferred on the 2nd Respondent under section 58 (2) to extend the period of issuing a direction is a discretional power that has to be exercised judiciously, and not in an arbitrary manner and capricious manner. In this respect, the Applicant contended that the 2nd Respondent did not take into account the degree of prejudice which would be suffered by the Applicant who is being directed to change its name eight (8) years after its date of incorporation, and the effect the Registrar's decision would have on the Applicant's business.

21. In addressing this issue, the Respondents submit that the relevant provisions are those that govern the requirements on the name of a company and similarity to names of other companies. Reliance was placed on sections 49, 57, 58 and 59 of the Companies Act, for the statutory duty placed on the 2nd Respondent not to register a company by a particular name, if upon taking into account the relevant criteria the name is found to be undesirable, and to direct a company to change it's name where a name is similar to an existing name. Furthermore, that section 59 provides for regulations to be enacted to give effect to sections 57 and 58, which regulations are provided for in the Companies (General) Regulations, 2015.

22. According to the Respondents, they have demonstrated that the name BAPS LIMITED does not meet the criteria in the above cited provisions. In addition, that the directive of 17th June 2019 was not made outside the confines of the relevant provisions of the Companies Act, and is not *ultra vires,* irrational nor characterized by irrelevant considerations. Reliance was placed on the decision by Odunga J. in the case of **Republic vs Registrar of Companies ex parte Megascope Healthcare (K) Limited & Another [2017] eKLR,** that the law prohibits registration of a name similar to another one in the index of companies, and that the Registrar has powers to rectify such a scenario.

23. On the timelines within which the said directives can be given, the 2nd Respondent submitted that the letter dated 17th June 2019 was a directive under section 58(1) of the Companies Act, and specified the reason for the same, being that the name of the Applicant was registered after that of the Interested Party, and which action was inadvertent. Further, that considering that the period within which such a directive can be issued is 12 months, the 2nd Respondent then extended the time limit for issuing the directive as enabled under section 58(2) of the Companies Act, and directed the Applicant to change its name within 30 days. The 2nd Respondent contended that it has the responsibility and statutory duty to rectify such a situation.

24. This Court in this respect is guided by the description of illegality by Lord Diplock in **Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410,** as a failure by a public body to understand correctly the law that regulates its decision making power, or a failure to give effect to that law. It is therefore necessary when deciding whether a law has been correctly interpreted and applied, to identify and construe the scope of the applicable statutory provisions. In the present application, the applicable law is sections 57 and 58 of the Companies Act. Section 57 provides as follows as regards registration of companies with similar names:

> **"(1) The Registrar shall not register a company under this Act by a name that is the same as another name appearing in the index of company names.**
>
> **(2) The regulations may provide—**
>
> **(a) The regulations may provide—**
>
> **(i) in specified circumstances; or**
>
> **(ii) with a specified consent; and**
>
> **(b) that, if those circumstances are existing or that consent is given at the at the time a company is registered by a name, a subsequent change of circumstances or withdrawal of consent, does not affect the registration."**

25. Section 58 provides the Respondent with the power to direct change of a company's name in case of similarity to an existing name as follows:

> **"(1) The Registrar may direct a company to change its name if it has been registered by a name that is the same as or, in the opinion of the Registrar, too similar to—**
>
> **(a) a name appearing at the time of the registration in the Registrar's index of company names; or**
>
> **(b) a name that should have appeared in that index at that time.**
>
> **(2) A direction under subsection (1) may be given only within twelve months after the date on which the company concerned was registered or within such extended period as the Registrar may specify in writing in a particular case.**
>
> **(3) In giving a direction under subsection (1), the Registrar shall specify the period within which the company is required to comply with the direction.**
>
> **(4) The regulations may further provide—**
>
> **(a) that no direction is to be given under this section in respect of a name—**
>
> **(i) in specified circumstances; or**
>
> **(ii) if specified consent is given; and**
>
> **(b) that a subsequent change of circumstances or withdrawal of consent does not give rise to grounds for a direction under this section.**

(5) If the company does not comply with the direction issued under subsection

(1) within fourteen days, the Registrar shall publish a notice in the *Gazette* to strike the name of the company off the Register.

(6) As soon as practicable after striking the name of the company off the Register, the Registrar shall publish in the *Gazette* a notice indicating that the name of the company has been struck off the register.

(7) Upon publication of the notice under subsection (6), the company shall be deemed to have been dissolved."

26. Similar provisions are also provided for in Regulation 11 of the Companies (General) Regulations, 2015.

27. It is evident that the 2nd Respondent has power under section 58 of the Act to give directions as to change of name, but under section 58(2), there are time limits within which such directions may be given, which is within twelve months after the date of registration of a company, or within such extended period that the Registrar may specify. The impugned directions in the present case were in a letter by the 2nd Respondent dated 17th June 2019 which read as follows:

"The Directors

Baps Limited

P.O. Box 42455-00100

NAIROBI.

Date : 17th June, 2019

Dear Sir/Madam,

RE: CHANGE OF NAME- BAPS LIMITED (CPR/2011/47997)

We have noted that this office registered a limited liability company bearing the name 'BAPS INTERNATIONAL LIMITED' (CPR/2009/3882) on May 28 2009 before you sought registration for your limited liability company on May 24, 2011.

The allocation of the 'BAPS LIMITED' (CPR/2011/47997) to you was therefore inadvertent and the same is no longer tenable within the meaning of Section 58 (l) of the Companies Act, 2015 of the Laws of Kenya. In this particular case, the Registrar hereby extends the time period within which this directive is issued pursuant to Section 58(2) of the Act.

We therefore call upon you to change the name of your company within thirty (30) days from the date hereof, failure to which we shall invoke the provisions of Section 58 (5) (6) and (7) pursuant to the Companies (Amendment) Act, No. 28 of 2017, and strike off the said registration in our register.

Yours faithfully,

ALICE MWENDWA

SENIOR STATE COUNSEL

For: REGISTRAR OF COMPANIES

Cc: The Directors

Baps International Limited (CPR/2009/3883)

P.O. Box 3908-00506

Nairobi."

28. It is not in dispute that the directive to change the name was made well beyond the prescribed twelve months from the time of registration of the Applicant on 24th May 2011. The 2nd Respondent did in the said letter also extend the time within which to issue the directive. It is notable in this respect that there are no time limits provided in the law as to when this extension of time can be given by the 2nd Respondent. The question therefore before this Court is whether there is a requirement that such extension must be made within a reasonable time after the expiry of the twelve months, or whether the 2nd Respondent is allowed an indefinite period by the law within which to extend the time.

29. The general rule is that any duty or function for which there is no imposition of a time limit must be undertaken without unreasonable delay. In **R(S) vs Secretary of State for the Home Department (2007) EWCA Civ 546**, it was held that legislative schemes implicitly impose a duty to act within a reasonable time. It is also a legal principle that that there is general duty to act reasonably when performing a function or making a decision, as held in **R (Saadi) vs Secretary of State for the Home Department (2002) 1 WLR 3131**. The Kenyan Constitution in this respect also provides guidance in Article 259(8) of the Constitution where it is provided that:

> **"If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises."**

30. The concept of what is reasonable time is flexible, and will depend on the circumstances of a case, as held in **Law Society of Kenya v Attorney General & 2 others [2016] eKLR**. Relevant circumstances include the nature of the matter to which the inaction relates, any mitigating circumstances on the part of the decision maker, the adverse consequences of delay, and the need to ensure fairness. In the present case it is not disputed that the 2nd Respondent sought to extend the time in which to issue directives on change of name after a period of eight (8) years from the date of registration of the Applicant. The 2nd Respondent did not give any reasons for the delay in so acting, and the only explanation given was with regards to the directive to change the Applicant's name, which was that there was an inadvertent error on its part in registering the name.

31. The Applicant has averred, and it is not disputed by the Respondents, that in those eight years it has acquired properties in its name and will be legally and financially prejudiced if its name is changed. The Respondents on the other hand have not demonstrated any prejudice that will be suffered if the name is not changed, and particularly by the Interested Party. The delay of eight years by the 2nd Respondent in extending time to direct change of name, and also in directing the Applicant to change its name, is therefore unreasonable, as no justifiable reason has been provided by the 2nd Respondent for its inaction, and as it will also negatively prejudice the Applicant. To this extent the decision to direct change of name was unlawful.

Whether the decision was Unreasonable

32. On this issue, the Applicant submitted that the 2nd Respondent had other legal alternatives, as it was not disputed that the Interested Party presently does not have a registered office, and there is no evidence that it has filed annual returns or that it is carrying on business. As such, that the 2nd Respondent ought to have exercised the powers under section 894 of the Companies Act to verify whether or not the Interested Party is carrying on business, and in the likely event that it is not, strike it off the register. In addition, that the provisions of section 708 of the Companies Act, 2015 make it an offence for a Company not to lodge annual returns on time.

33. The Respondents on the other hand submit that Applicant in its verifying affidavit produced an annexture which indicates that it reserved two names being PABS LIMITED & BAPS LIMITED, which it explained are drawn from the initials of the names of the directors. Therefore, that the Applicant still has an option of changing its name to PABS LIMITED. On the submissions that the Interested Party may not be carrying out business, the 2nd Respondent submitted that it can only act after having been satisfied that the conditions in section 894 of the Companies Act apply.

34. It has long been established that the decision of a public body will be unlawful if it is irrational or unreasonable, in the sense that it is a decision which no public body acting reasonably would have reached. The two terms "irrational" and "unreasonable" are used interchangeably in this regard, after they were each used in two decisions namely **Associated Provincial Picture Houses vs Wednesbury Corporation (1948) 1 KB 223** and **Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374** to illustrate an unreasonable decision. These terms were also explained in **Pastoli vs Kabale District Local Government Council & Others, (supra),** and are interchangeably used to describe cases where the nature of the outcome of a decision is not acceptable for established reasons, or where there are flaws in the process of reasoning used to arrive at the decision.

35. This Court has already found that no reasons were given by the 2nd Respondent for the delay in giving the directive to the Applicant to change its name. In addition, it has not disputed that the Interested Party has not been filing annual returns. It is therefore inexplicable, why the 2nd Respondent opted to direct the Applicant, which has been active in filing returns, to change its name, before seeking to confirm the status of the Interested Party. It is also not shown by the 2nd Respondent that it explored other legal options that would be least prejudicial. To this extent, it is also my finding that the 2nd Respondents directives to the Applicant to change its name were also unreasonable and irrational.

Whether there was Procedural Unfairness

36. On the fairness of the process employed, the Applicant cited the provisions of Article 47 of the Constitution to submit that the action of the 2nd Respondent is an administrative action, and that at the point of writing the impugned letter dated 17th June, 2019, the 1st Respondent ought to have given the Applicant an opportunity to demonstrate why its name should not be changed. However, that such an opportunity was not accorded to the Applicant, who was instead directed to change its name within thirty days, failing which the provisions of section 58 (5) (6) and (7) would be invoked. Therefore, that at that point the decision had already been made, and there was no room for the Applicant to challenge and/or object to the directive.

37. In response to the allegation that the impugned decision violates the provisions of Article 47 of the Constitution, the Respondents submit that they are cognizant that in making an administrative decision, they must adhere to the provisions of Article 47 of the Constitution, as well as of the Fair Administrative Action Act. The Respondents contend that the administrative decision was started by the letter dated 17th June 2019, which gave specific reasons as to why the directive was issued. Further, that at the point of writing the letter dated 17th June 2019, the 2nd Respondent gave the Applicant an opportunity to demonstrate why its name should not be changed within 30 days.

38. Lastly, that the change of name or otherwise would still have gone through other processes before reaching the final stage of being gazetted under section 58(5) & (6) of the Companies Act. Reliance was placed on the decision in **Egal Mohamed Osman vs Inspector General of Police & 3 others [2015] eKLR** on the scope of application of the provisions of Article 47, and for the submission that the Respondents did not violate the rules of natural justice or Article 47 of the Constitution.

39. It is not in dispute that a core requirement of Article 47 of the Constitution is that every person who is to be affected by a decision must be accorded fair administrative action. The said Article imports and implies a duty to act fairly by any decision maker in any administrative action, and provides as follows in this regard:

> **"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."**

40. In addition, section 4 (3) and (4) of the Fair Administrative Action Act, which was enacted to implement the provisions of Article 47, lays down the procedure to be adopted when taking an administrative action or decision as follows:

> **"(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**
>
> **(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
>
> **(b) an opportunity to be heard and to make representations in that regard;**
>
> **(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
>
> **(d) a statement of reasons pursuant to section 6;**
>
> **(e) notice of the right to legal representation, where applicable;**
>
> **(f) notice of the right to cross-examine or where applicable; or**
>
> **(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**
>
> **(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**
>
> **(a) attend proceedings, in person or in the company of an expert of his choice;**
>
> **(b) be heard;**
>
> **(c) cross-examine persons who give adverse evidence against him; and**
>
> **(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing."**

41. In the present application, the import and effect of the impugned decision and directives made in the letter dated 17th June 2019 was three fold. First, it extended the time by which the 2nd Respondent could give a directive for change of name. Second, it directed the Applicant to change its name within 30 days. Lastly, it also directed on the consequences if the said change of name was not effected. It is therefore evident that a decision had already been made by the 2nd Respondent in the said letter that the Applicant should change its name.

42. The core of the duty to act fairly and the requirement of fairness is the need to ensure that a person affected by a decision has an effective opportunity to make representations before it is taken. This requirement is what informs the key procedural steps set down by the law of giving of notice of an administrative action, and provision of the evidence that will be relied upon during that administrative action. It is also notable that the duty and obligation is upon the Respondents as administrators to respect and observe the requirements of Article 47 of the Constitution, and to apply the provisions of the Fair Administrative Act before the taking of an administrative action or making of a decision. The Applicant cannot therefore be faulted for acting on a decision has been unfairly made.

43. It is thus my finding that in the present case, as the 2nd Respondent did not provide any evidence that the Applicant was given notice or an opportunity to state its case as regards the directive to change its name before the letter dated 17th June 2019, the decision and directives therein were made unfairly.

Whether there was a violation of the Applicant's Legitimate Expectations

44. The Applicant further submitted that it had a legitimate expectation that its name having been approved and reserved for registration by the Registrar of Companies, and thereafter having been issued with a Certificate of incorporation, a direction under section 58 (2) would only be issued within twelve months or such other reasonable period, but not after a period of eight (8) years. Furthermore, that the Applicant had

a legitimate expectation that it would not be deprived the right to continue enjoying the use of its name, and that its legitimate expectation is well founded in law and does not go against any statutory requirements or regulations.

45. The Respondents submitted that a legitimate expectation must be founded on the law, and any expectation not to be deregistered can only be determined within the confines of the Companies Act, for the reason that it is only those entities that fulfil the requirements of the Act that are permitted to remain on the register of companies. Furthermore, that the legitimate expectation not to be deregistered must be in full compliance with the statutory and all other regulatory requirements, which have not been met in this case. Therefore, that the Applicant had no legitimate expectation in law that it would be able to continue to exist on the register of companies, with a name that offends the provisions of the Companies Act. Reliance was placed on the decision by the Supreme Court of Kenya in the case of **Communications Authority of Kenya & 5 Others -vs- Royal Media Services Limited & 5 Others [2014] eKLR.**

46. A five judge bench of this Court in the case of **Kalpana H. Rawal v Judicial Service Commission & 4 others [2015] eKLR** exhaustively discussed the doctrine of legitimate expectation, and various judicial decisions on the doctrine, and its decision that was affirmed by the Court of Appeal . The said bench observed as follows:

> "**207. The doctrine of legitimate expectation was developed by English courts to hold rulers to their promises. In the 4th Edition, 2001 Reissue, of Halsbury's Laws of England the authors at page 212, paragraph 92 explain the concept behind the development of the principle as follows:**
>
> > ***"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of decision maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.***
>
> ***The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other* requirement of procedural fairness. A *legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision maker."***

47. The Supreme Court in the **Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others, (supra)** also explained the principle of legitimate expectation as follows:

> **"[264] In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.**
>
> **[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation."**

48. The said Court further laid down the principles that govern a successful invocation of the doctrine of legitimate expectation as follows:

"[269] The emerging principles may be succinctly set out as follows:

> **a. there must be an express, clear and unambiguous promise given by a public authority;**
>
> **b. the expectation itself must be reasonable;**
>
> **c. the representation must be one which it was competent and lawful for the decision-maker to make; and**
>
> **d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution."**

49. Applying these principles to the present case, this Court finds that there was a clear representation made by the 2nd Respondent, founded on section 18 of the Companies Act, when it registered the Applicant's name and issued it with a certificate of Incorporation on 24th May 2011. The said certificate was annexed to the Applicant's supporting affidavit as Annexure "SB-5". Section 18 of the Act not only gives the 2nd Respondent powers to issue a certificate of registration, but also provides that the certificate is conclusive evidence that the requirements of this Act relating to registration have been complied with, and that a company is duly registered under the Act.

50. In addition, this Court has found that it was unlawful for the 2nd Respondent to purport to extend time within which to direct a change of name after eight years. In my view there was thus a legal basis the Applicant's legitimate expectation that it would not be deprived the right to continue enjoying the use of its name. It is thus my finding that the decision by the 2nd Respondent that the Applicant should change its name after eight years of use of such name was in violation of the Applicant's legitimate expectations that it would continue using the said name and the accrued legal interests arising thereby.

Whether the Remedies sought are merited

51. The Applicants have sought the remedies of certiorari and prohibition. The Court of Appeal in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances when the orders of certiorari and prohibition can issue as follows:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Only an order of *certiorari* can 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 complied with or for such like reasons."**

52. The 2nd Respondent has been found to have acted unlawfully in extending time and directing the Applicant to change its name eight years after the Applicant's name was approved, and it was incorporated by the said name. In addition, the Applicant has also been found to have thereby acted unreasonably, unfairly and in violation of the Applicant's legitimate expectations. The order sought of certiorari to quash the impugned decision and directives in the 2nd Respondent's letter dated 17th June 2019 is therefore merited. Likewise, the orders of prohibition are also merited, to the extent that the effect of quashing the decision by the 2nd Respondent is that the current *status quo* will obtain, and the Respondents cannot therefore proceed with the implementation of the impugned decision and directives.

53. In the premises this Court finds that the Applicant's Notice of Motion dated 12th July 2019 is merited, and I hereby grant the following orders:

> **I. An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing, and to quash the decision and directions of the 2nd Respondent contained in a letter address by the 2nd Respondent to the Directors of the Applicant dated 17th June 2019, in which the 2nd Respondent is directing the Applicant to change its name within thirty (30) days from the date of the said letter.**
>
> **II. An order of Prohibition be and is hereby granted prohibiting the 2nd Respondent whether by itself, its agents, employees or whomsoever from taking any steps, actions, and measures to enforce or implement the directives contained in the letter dated the 17th June, 2019 addressed by the 2nd Respondent to the Directors of the Applicant.**
>
> **III. The 2nd Respondent shall meet the Applicant's costs of the Notice of Motion dated 12th July 2019.**

54. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY 2020

P. NYAMWEYA

JUDGE