REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 130 OF 2016

CHRISTOPHER DENNIS WILSON.....APPLICANT

VERSUS

1. THE REGISTRAR OF COMPANIES

2. PATBON INVESTMENT COMPANY

3. KILIFI PLAINS LIMITED.....RESPONDENTS

R U L I N G

1. The applicant, CHRISTOPHER DENNIS WILSON, a shareholder and contributory of the company, has approached the court and filed an application under Section 339 of the Repealed Companies Act as well as under Sections 895, 912 and 917 of the Companies Act 2015, and sought one substantive order that the court be pleased to restore the name of KILIFI PLANTATION PROPERTIES to the Register of Companies.

2. The grounds disclosed to premise the application are that the company was dissolved by the Registrar of Companies, the Respondent, pursuant to its statutory powers under the repealed Act though a gazette notice no. 13863 dated 12/11/2010 but he only became aware of the dissolution on 18/01/2018 and thereafter moved with speed and filed the application in May 2018.

3. The interest to restore the company is based on the facts that the company continue to own assets, landed property, it has let on long term leases to different individuals, including the interested parties, who have invested heavily in developing the same and thus stand to suffer irreparable loss and damage if the company stands dissolved hence the application and intervention of the inherent powers of the court to do justice and avoid injustice was invoked to ensure that nobody was unjustly prejudiced.

4. Those grounds were amplified in the Affidavit in support sworn by the Applicant which then annexed the memorandum and Articles of Association of the company, largely to demonstrate that the applicant was contributory at incorporation as the only natural shareholder with one share, as well as the gazette notice together with the copy of the title to those parcels of land registered at the Coast Registry and known as CR 53493 and CR 18984/1 together with a copy of resolution of the company authorising the institution of these proceedings. It was then added that the company is prepared to comply with all provisions of the law for the purposes of the requested restoration and that the Respondent stood to suffer no prejudice if the restoration was to be ordered as compared the state of dissolution that exposes the company and its lessees to an arbitrary deprivation of property.

5. On 22/6/2018, before the Application for restoration could be heard, the two interested parties, PATBON INVESTMENTS CO. LTD and KILIFI PLAINS LTD, also filed an application to be joined to the proceeding, as interested parties and exhibited several agreements of sale of some about 180 acres of land by the company to the interested parties which transfers were said not to have been completed and could not be concluded on account of dissolution of the company. That latter application came up for hearing on the 25/6/2018 when parties agreed that the two interested parties be joined as such by consent and further that the application for restoration be advertise in the Daily Nation and the East African Standard inviting any party interested in the matter and in participation at trial to get copies of the application from the court file and to be at liberty to participate at the hearing with all the liberties including the right to file any papers desired.

6. No additional papers were filed by the interested parties but the Respondent did file grounds of opposition in which it was contended that the application was statute barred under section 917 as much as it also offended the principle of exhaustion of alternative dispute resolution mechanism provided under section 912 (2) of the Act. Parties then filed submissions and attended court to highlight the same.

Submissions by the parties

7. For the Applicant submissions were dated 13/12/2018. In those submission and the oral highlights it was emphasized that under the

repealed statute the time within which to bring an application for the restoration of a dissolved company was 10 year which period was reduced to six years thereby inviting the application of Section 23(3) of Cap 2 to the effect that an amendment should not affect a vested right or interest. To the Applicant the statutory right to seek restoration within 10 years had not been taken away and could not be legally so taken away on the repeal of the old Act and enactment of the new statute. It was then submitted that even the transition provisions which only affected pending court disputes did not affect the vested right of the applicant in a negative way. The court was then referred to entries no. 45, 4, 5 & 6 on the title No. CR 27043 in which leases in favour the 2nd interested party with an emphasis that unless restoration is ordered such interests would be defected dissipated and destroyed. It was therefore urged that the court funds favour with application and allows the same as prayed.

8. Mr. Gikandi for the interested party supported the application and added that certificates of registered long term leases could not be issued due to the dissolution of the company as the lessor. He invited the court to adopt a purposive interpretation under article 159 of the Constitution for the purposes of preservation and protection of the vested property interests of the interested parties including the right to property from being arbitrarily deprived.

9. Counsel pointed out that the respondent had opted not to file an Affidavit to challenge the factual position asserted by the applicant and interested parties and therefore such facts as deponed in the affidavits stood uncontroverted. It was also urged that the Respondent being a public agency be held to the dictates of article 10 of the Constitution and to the court was cited the decision in ***RE Portreitz Co. Ltd [2016] eKLR*** where the court, Ogola E.K.O, J ordered a company which had dissolved itself to be restored to the register so as to stand the consequences of its improper conduct prior to dissolution.

10. On the decision in ***Speaker of National Assembly vs Hon. James Njenga Karume [1992] KRR, Peter Ngoge vs Hon. Francis Kepera*** and ***Yusuf Gitau Abdallah vs Building Centre (K) Ltd [2014] eKLR***, the counsel argued that the principle of need to exhaust alternative remedy does not exhaust the court's jurisdiction under article 165 of the Constitution. Counsel then urged the court to take notice that even though the law regards gazettement as a sufficient mode of service, not many people access and read the Kenya Gazette. He urged the court to allow the application so as to protect the property right from being deprived arbitrarily.

11. For the Respondent, Mr. Odhiambo relied on his grounds of opposition dated 12/112018 as well as the written submissions. The tenure of those documents was that application was statute barred by virtue of the provisions of Section 912(2) c as read with 917(4) of the Companies Act No. 17 of 2015 and further that by the principle of exhaustion of alternative and efficacious statutory remedies enunciated by the decisions in ***Speaker of National Assembly vs Hon. James Njanga Karme [1992] KLR 22***, ***Peter Ngoge vs Francis Kaparo and Yusuf Gitau Abdallah vs Building Centre (K) Ltd [2014] eKLR*** the application is rush and cannot be granted in that to grant the same would defeat the clear intention of the legislature as expressed in the statute which is that the registrar reserves the jurisdiction to administratively restore the company to the Register. To counsel, the provisions of Section 23(3) and c have no assistance to the Applicant and the interested party owing to the fact that they are statute barred by the regime of the amended statute. As a parting, shot counsel submitted that both the Applicant and interested party had not attempted any challenge at the dissolution of the company and must be taken to concede that the jurisdiction was properly exercised.

12. In his closing submissions Mr. Gakuo for the Applicant made emphasis on the point that by operation of Section 23(3) c Cap 2, an accrued and vested right is incapable of defeat by an amendment introduced by the companies Act 2015 and that the inherent powers of the court are wide enough to remedy the applicant's situation. In addition the counsel added that there was no Replying Affidavit to controvert the depositions by the Applicants in the Affidavit in support of the Application.

13. From the papers filed and submissions offered the issues that present themselves for resolution by the court are:-

a) Whether Sections 912 and 917 make the current application untenable and statute barred.

b) Whether the court has a discretion and jurisdiction to grant the orders sought.

c) What orders should be made as to costs.

Is the matter barred and wholly untenable?

14. In his application, the applicant has invoked not only the overriding objectives of the court and the inherent powers of the court but also the provisions of the repealed statute as well as the new statute as vesting in the court, the powers to make an order for restoration. That position in wholly supported by the interested party who add that the right to property under article 40 is exposed to violation and infringement unless the restoration be ordered or else their leases shall be escheated to the state.

15. While the Respondent concede that right to property will indeed be interfered with, without according to the interested parties a right to be heard, counsel contended that the matter is untenable for being statute barred and for having bypassed the statutory jurisdiction upon the Registrar to consider and application for restoration. Accordingly, I take the view that the sustainability of the matter will depend on whether or not it is statute barred. That determination thus effectively and necessarily call for an interrogation of the effect of the repeal and re-enactment of the Companies Act by Act No. 17 of 2015.

16. The undisputed fact is that while the repealed statute granted to the applicant a period of 10 years to seek restoration, the amendment by re-enactment reduced that period to a period of six (6) years.

17. It is in no doubt that the matter having been filed in 2018; the provision to apply is the 2015 Act and not the repealed one. Yet there are the rights vested and accrued under the old statute that the law says and guarantees must be respected, honoured, and accorded protection.

18. Faced with the need to interpret the effect of the repeal on the then existing rights, I have taken a resort on the provisions of Section

23(3) of the **Interpretation and General Provisions Act**, **cap 2**, which provide:-

> **"Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not-**
>
> **a) Revive anything not in force or existing at the time at which the repeal takes effect; or**
>
> **b) Affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or**
>
> **c) Affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or**
>
> **d) Affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or**
>
> **e) Affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made".**

19. The law make it clear that rights and obligations accrued vested and incurred under a repealed statute are never to be affected or removed by the repeal and/or re-enactment. This is the enactment that helps interpret whether a statute can be interpreted and taken to have a retrospective effect. Indeed a chose in action under article 40 of the constitution is indeed a property accorded the protection from being deprived in an arbitrary manner. With that provision in mind, I have read the Section 917 of the companies act, 2015 relied upon by the Respondent for the contention that this matter is statute barred and I cannot but hold that there is no clear intention revealed in that provisions that parliament intended that a right to seek restoration of a dissolved company within 10 years from the date of dissolution was to be taken away.

20. In ***S.K. Macharia & Another vs Kenya Commercial Bank Ltd [2012] eKLR*** the supreme court laid the law in the following words:-

> **"[61] As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature**

21. the same position had been taken by the High Court in ***Kenya Bankets Association & Others Vs Minister for finance & others [2002]1KLR 61 at 86, line 13*** when the court held**:-**

> **"The general rule in our jurisprudence, is that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure; and objection is more strongly felt in respect of *ex post fac*to imposition of novel penalties, and of arbitrary creation of new crimes, than in any other form of retroactive legislation, for it shocks the most elementary sense of justice to punish anybody, as an afterthought, for doing that which was lawful when he did it. This rule chiefly prevails where the enactment would prejudicially affect vested rights, or the legality of past transactions or impair contracts. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed to be intended not to have a retrospective operation".**

22**.** It is not being asserted by the court that parliament have no authority to pass a retrospective legislation. The law is that that power is clearly with the legislature but the intention must be clear and unambiguous from the words of the statute. The conclusion I do make is that there is no retrospective application shown to have been intended by parliament in replacing the provisions of Section 339(6) of the Repealed Company Act with Section 917 of the 2015 Act. I hold and find that the rights vested upon the applicant to seek restoration within 10 years was not affected by the repeal and that when filed the matter was not statute barred but was filed within time.

23. Closely related to the foregoing is the position of the Respondent that Section 912 of the 2015 Act provides an effective and sufficient remedy and that the applicant ought to have made the application before the Registrar before approaching the court.

24. My understanding of the law is that for this court's jurisdiction to be ousted there must be a clear, firm and unequivocal provision in the alleged ouster clause. The supreme court in **Judges and Magistrates Vetting Board vs The Centre for *Human Rights and Democracy & Others [2013] eKLR*** set the law on ouster of court's jurisdiction in the following words:-

> **"Ouster clauses can be categorized as constitutional or statutory. Where they are statutory ouster clauses, the statute may confer exclusive jurisdiction on the relevant body to determine the relevant matter. In such a case, the relevant body must act under the statute and not outside it".**
>
> **…it is a principle of interpretation adopted in Anisminic, that when a statutory ouster clause is invoked, courts should interpret it in a manner likely to preserve the jurisdiction of the courts**.
>
> **…the courts have a conventional inclination to interpret statutes in a manner that precludes acceding of jurisdiction to other agencies … the court have recognized that indeed, there will be proper instances of jurisdiction being conferred upon**

other agencies by the legislature but when the legislature does so, it has an obligation to express itself in clear, firm and unequivocal language".

(Emphasis provided)

25. I have read the Section 912 with 917 and I see no firm and unequivocal attention to oust the jurisdiction of the court. Instead I hold that a party affected by dissolution of a company by the Registrar has the option to either go to the registrar first or just approach the court directly.

26. Having come to the finding that the application is properly before the court, I am now left with the final issue for determination whether a basis has been laid to restore the company to the Register of Companies.

27. The primary purpose of a court system since the invention of equitable principles is that the court should not give succour to a right being infringed without a legal recourse. Under the Kenyan modern and rebuts constitution, the situation is even more clearer. The court is mandated to administer justice in a manner that promotes and protects the principles of the constitution. One of the principles of the constitution is entrenchment and safeguard of the bill of rights which include the right to property.

28. 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 its 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, 4th 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

29. I do order and direct that the company be restored onto the Register of Companies but on terms that it shall submit all the un-submitted returns of its operations since 2010 to date within 30 days from today

30. Since it has not been suggested or even alleged that the Respondent exercised its statutory duty improperly or unlawfully, I infer that the Respondent acted properly and I order that each party bears own costs even though the Applicant has succeeded.

Dated and **delivered** at **Mombasa** this **1st** day of **April 2019**.

P.J.O. OTIENO

JUDGE