



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 258 OF 2018**

**BETWEEN**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL  
REVIEW ORDERS OF CERTIORARI AND MANDAMUS.**

**AND**

**IN THE MATTER OF SECTION 4(3)(b), 5(2)(b)&(c) 7(1)(a)&(2),  
9,10,11(1) OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF SECTION 57 OF THE COMPANIES ACT**

**AND**

**AND IN THE MATTER OF ORDER 53 RULE 1(1) & (2)**

**OF THE CIVIL PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**REGISTRAR OF COMPANIES.....RESPONDENT**

**AND**

**GOLDEN AFRICA TRADING COMPANY LIMITED...INTERESTED PARTY**

**EX PARTE: GOLDEN AFRICA KENYA LIMITED**

**JUDGMENT**

**The Application**

1. The application that is before this Court for determination is the Notice of Motion dated 10<sup>th</sup> January 2019, that was filed by Golden Africa Kenya Limited, a limited liability company incorporated in Kenya and the *ex parte* Applicant herein (hereinafter referred to as “the Applicant”). The Respondent is the Registrar of Companies, which is a statutory office established under the Companies Act. The Interested Party on the other hand is Golden Africa Trading Company Limited, a limited liability company registered under the Companies Act.

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

**1. An Order of Certiorari to bring into this Court for purposes of quashing the decision of the Registrar of Companies to register the Interested Party Company being Golden Africa Trading Limited and of Company No. CPR/2015/218291.**

**2. An order of Mandamus do issue for the purposes of compelling the Registrar of Companies to strike out the Interested Party Company being Golden Africa Trading Limited of Companies No. CPR/2015/218291 from the Registrar of Companies.**

**3. The Court do issue an order directing the Interested Party being Golden Africa Trading Limited of Companies No. CPR/2015/218291 to change its name within Twenty one (21) days from the date of service of this order thereof failure to which name of the Interested Party shall be struck out forthwith from the Register of Companies.**

**4. This Court be pleased to issue any such further orders as it deems mete and just.**

**5. That costs of the application be provided for.**

3. The facts and grounds giving rise to the present application were stated in a statement filed by the Applicant’s Advocates dated 26<sup>th</sup> June 2018, and a verifying affidavit sworn on the same dated by Omar Hayel, the Applicant’s Deputy Director. In summary, these are that the Applicant Company was duly registered on 21<sup>st</sup> April, 2011 as Golden Africa Refinery Limited under the Companies Act and subsequently through a Special Resolution changed its name to Golden Africa Kenya Limited on 15<sup>th</sup> August, 2011, and was issued with certificate No. CPR/2011/46060, a copy which was annexed.

4. That pursuant to an official Search at the Companies registry, the Applicant noted that Golden Africa Trading Limited, the Interested Party herein and being Company No. CPR/2015/218291 was registered as a private limited company on 11<sup>th</sup> December, 2015 with its shareholders being Suneel Kumar and Dharminar Kumar each holding 50% of the shares. The Applicant avers that the name of the Interested Party, “Golden Africa Trading Limited”, is visually and phonetically similar to that of the Applicant, and the similarity of names is bound to create confusion and lead the Applicant’s customers as well as general public into thinking that the two companies are interrelated being that they deal in similar commodities.

5. The Applicant averred that the Respondent’s action to register the Interested Party was arrived at by error of the law, and in disregard of the express provisions of section 57 (1) of the Companies Act, therefore infringing on the *ex-parte* Applicant’s rights.

### **The Response**

6. The Respondent filed a replying affidavit sworn on 12<sup>th</sup> February 2018 by Joyce Koech, an Assistant Registrar of Companies, in response to the application. According to the Respondent, its records show that the Applicant was incorporated on 21<sup>st</sup> April 2011 as Golden Africa Refinery Limited (CPR/2011/46060) and subsequently, by a special resolution dated 20<sup>th</sup> July 2011 changed its name to Golden Africa Kenya Limited, and a certificate of change of name dated 15<sup>th</sup> August, 2011 was issued by the Respondent. Further, that the Interested Party herein Golden Africa Trading Limited CPR/2015/218291 was registered on 11<sup>th</sup> December 2015.

7. The Respondent stated that it was notified by the Applicant about the registration of the Interested Party Company being the second in time, and that the Interested Party’s name is visually and phonetically similar to the Applicant’s name and which was likely to create confusion to the public to think that the two companies are the same. The Respondent referred to section 57 (1) of the Companies Act on registration of companies, which stipulates that 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. Further, that the same is to be read together with Regulation 11(b) of the Companies (General) Regulations, 2015 which provide that a company name may not be registered if it has a close phonetic resemblance to the name of company, business name, limited liability partnership or partnership that is already registered.

8. Therefore, that the registration of the Interested party herein was inadvertent and the same is not tenable within the meaning of Section 57(1) of the Companies Act, 2015, and the Respondent has the power under the provisions of Section 58 (5) & (6) of the Companies Act to strike off a company where it has issued the same company with a directive under Section 58(1) of the Act to change its name where inadvertent registration of a company with similar name has occurred. However, that this matter was brought to court before the Respondent could exercise this statutory duty under the Act.

9. Lastly, that it is in the interest of justice that the court makes appropriate orders to make redress. However, that prayers number 4 & 5 on the application are not available in judicial review proceedings.

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

### **The Determination**

11. I have considered the pleadings and arguments made by the Applicant and Respondent which raise two issues, namely, whether the Respondent made an error of law in its decision to register the Interested Party, and whether this Court can issue the orders sought by the Applicant. The Court directed that the application be canvassed by way of written submissions, and the Applicant's Advocates, Robson Harris & Co. Advocates filed submissions dated 11<sup>th</sup> February 2019. The Respondents did not file any submissions.

12. The Applicant reiterated its arguments on having been registered first in time, and its name being similar to that of the Interested Party, and relied on sections 57 and 58 of the Companies Act which prohibit the Registrar of Companies from registering a company by a name that is the same as another name appearing in the index of companies names, and give it power to direct change of such a name. It submitted that the decision of the Registrar of Companies to allow registration of the Interested Party is illegal and must be quashed. Reliance was also placed on the decision by Aburili J. in the case of **Republic vs. Registrar of Companies Exparte Atlantic Group (K) Limited**, (2016) eKLR, where the learned Judge directed that the Interested Party therein change its name within 14 days from the date of service of the order, failure to which the Registrar shall forthwith deregister the name of the said interested party. The Applicant also submitted that this court has a constitutional right pursuant to Articles 24, 47, 159 and 165 of the Constitution to grant judicial review orders, and protect the rights of the Applicant.

13. I am guided by the broad grounds for the exercise of judicial review jurisdiction as were 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).”**

14. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited**, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows:

**“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 made 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 he 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 there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”**

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 reveals an implicit shift of judicial review to include aspects of merit review of administrative action, 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.

16. In the present application, the arguments raised are that the Respondent acted illegally, and regard is made to 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.

17. This Court is also guided by the expose on when errors of law will arise in decisions made by a public body, as expounded in **Halsbury's Laws of England, 4<sup>th</sup> Edition** at paragraph 77 as follows:

**“There is a general presumption that a public decision making body has no jurisdiction or power to commit an error of law; thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order. The error of law must be relevant, that is to say it must be an error in the actual making of the decision which affects the decision itself. Even if the error of law is relevant, the court may exercise its discretion not to quash where the decision would have been no different had the error not been committed. Where a notice, order or other instrument made by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed. In certain exceptional cases, the presumption that there is no power or jurisdiction to commit an error of law may be rebutted, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense. The previous law which drew a**

distinction between errors of law on the face of the record and other errors of law is now obsolete. 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.”

18. 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 provide 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.”**

19. 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.”**

20. The Respondent in this regard conceded that its action to register the Interested Party was illegal, and expressed its willingness to remedy the situation. In this regard, it is notable that there is a procedure required by law to be followed by the Respondent in remedying the situation including giving notice to the Interested Party and culminating in the publication in the Gazette of a notice striking off the name of

the Interested Party.

21. Coming to the second issue as regards whether the relief sought by the Applicant can issue, the Court of Appeal held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** *inter alia* as follows as regards the nature of the judicial review orders of certiorari and mandamus:

“...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...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. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

22. It is not contested that the Respondent's decision to were made in error of law. However, certiorari is not the appropriate remedy in the circumstances of this application in light of the procedure that is first required to be followed by the Respondent in section 58 of the Companies Act. In addition, this Court cannot grant the order of mandamus on the terms sought by the Applicant, as it cannot direct the Respondent to undertake its duties in a particular manner. However, section 11 (1) (e) and (h) of the **Fair Administrative Action Act** permits this court to remit a matter back to the decision maker for reconsideration, and the Respondent can therefore be compelled to act according to the applicable law.

23. In the premises, this Court finds that Applicant's Notice of Motion dated 10<sup>th</sup> January 2019 is merited to the extent of the following orders:

**1. An order of Mandamus do issue compelling the Registrar of Companies to follow the procedure set out in section 58 of the Companies Act in relation to change of the name of the Interested Party herein, being Golden Africa Trading Limited of Companies No. CPR/2015/218291, within thirty (30) days from the date of this order, failure to which the name of the said Interested Party shall be struck out forthwith from the Register of Companies.**

**2. That Respondent shall meet the costs of the Applicant's Amended Notice of Motion dated 10<sup>th</sup> January 2019.**

24. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 2<sup>nd</sup> DAY OF APRIL 2019

P. NYAMWEYA

JUDGE