



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW**

**MISCELLANEOUS APPLICATION NO. 329 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR LEAVE BY ATLANTIC GROUP(K)LIMITED  
TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW FOR ORDERS  
OF CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF REGISTRATION OF ATLANTIC GROUP COMPANY LIMITED  
REGISTERED UNDER CERTIFICATE OF INCORPORATION NUMBER 17025 ON 23<sup>RD</sup>  
FEBRUARY 2015**

**AND**

**IN THE MATTER OF ARTICLE 47 AND 165 THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT ( ACT NO. 4 OF 2015) AND  
CIVIL PROCEDURE ACT CHAPTER 21 OF THE LAWS OF KENYA, ORDER 53 OF THE  
CIVIL PROCEDURE RULES, 2010.**

**AND**

**IN THE MATTER OF SECTIONS 57,58,59,60 AND 61 OF THE COMPANIES ACT NO. 17 OF  
2015**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

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

**ATLANTIC GROUP COMPANY LIMITED .....INTERESTED PARTY**

**EX PARTE .....ATLANTIC GROUP (K) LIMITED**

## JUDGMENT

1. On 28<sup>th</sup> July 2016 this court granted the ex parte applicant Atlantic Group (K) Limited leave to institute Judicial Review proceedings seeking for Judicial Review orders of:

**a. Certiorari** to issue to remove into the High Court and quash the decision of the Registrar of Companies to register the interested PARTY ATLANTIC GROUP COMPANY LIMITED as a registered company;

**b. Mandamus** to compel the respondent to strike out from the Registrar of Companies the registration of the name 'ATLANTIC GROUP COMPANY LIMITED' from the list of registered companies.

2. The court ordered that the substantive motion be filed and served by way of substituted service upon the respondent and interested party within 21 days from date of order.

3. As against the interested party, the court also granted leave for service upon the company by way of substituted service in at least two daily newspapers of Nationwide circulation giving it 14 days from the date of service to file their response to the substantive motion.

4. The ex parte applicant complied with the orders for leave and filed the substantive notice of motion on 5<sup>th</sup> August 2016 and effected service upon the interested party by way of newspaper advertisements in the Daily Nation and the Standard Newspapers on 11<sup>th</sup> August 2016. The Registrar of Companies who is the respondent in this matter was also served on 8<sup>th</sup> August 2016.

5. Neither the respondent nor interested party filed any appearance or response to the substantive motion filed on 5<sup>th</sup> August 2016.

6. The matter came up for directions on 5<sup>th</sup> October 2016 and the court fixed the hearing for 16<sup>th</sup> November 2016 and hearing proceeded as scheduled.

7. The notice of motion was supported by the statutory statement and verifying affidavit sworn by Alex Trachtenberg and annexures thereto. The ex parte applicant's case is that it is a limited liability company duly registered on 16<sup>th</sup> March 2005 under the then Companies Act Cap 486 Laws of Kenya (repealed) and issued with a Certificate of Incorporation No. C 115423. That it complied with the law and from time to time filed its annual returns. That when its advocates Ms Oraro & Company Advocates wrote a letter to the respondent Registrar of Companies on 3<sup>rd</sup> June 2015 seeking for a search certificate as per Form CR 12 to verify the existing shareholders and directors, and a further letter of 27<sup>th</sup> July 2015 requesting for copy of the Memorandum and Articles of Association of the ex parte applicant, the ex parte applicant received a letter from the respondent to the effect that the applicant's file at the Companies Registry was missing.

8. In the ensuing, the applicant learnt that one Mr Dominic Otieno had applied to reserve the name "**ATLANTIC GROUP COMPANY LIMITED**" which name is confusingly similar to the applicant's name.

9. That subsequently, the said Atlantic Group Company had its Memorandum and Articles of Association presented for registration allegedly drawn by an advocate under the name of Ms Sammy Nyaga of P.O. Box 4009-40103 Kisumu, together with a statement of nominal share capital dated 11<sup>th</sup> February 2015; Form 201 and 208 both dated 13<sup>th</sup> February 2015 and Form 203 dated 12<sup>th</sup> February 2015 were lodged and registered with the respondent.

10. That on 17<sup>th</sup> February 2015 the reservation of name was registered by the respondent and followed by the lodging of the registration document for the interested party. That on 23<sup>rd</sup> October

2015 the applicant through its advocates wrote to the respondent demanding that a notice be issued to the interested party requiring it to change its name and copies of the said letter send to the addresses indicated in the Memorandum and Articles of Association being : **Dominic Otieno Ogallo P.O. BOx 1994-40100, Kisumu; Phoebe Atieno Agik, P.O. BOX 5036 Kisumu and its advocates Sammy Nyaga P.O. Box 4009-40103 Kisumu.**

11. That the respondent never responded to the said letter and that despite follow up letter of 20<sup>th</sup> November 2015 requesting for urgent confirmation of whether the directors and shareholders of the interested party company were issued with notice, there was no response. That a further letter dated 14<sup>th</sup> December 2015 to the respondent elicited to response.

12. That it was not until 4<sup>th</sup> January 2016 that the respondent wrote a letter to the interested party asking the interested parties to change their name in default of which she would invoke the provisions of Sections 20(2) of the Companies Act, which the interested party has failed to change and neither did the respondent invoke those provisions of Section 20(2) (b) of the Companies Act to revoke the registration of the interested party company.

13. That despite several reminders to the respondent dated 19<sup>th</sup> January 2011, 14<sup>th</sup> March 2016 and 19<sup>th</sup> March 2016 the respondent has not struck out of the register the interested party's name.

14. That the missing file has now been retrieved and the file shows the details of directors and shareholders of the applicant which are different from the interested party's. That the confirmation from the Law Society of Kenya shows that there is no such advocate by the name of **Sammy Nyaga** practicing law in Kenya or Kisumu.

15. That registration of the interested party breaches Section 57,58, 59 and 60 of the Companies Act No. 17/2015 and that there is great danger that the interested party may be used either to defraud the applicant or third parties in the name of the applicant since the two names are confusingly similar.

16. The exparte applicant's application was argued orally by its counsel Mr Okoth holding brief for Mr SC Oraro relying on the grounds in the statutory statement, the verifying affidavit and the annexures verifying the facts relied on.

17. The applicant's counsel also filed brief submission relying on statutory provisions with no case law cited. The submissions mirror the grounds and verified facts while citing the statutory provisions in support thereof.

## **Determination**

18. I have carefully considered the exparte applicant's notice of motion, the statutory statement grounds, the verifying affidavit and annexures as well as the brief written and oral submissions supported by relevant statutory provisions of the law.

19. The issue for determination is whether the Judicial Review Order of certiorari and mandamus as sought are available to the exparte applicant.

20. Section 20 of the Companies Act (repealed) provides that:

### **“change of name”**

***1. A company may, by special resolution and with the approval of the Registrar signified in writing change its name.***

***a. If through inadvertence or otherwise, a company on its first registration is***

*registered by a name which, in the opinion of the Registrar, 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.*

*b. If a company makes default in complying with a discretion under this subsection, the company and every officer of the company who is in default shall be liable to a fine not exceeding one hundred shillings for every day during which the default continues.*

*c. Where a company changes its name under this Section, it shall within fourteen days give notice to the Registrar thereof and the Registrar shall enter the new name on the register in place of the former name, and shall issue to the company a certificate of change of name, and shall notify such change of name in the Gazette.*

*d. ....”*

21. From the above provision, it is clear that in cases where the Registrar inadvertently or otherwise registers two companies under the same name, the Registrar is obliged to call up and inform the latter company, to change its name, and if the latter company defaults to comply with the Registrar's directions, such company and every officer thereof shall be liable to a fine not exceeding one hundred shillings for every day during which the default continues.

22. The Registrar, regrettably, cannot enforce such default. He/she can only follow the criminal process of complaining to the Director of Public Prosecutions for prosecution or to cause the Inspector General of Police to investigate the alleged violation and prosecute the defaulting company and its chief officers including directors and chairman( see Section 395 of the Act).

23. In the instant case, the Registrar of Companies has not followed up the enforcement of Section 395 of the Act to cause the interested party to be prosecuted for refusing to change its name which is in material particulars, similar to the *exparte* applicant's name.

24. There is a overwhelming evidence which is uncontroverted by either the respondent or the interested party that the registration of the applicant was done in 2005 nearly 10 years before the interested party was registered hence the applicant has priority of registration and existence.

25. **Palmers Company Precedents 17<sup>th</sup> Edition page 289 by K. W. Mackinnon & Buchanan** writes that:

*“ The principle on which the courts interfere in such cases is that, one person is not to be permitted to represent the business which is carried on by another as carried on by him, or to represent his goods as being the goods of another man, or to enable his customers to make a false representation, to someone who is an ultimate purchaser.”*

26. In **Leny Vs Walker [1879] 10 ch D.P 206** the authors refer to an English Companies Acts 1948, similar to Sections 15,16,19 and 20 of the Companies Act, Cap 486 Laws of Kenya a stating:

*“ These provisions are designed principally to prevent similar names getting to the register, but the registration of a company by a name which is calculated to deceive by reason of its identity with or resemblance to the name used by some other registered company--- will not prevent the courts from intervening in a proper case by injunction, to protect the rights of such last mentioned company for the court has jurisdiction to restrain a defendant from using a trade name colourably resembling that of the plaintiff, if the defendant's trade name though innocently adopted is calculated to deceive either:*

*By diverting customers from the plaintiff to the defendants, or*

*By occasioning confusion between the two businesses.”*

27. In the present case, one does not need a scanner to see and discern that the name of the ex parte applicant **ATLANTIC GROUP (K) LIMITED (C 115423)** is quite similar in resemblance to the name of the interested party **ATLANTIC GROUP COMPANY LIMITED CR 2015/179025** which names are strikingly and confusingly similar.

28. Section 20(2) of the Companies Act is clear that a company may change the name with the approval of the Registrar. And once the Registrar discovers that another company with a similar name has inadvertently or otherwise been registered and informs the affected company in writing, that notification marks the end of the name of the latter company and the affected company is bound to change its name and in default, the latter company and its directors or officers commit an offence triable and fined under Section 20(2) (b) of the Act.

29. The ex parte applicant herein seeks for Judicial Review Order of Mandamus to compel the Registrar to do that which the law requires her to do, where two companies have inadvertently or otherwise been registered.

30. However, since the law only requires the respondent to advise the interested party to change its name, and the Registrar having so advised the interested party vide her letter dated 4<sup>th</sup> January 2016 CR 18-C115423 & CPR/2015/179025 using the last known registered address of the interested party at P.O. Box 1994-40100 Kisumu, and having notified the latter company that its name and the ex parte applicant's name are deceptively similar and cannot exist concurrently in the register as they are likely to cause confusion to ordinary members of the public; and that the allocation of the name "**ATLANTIC GROUP COMPANY LIMITED**" to it was inadvertently done and the same is no longer tenable within the meaning of Section 20 of the Companies Act Cap 486 Laws of Kenya; and calling upon the interested party to change its name within 6 weeks from 4<sup>th</sup> January 2016 failure to which the Registrar's office would invoke the provisions of Section 20(2) (b) of the Companies Act; and the interested party having defaulted to change its name; I find that the respondent has done that which the law requires her to do and therefore the order of mandamus will not issue against the respondent who has already done what the statute commands her to do- to advise the interested party to change its name within a certain stipulated period.

31. Similarly, the Judicial Review Order of certiorari cannot issue to quash the decision of the respondent to register the interested party for reasons that the provisions of Section 20 of the Companies Act foresees situations where the Registrar may inadvertently or otherwise register the latter company bearing the same or similar name as the already existing company.

32. Furthermore, the said Section 20 provides a remedy where such registration by inadvertence or otherwise occurs that of directing the latter company to change its name within the stipulated period, and which the respondent has done.

33. The same provisions also provide for penal consequences for failure to comply with the Registrar's directions by the interested party.

34. Accordingly, I find that the order of certiorari is not an effective remedy in the circumstances of this case. I decline to grant it.

35. Nonetheless, the ex parte applicant has genuinely approached the seat and temple of justice. It cannot go away remediless. A wrong has been committed against it and there cannot be no remedy for such a wrong which is likely to cause it loses through fraudulent transactions by the interested party who has defaulted to comply with the Registrar's directives, with impunity.

36. Article 159(2) of the Constitution clothes this court with inherent jurisdiction to administer

justice to all irrespective of status and make such orders as may be necessary to meet the ends of justice and to prevent the abuse of court process.

37. There is no abuse of court process in the instant proceedings. However, there is a sufficient cause to make such orders as to meet the ends of justice. It is for the above reasons that I make the following orders:

1. That the Registrar of Companies shall pursuant to Section 20 of the Companies Act report the interested party's default to the Director of Public Prosecutions for the prosecution of the interested party and all its directors for flagrant breach of Section 20(1) (b) of the Companies Act.
2. The interested party shall change its name within 14 days from the date of service of this order.
3. This order to be served upon the Registrar of Companies personally and upon the interested party by way of advertisement in at least two daily newspapers of nationwide circulation.
4. Upon expiry of 14 days from date of service of this order upon the interested party in the manner aforesaid in Order No. (3) above; the respondent Registrar shall, without further application by the ex parte applicant forthwith deregister the interested party **ATLANTIC GROUP COMPANY LIMITED**, and publish the fact of such deregistration or striking it off the register of companies in the Kenya Gazette within 14 days from the date of expiry of notice stipulated in Order No. 3 above.
5. The interested party **ATLANTIC GROUP COMPANY LIMITED** shall pay costs of these Judicial Review proceedings and in default thereof, the corporate veil of the interested party shall be lifted by this order and such costs be borne by **Dominic Otieno Ogallo of P.O. BOX 1994-40100 Kisumu and Phoebe Atieno Agik P.O. BOX 5036-40100 Kisumu** jointly and severally.

**Dated, signed and delivered in open court at Nairobi this 18th day of January 2017.**

**R.E. ABURILI**

**JUDGE**

In the presence of Mr Okoth for the ex parte applicant

N/A for the Respondent

N/A for the interested party