



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 700 OF 2010

ZARA PROPERTIES LIMITED(Formerly Prompt

Fire Protection Limited)(C.106174).....PLAINITFF

VERSUS

THE HONOURABLE ATTORNER GENERAL.....1ST DEFENDANT

ZARA PROPERTIES LIMITED (CPR/2010/24490).....2NDDEFENDANT

JUDGEMENT

1. There are two Companies incorporated in Kenya which share the name “Zara Properties Limited”. This has ruffled Zara properties Ltd (C No.106174)(**the Plaintiff**) and in this suit seeks an order for the Attorney General (**1st Defendant**) to compel Zara Properties ltd (CPR/2010/24490) (**the 2nd Defendant**) to change its name.

2. The other prayers in the Plaint dated 19th October 2010 and filed on even date are for:-

(i) A declaration that the 2nd Defendant’s name is undesirable.

(ii) A permanent injunction restraining the 2nd Defendant from using the name Zara properties Limited

3. It is averred that on 14th October 2009 the Plaintiff then bearing the name ‘**Prompt Fire Protection Limited, (hereafter Prompt Fire)**, wrote to the Registrar of Companies (**hereafter the Registrar**) requesting for the reservation of the name Zara Properties Limited. The name was confirmed as available and on 2nd December 2009, the Registrar accepted from the Plaintiff all Documents required to effect the change.

4. There was delay in issuing the Certificate of Change of Name to the Plaintiff and it then turns out that on 5th June 2010 the Registrar purported to incorporate the 2nd Defendant in the name of Zara Properties Limited and issued it with a Certificate of Incorporation being CPR/2010/24490.

5. The Plaintiff pleads that the subsequent incorporation of the 2nd Defendant by the Registrar with a name identical with the Plaintiffs is detrimental to the Plaintiff and undesirable in terms of the Provisions of The Companies Act (in this event the Repealed Act Chapter 486 Laws of Kenya).

6. If the Plaintiff's claim were to succeed then the person to be affected substantially would be the 2nd Defendant. The 2nd Defendant resists the Claim in a Statement of Defence dated 10th August 2011 and filed on the same day. It avers that its incorporation was in due compliance with the Law and procedure. Further that it is it (the 2nd Defendant) and not the Plaintiff that is likely to suffer from the state of affairs.

7. In addition, the 2nd Defendant's Defence is that the Plaintiff lacks locus standi to present this suit as it is an unregistered entity.

8. While the 1st Defendant denies the controversial contents of the Plaint, he avers that he demands proof of the following:-

- a) Proof of strict procedural Laws undertaken pursuant to the issuance of the Certificate confirming the Plaintiff's change of name.
- b) Proof, by an expert witness, of the authenticity of the Documents tendered in Court as evidence.
- c) The reflection of the Documents in the data maintained at the Companies Registry.
- d) The establishment of the good root of a title Document in proof of the actual registration and ownership of the disputed Company.

9. As an alternative, the 1st Defendant makes this important averment that it shall be invoking the equitable doctrine that where there are two equities the first in time prevails and further that equity follows the law. This would be important because, as will be apparent shortly, it is in tandem with the provisions of Sections 20(2) of the Repealed Act on the Registration of two Companies with one or identical names.

10. Hearing of this suit commenced on 24th March 2016 before Kariuki J. James Musee Ndune (PW1) was at the time he testified a Senior Deputy Registrar of Companies. His evidence is that at the time of the incorporation of the 2nd Defendant, **Prompt Fire** had already changed its name to **Zara Properties Limited**. This would be on 2nd December 2009 while the 2nd Defendant was incorporated on 5th June 2010.

11. This had escaped the attention of the Registrar as the first Company had been registered under the manual Register. The Registrar was to later explain that some time in 2009, the Companies Register went electronic and that the 2nd Defendant was registered under the new system. Under the new system Documents presented for filing are scanned and uploaded in soft. The original would be filed away and the soft file is deemed as the Registry file.

12. Anyhow, once the anomaly was discovered, the Registrar, invoking the Powers available to him/her under Section 20(2) of The Repealed Act, wrote to the 2nd Defendant on 15th March 2012 calling upon it to change the name within six weeks from that date. The 2nd Defendant declined to oblige.

13. The evidence of PW1 was that the Directorship and Shareholding of the Plaintiff was as follows:-

<u>Directors</u>	<u>shares</u>
Vihang H Joshi	7
Sophia Wambui Nyaga	1

While that of the 2nd Defendant was,

<u>Directors</u>	<u>Shares</u>
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Frank K. Kioni	1
Musa K. Mibei	1
James Kioni	1

3

14. On 16th February, 2017, PW1 brought to Court certified copies of the Records of the two companies. His testimony was that the original files could not be traced and what he had were scanned copies of the originals. He clarified that in respect to the file to **Prompt Fire**, the original file could not be traced but in respect to the 2nd Defendant there would be no original file as it was incorporated in the Electronic Register. Pw1 stated that a Search under the two Systems would produce different results.

15. In respect to the procedure for Change of Names, PW1 explained the process to be as follows. A Company desiring a Change of Name reserves the preferred Name by a letter. If the Registrar finds the name to be suitable, he/she approves it on the Applicant's letter.

16. Upon approval, the Company presents the following documents;

- (i) Company Resolution for change of Name.
- (ii) Particulars of change.
- (iii) Notice of change.

17. PW1 conceded that in respect to the file for the Plaintiff, there was only a Resolution for change of name to Zara Properties Limited. He could not trace a letter by the Plaintiff seeking the reservation of that name. Moreover he could not trace the Application for change of name or receipt for payment thereof.

18. However, it seemed to PW1 that the Documents for change of name were paid for on 2nd December 2009 on the same day the certificate was issued in favour of the Plaintiff.

19. Counsel for the 2nd Defendant showed to the witness a letter dated 23rd August 2010 (Plaintiff's Document 6) in which the Plaintiffs, through their Advocates Njenga Mbugua & Nyangaa, were complaining to the Attorney General about the non issuance of the Certificate of Change despite many promises that it would be done. The witness thought that if the Certificate was in the file, then there would be no reason not to release it and that the demand would not have been necessary.

20. In respect to the file for the 2nd Defendant, the witness stated that there is a letter of 18th May 2010 being an inquiry as to the availability of the name Zara Properties Limited. The name was approved.

21. PW1 also noted that the letter of 15th March 2012 (being the letter to the 2nd Defendant recalling the name) was in the file of the Plaintiff and not the 2nd Defendant. It was also noted that the letter was posted to Post Office Box 1252-00400 Nairobi which would be different from Postal address 12452-00400 of the Plaintiff. Perhaps, the witness meant the address of the 2nd Defendant which is on the Notice of situation of Registered Offices of the 2nd Defendant.

22. Answering questions from Counsel for the Plaintiff, the witness stated that a receipt such as receipt No.0663214 (Plaintiff's Document 2) was for Search fees for the reservation of a name. In reaction to the letter dated 18th May 2010 (2nd Defendant's Document 3), the witness said that one cannot register a Limited Liability Company on the strength of such a letter. That letter is from Frank Kioni (a Director of the 2nd Defendant) inquiring about the availability of Zhara Properties, Sara properties, Zahira Properties

for purposes of a Business name.

23. The second witness was Inspector Gilbert Gitonga who produced a letter of 29th July, 2016 from the Director of Criminal Investigations to Gachie Mwanza & Co. Advocates. Those are the Advocates for the 1st Defendant. The Author of the letter says that on writing two letters (18th April, 2016 and 22nd April, 2016) to the Registrar of Companies as to who were the registered owners of the Zara Properties Limited, the Registrar General gave the names of the following as the three Directors:-

FRANK KINYUA KIONI

MUSA KIPSANG MIBEI

JAMES KIPLILING KIONI

24. So much for the evidence. The Plaintiff and the 2nd Defendant identified two issues for determination:-

a) Who between Zara Properties Limited (C.106174) and Zara Properties Limited (CPR/2010/24490) is the proper and legal registered entity.

b) Who bears the cost of the suit.

The Attorney General did not propose any issues and this Court elects to adopt the issues proposed by the main protagonists here.

25. As a preface, it is not contentious that by virtue of the Transitional Provisions of Sections 734 of The Companies Act (Act No. 18 of 2015), the Law applicable to this dispute is the Repealed Companies Act (Chapter 486 Laws of Kenya)(hereafter the Act).

26. The Plaintiff and the 1st Defendant take a Common position as to the conclusiveness of a Certificate of Incorporation issued by the Registrar under Section 16(1) of The Repealed Act. In this regard Sections 16 and 17 of The Repealed Act Provide:-

“16. (1) On the registration of the memorandum of a company the registrar shall certify under his hand that the company is incorporated and, in the case of a limited company, that the company is limited.

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company, with power to hold land and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

17. (1) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under this Act.

(2) A statutory declaration by an advocate engaged in the formation of the company, or by a person named in the articles as a director or secretary of the company, of compliance with all or any of the said requirements shall be delivered to the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance”.

27. The Courts have had no difficulty affirming this position. See for example **Root Capital Incorporation Vs. Tekangu Farmers Co-operative Society Ltd & another** [2016] eKLR cited by the Plaintiff where Judge Ngaah Jairus held:-

“The only proof that a Company is duly registered and it is a body corporate capable of exercising all the functions of an incorporated company including the power to sue is a certificate of incorporation given under the hand of the registrar of companies; this certificate was initially issued under section 16(1) of the now repealed Companies Act, Cap. 486 of the Laws of Kenya for companies incorporated in Kenya. Under section 17 of that Act, a certificate of incorporation issued by the registrar in respect of any association was conclusive evidence that all the requirements of the Act in respect of registration and matter precedent and incidental thereto had been complied with and that the association was a company duly authorized to be duly registered under that Act.”

28. As I understand it the Plaintiff and the Attorney General take the position that in so far as there are two Certificates of Incorporation duly issued by the Registrar, it must be accepted that all requirements in respect of Registration of the two entities were complied with.

29. In addition, the Plaintiff asserts that there is independent evidence that it complied with the provisions of the Act. Its Counsel submitted:-

“In compliance with the above provision, Prompt Fire Protection Limited passed a Special Resolution on 22nd May 2009 resolving to change its name to Zara Properties Limited as has been evidenced. Thereafter, on 14th October 2009 the Plaintiff requested the 1st Defendant to reserve the name Zara Properties Limited. The name was confirmed as available and was reserved. The Plaintiff proceeded to file all the requisite documents and paid all the necessary fees at each stage. On 2nd December 2009, the 1st Defendant issued the Plaintiff with a Certificate of Change of Name to the effect that Prompt Fire Protection Limited changed its name and would henceforth be called Zara Properties Limited”

30. The two therefore see section 20(2) of the Act as providing a simple way out of this quagmire. The provisions of this Section are as follows:-

“(2) (a) If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name is registered by a name which, in the opinion of the registrar, is too like the name by which a company in existence is previously registered, the first-mentioned company may change its name with the sanction of the registrar and, if he so directs within six months of its being registered by that name, shall change it within a period of six weeks from the date of the direction or such longer period as the registrar may think fit to allow.

(b) If a company makes default in complying with a direction 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”.

31. The 2nd Defendant on the other hand submitted that the purported change of Prompt Fire to Zara Properties Limited was part of a fraudulent scheme by its owners to steal that Land known as Land Reference No.209/12261 now registered in the name of the Zara Properties Limited.

32. In support of this theory, the 2nd Defendant asserts that Prompt Fire did not comply with the procedure for change of name. It is pointed out that certain Documents eg. the Application for Change of Name are not in the records at the Companies Register.

33. To buttress its proposition, it was submitted that the Certificate of Change of Name dated 2nd December 2009 was curious and if it was indeed issued on that date, then why would the Plaintiff be complaining of having not obtained it in a letter of 23rd August 2010. The Court was also asked to

question why the Notice of 15th March 2012 by the Registrar recalling the name from the 2nd Defendant was issued 2 years after the suit had been filed.

34. In addition, it was submitted that the speed in which the Certificate of Change of Name was issued to the Plaintiff was suspect. The Certificate having been issued on the same day when the minutes that purported to contain the Resolution of Change of Name were filed with the Registrar!

35. This is the view of this matter. An enduring feature of Common Law Civil Litigation is that parties are bound by their pleadings. And pleadings can be stubborn!

36. In the Plaintiff, the Plaintiff takes what may seem to be a dull and uninvolved stance that on 2nd December 2009 it was duly issued with a Notice of Change of Name by the Registrar and so the subsequent incorporation of the 2nd Defendant with an identical name is detrimental to it and undesirable.

37. In its Defence, the 2nd Defendant maintains that it was duly incorporated and avers that it is a stranger as to how the Plaintiff changed its name to **Zara Properties Limited**. It then takes the position that the Plaintiff lacks locus standi since it is an unregistered entity.

38. As to the 1st Defendant, it abandoned any Defence it may have put up when it aligned itself with the Plaintiff's Claim in its submissions of 4th May 2017. Those Submissions were essentially an admission of the Plaintiff's Claim.

39. The Court makes these observations in respect to the Pleadings because the 2nd Defendant now attempts to impeach the Certificate of Change of Name issued to the Plaintiff on grounds that it was wrongfully issued and was in fact fraudulent. This Defence is not available because fraud must be specifically pleaded and distinctly proved. This is common place (see **Bullen, Leake and Jaccobs Precedents and Pleadings 12th Edition page 452, Ratilal Gordhanbhai Patel vs. Lalji Makanji [1957] EA 314**) and also **Rose Ayuma Musawa vs. Mathias Onyango Tabuche [2016] eKLR** cited to this Court by the Plaintiff).

40. Being of that mind, this Court cannot, and does not, find that the manner in which either, the change of name from **Prompt Fire** to **Zara Properties Limited** was effected in favour of the Plaintiff or the Certificate of Incorporation of Zara Properties Limited (CPR 2010/24490) of 5th June 2010 was issued to the 2nd Defendant fell for determination. The Court will therefore accept that the two Certificates are conclusive evidence that all requirements of the Act in respect to Registration and of matters precedent and incidental thereto were complied with when each of the Certificates were issued (Section 17(1) of The Act).

41. It is, obviously, undisputed that the Plaintiff and 2nd Defendant now bear completely identical names. This without doubt is undesirable. Fortunately, the Law contemplates that through inadvertence or otherwise this may happen and so in Section 20(2) provides this solution:-

“(2) (a) If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name is registered by a name which, in the opinion of the registrar, is too like the name by which a company in existence is previously registered, the first-mentioned company may change its name with the sanction of the registrar and, if he so directs within six months of its being registered by that name, shall change it within a period of six weeks from the date of the direction or such longer period as the registrar may think fit to allow.

(b) If a company makes default in complying with a direction 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”.

42. The 2nd Defendant makes a valid point it would be curious that the Notice of the Registrar dated 15th

March 2012, (under Section 20(2)) was made about 2 years after this suit had been filed. There is however evidence that through a letter dated 30th August 2010 the existence of the two Companies with one name was brought to the attention of The Registrar of Companies by the Plaintiff. On the part of the Registrar, PW1 did not explain the lateness in issuance of the Notice. However, this matter is now before Court for Resolution and the Court is properly seized of it.

43. The Certificate of Change of Name in favour of the Plaintiff is dated 2nd December 2009 while the Certificate of Incorporation issued to the 2nd Defendant is dated 5th June, 2010. In salutation to the provisions of Section 20(2) of the Act, the first in time prevails and the Plaintiff's Claim must naturally succeed.

44. But I will add as follows. As earlier pointed out, the 2nd Defendant had in its submissions connected this dispute to the ownership of Land Reference Number 209/12261 which is now registered in the name of Zara Properties Limited. Indeed in a Decision made on 17th February 2011 in answer to an interlocutory application herein, Mugo J. had observed,

“I am quite convinced that the matters herein hinge upon the acquisition of by Zara properties Limited, whoever that party may be, of the parcel of Land evidenced by the Grant NO. L.R 123523 currently held by the Applicants”.

And in his submissions the Attorney General alluded to ongoing litigation (ELC Case No.183 of 2011) in respect to that Land.

45. The Law is often a genius and the 2nd Defendant need not be anxious in respect to any rights or legal proceedings it may have over the aforesaid property or any other assets or rights because Sections 20(4) offers the following protection or insulation:-

“(4) A change of name by a company under this section shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name”.

46. On costs, I take it that the Plaintiff and the 2nd Defendant find themselves in this difficult position because of inadvertence or a failure on the part of the Registrar of Companies. Guided by the pleadings herein and evidence in support thereof neither the Plaintiff nor the 2nd Defendant would be to blame. And there being no evidence that the failure was deliberate, this Court will order that each party will bear its own costs.

47. What are the appropriate orders to grant? The Plaintiff is seeking for the following orders:-

- a) A declaration the 2nd Defendants name is undesirable.
- b) A mandatory injunction compelling the 1st Defendant to compel the 2nd Defendant to change its name from Zara Properties Limited.
- c) A Permanent Injunction restraining the 2nd Defendant from using the name Zara Properties Limited.
- d) Costs of this suit.

Whilst the proceedings were ongoing, the Registrar purported to issue a Notice dated 15th March 2012 pursuant to the provisions of Section 20(2) of the Act. As it became apparent during the hearing, the Notice was sent to the wrong Postal Address. In view of this the Registrar will have to issue a fresh Notice.

48. There are two aspects of Section 20(2) of The Act that are crucially important. And for purposes of making the point I again reproduce Section 20(2) of the Act:-

“(2) (a) If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name is registered by a name which, in the opinion of the registrar, is too like the name by which a company in existence is previously registered, the first-mentioned company may change its name with the sanction of the registrar and, if he so directs within six months of its being registered by that name, shall change it within a period of six weeks from the date of the direction or such longer period as the registrar may think fit to allow.

(b) If a company makes default in complying with a direction 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”.

The Registrar ought to direct for the Change of Name within six months of the Registration of the undesirable Name. The expectation of the Law is that the Direction should come as early as possible so that any inconvenience to the affected Companies is minimized. In the instant case, the existence of the 2nd Defendant’s Certificate was brought to the attention of the Registrar on 23rd August 2010 and 30th August 2010, this would be about two months after the issuance of the Certificate on 5th June 2010. For some unexplained reason the Registrar failed to act promptly and only purported to do so on 15th March, 2012.

49. The second aspect is that a Company required to change its name must do so within a period of 6 weeks from the date of the Directions or such longer period as the Registrar may think fit to allow. A rationale for granting this period may not be difficult to surmise. A Company which is required to change its name may be put into some inconvenience if it has already organized its affairs in the name it must surrender. It may have traded or acquired property in the name. The period granted enables the Company to reorganize itself or its affairs. Some Companies will require longer periods than others and hence the discretion granted to the Registrar to allow for a longer period than 6 weeks. This Court trusts that the Registrar will bear in mind all the circumstances of this situation, including that he/she failed to act promptly when alerted, in fixing the period within which the 2nd Defendant must change its name.

50. These are the orders of the Court:-

50.1. The 2nd Defendant’s name is hereby declared as undesirable.

50.2. The Registrar (or his/her Successor in Title) shall within 14 days hereof issue the Notice under Section 20(2) of The Act to the 2nd Defendant to Change its Name from Zara Properties Limited.

50.3. At the lapse of the Notice issued under Order 50.2 above, the 2nd Defendant shall be restrained by way of Permanent Injunction from using the name Zara Properties Limited.

50.4. Each of the Parties shall bear their own costs.

Dated, Signed and Delivered in Court at Nairobi this 8th day of June, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Baraza h/b Nyamodi for Plaintiff

Gachie for 2nd Defendant

Fatma h/b Njoroge for 1st Defendant

Alex - Court clerk