



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS APPLICATION NO. 314 OF 2015
IN THE MATTER OF ANTOW TRADING COMPANY LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT
AND
IN THE MATTER OF AN APPLICATION BY JACOB KIKURU NGOLETUM,
MICHAEL LOBUIN NENEE, MAHMOUD CHEMWOR TARUS FOR AN ORDER
CHALLENGING THE RESTORATION OF THE COMPANY IN THE REGISTER
OF COMPANIES UNDER SECTION 339 OF THE COMPANIES ACT, CHAPTER 486 OF THE
LAWS KENYA.

RULING

1. The application dated 9th November 2015 sought the setting aside of the orders dated 22nd September 2015.
2. On 22nd September 2015 the court had ordered that the name of the Company, **ANTOW TRADING COMPANY LIMITED**, be restored forthwith to the Register of Companies.
3. The court had further ordered the Registrar of Companies to advertise in the Kenya Gazette, the fact that the Company had been duly restored to the Register of Companies.
4. By the current application, 3 directors of the company have asked the court to direct the Registrar of Companies to place an advertisement in the Kenya Gazette to notify everybody that the Company had not only been dissolved but had also been deregistered from the Register of Companies.
6. The 3 directors who have brought the application are;
 - a) **MAHMOUD TARUS;**
 - b) **JACOB NGOLETUM; and**

c) MICHAEL NENEE.

6. It is their position that prior to the dissolution of the company, it had 4 directors, namely;

a) MAHMOUD CHEMWOR TARUS;

b) JACOB KIKURU NGOLETUM;

c) MICHAEL LOBUIN NENEE; and

d) JENEBY ARAP TOO

7. Notwithstanding that fact, the applicants contend that they were neither party to nor were they informed about the petition dated 21st July 2015. The said petition was said to have been brought solely by **JENEBY TOO**.

8. In effect, the court was led to act of an application brought by only one among the four directors.

9. The applicants insisted that on 18th May 2007 **ALL** the Directors of the Company signed a Resolution to wind up the Company.

10. The applicants pointed out that the petitioner was also a signatory to the Resolution to dissolve the Company. Therefore, when the petitioner later sought to have the company restored, he is said to have acted on the basis of false and misleading information.

11. In answer to the application, **JENEBY ARAP TOO** deponed that he is the Managing Director of the Company, **ANTOW TRADING COMPANY LIMITED**.

12. He acknowledged the existence of the resolution dated 21st May 2007, through which the Company decided to dissolve itself. However, Jeneby asserts that the said resolution was obtained through fraud, which was perpetrated by **ANIL BHARMAL SHAH**, who is a director of **SATO PROPERTIES LIMITED**.

13. Jeneby also deponed that none of the Company's directors had signed the resolution dated 21st May 2007. On the other hand, Mahmoud Tarus has sworn a supplementary affidavit on 14th March 2016, reiterating that he did sign the resolution.

14. Meanwhile, Jeneby has provided a report from **JOHN MUINDE**, a Document Examiner, who expressed the opinion that the signature attributed to Mahmoud Tarus was not his.

15. The question that arises in whether the opinion of the expert can be more accurate than the word of the person who says that the signature was his.

16. In my considered view, the person who appended his signature to a document should be best placed to know whether or not the signature in issue was his. However, I do also acknowledge that there may arise situations when a person may wish to lay claim to a signature which was not his. If evidence is led to show such a motive, the court would be obliged to exercise its discretion appropriately.

17. In determining the application I note that the petition to restore the company to the Register of Companies was supported by the affidavit of **JENEBY TOO**. He deponed that neither he, (*as a Director*) nor the company was aware of the circumstances leading to the dissolution of the company.

18. In the present application it has been said that all the 4 directors of the company had duly signed a resolution on 18th May 2007: by that resolution, the directors declared their decision to dissolve the company.

19. The said statement was made on oath, by **MAHMOUD TARUS**.

20. It was further deposed by Tarus that on 16th May 2007, all the directors of the company signed an Agreement between the Company and **SATO PROPERTIES LIMITED**.

21. Of course if **JENEBY TOO** had signed the Agreement or the Resolution, he would be telling a lie if then claimed to have been unaware of the decision to dissolve the company.

22. In answer to the affidavit of Tarus, it is noteworthy that Jeneby Too has not denied having executed both the resolution and the Agreement dated 16th May 2007.

23. Too stated that the company had initially been dissolved;

“illegally without proper resolution”.

24. I understand that deposition to mean that Too acknowledges the existence of a resolution to dissolve the company. However, he was questioning the validity of the resolution.

25. The reason given by Too for stating that the resolution was a nullity was the fact that the resolution was not signed by the Company secretary.

26. In my considered opinion, it is not necessary for me to make a finding about whether or not the resolution to dissolve the company was void.

27. The most significant fact is the acknowledgement by Jeneby Too, that there was a resolution. I say so because that acknowledgement is wholly inconsistent with the position taken by the same gentleman when he petitioned this court to reinstate the company to the Register of Companies.

28. If there was a resolution by the directors to dissolve the company, that implies that when the court was told that the company did not know the circumstances under which it was dissolved, that was an untruth.

29. MICHAEL LOBUIN NENEE has sworn an affidavit stating inter alia that;

“6. THAT the company was reinstated by one of the directors Mr. Jeneby Arap Too”.

30. That statement is very telling. It means that the court was actually moved by one person, Jeneby Arap Too.

31. However, Mr. Nenee believes that Mahmoud Tarus had no mandate, be it legal or otherwise, to dissolve the company.

32. The law treats all persons equally. Therefore, if Mahmoud Tarus has no mandate to take action to dissolve the company, so too Arap Too had no mandate to seek to revive the company.

33. Looking back to the stage when the application to revive the company was made, I note that the supporting affidavit was sworn by one director, but he did not provide proof to the court that he had the requisite authority of the other persons who had been directors.

34. The same cannot be said about Tarus. Even though there appears to be a challenge to the authorization which he made available to the court, there is, at least, an attempt to demonstrate that he was not working on his own.

35. There is no requirement in law that the company secretary must sign the resolutions of the Board of Directors.

36. And in this case, Clause 23 (b) of the Memorandum and Articles of Association specifically states as

follows;

“A resolution in writing signed by all the Directors of the Company or their alternates shall be as valid and effectual as if it had been passed at a meeting of the Directors duly convened and held...”

37. Therefore, through their own Instrument, the directors of the company had made it clear that provided that a resolution was signed by all the directors, it would be valid and effectual. Once again, there was no need for the company secretary to sign the resolution.

38. I also find that there was no requirement either in law or in the Memorandum & Articles of Association requiring the attachment of the minutes of a meeting to the resolution. Clause 23 (b) simply talks about the need for the directors to sign the resolution.

39. It is clear to the court that the directors of the company were not speaking in one voice. They are at loggerheads.

40. As Jacob Ngoletum stated in his affidavit, 3 of the directors were opposed to the revival of the company, whilst one director was in support of the said revival.

41. Jeneby Arap Too confirmed the position when in his replying affidavit, sworn on 2nd March 2016, he said;

“8. That the resolution to reinstate Antow Trading Company was made after a deadlock in the management of the company and was in the best interest of the company”.

42. In my considered opinion, this is a situation in which one or more directors are pulling in a direction which is opposite to that in which the others are pulling. That is a most unhealthy situation for company. Instead of working in concert, the directors were competing against one another.

43. In this situation, I have come to conclusion that when the court ordered that the company be revived, the petitioner had withheld some material information from the court. Therefore, the orders made on 22nd September 2015 are vacated.

44. I further direct that the Petition dated 2nd July 2015 will now be heard *inter-partes*.

45. Finally, the costs of the application dated 9th November 2015 shall be in the cause

DATED, SIGNED and DELIVERED at NAIROBI this 6th day of June 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Njomo for the Petitioner

Mutai for the Respondent

Collins Odhiambo – Court clerk.