

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 18 OF 2015

**JOHN BLASIOUS OGATI MATUNDURA OF GUSII MWALIMU
INVESTMENT.....PETITIONER**

VERSUS

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. On 13th March 2015, the Petitioner herein, who describes himself as **JOHN BLASIOUS OGATI MATUNDURA OF GUSII MWALIMU INVESTMENT COMPANY**, filed the present petition under articles 22 and 23 of the Constitution seeking orders as follows:

- a. **The gazette notice dated 10th July, 1998 be declared illegal and be set aside.**
- b. **Gusii Mwalimu Investment Company to be declared to be existing.**
- c. **The respondents be compelled to correct the errors.**
- d. **Costs of this petition**
- e. **Any other order this court may deem fit to grant.**

Petitioner's Case

2. The petitioner's claim is that he is a fully paid up shareholder of **GUSII MWALIMU INVESTMENT COMPANY** (hereinafter in this judgment referred to as "**the company**"), holding **share certificate number 1779 and having 88 shares**. He states that the company, which was incorporated in 1982, continues to exist to-date as he has not attended any special meeting to dissolve it yet he got surprised to see Gazette Notice dated 10th July 1998 which showed that the company was dissolved on 9th June, 1998.

3. The petitioner contends that there was no special meeting or minutes ratifying the dissolution and therefore the registrar of companies was not justified in dissolving the company as he did not follow the right procedure in putting up the gazette notice.

4. The petitioner therefore seeks a correction of what he terms as "mistakes" illegally committed by the registrar.

5. Attached to the petition is a verifying affidavit sworn by the Petitioner on 8th May 2015 in which he confirms that the contents of the petition are true and that this court has jurisdiction to hear and determine the petition.

6. The Petitioner has attached to the petition, a copy of his share certificate, his national identity card and the company's memorandum and articles of association together with the certificate of incorporation.

Respondent's case

7. The respondent herein, the Attorney General of the Republic of Kenya, filed Grounds of opposition on 2nd February 2015, through Mr. Eredi Senior Principal Litigation Counsel in which he states as follows:

1. **“THAT the Petitioner has no *locus standi* to commence and sustain these proceedings.**
2. **THAT the Petition is untenable and unfounded as the orders sought cannot be granted as they will offend the provisions of section 339 (6) of The Companies Act CAP. 486 (Repealed).**
3. **THAT this being an ordinary civil suit of a commercial nature this court has no jurisdiction to hear it as a Constitutional Petition.**
4. **THAT there are no Constitutional issues raised in the petition capable of being determined by this Honourable Court.”**

8. When the petition came up for hearing before me on 2nd February 2016, parties agreed to canvass their arguments by way of written submissions which they were to be filed and exchanged within 45 days from 2nd February 2016.

Petitioner’s submissions

9. The petitioner, who appeared in person, submitted that he was a fully paid up shareholder of the company and therefore he had the right to own property through his 88 shares in the company which right could not be taken away through the dissolution of the company vide a gazette notice. He stated that the grounds of opposition filed by the respondent are only meant to delay this case and were a cover – up for the respondent’s illegal actions.

10. The petitioner prayed for the dismissal of the Respondent’s grounds of opposition and a declaration that the company still exists.

11. The Respondent had not filed written submissions as at 18th April, 2016 when the case was mentioned for the purposes of fixing a judgment date and even as at the time that this court was preparing this judgment.

Determination

12. After considering the pleadings filed herein, the law and the submissions by the Petitioner, for the purposes of this ruling, two issues stand out that require a determination by this court namely:

- a) **Whether this court has jurisdiction to entertain this case as a constitutional petition.**
- b) **Whether the petitioner has the locus standi to commence these proceedings.**
- c) **Whether the petitioner is entitled to the orders sought.**

13. Closely linked to the issue of the locus standi of the petitioner to institute this petition is the issue of whether or not this court has jurisdiction to entertain this case as constitutional petition. The respondent contends, in the grounds of opposition, that this case ought to have been instituted as an ordinary Civil Suit and not Constitutional Petition and therefore this court lacks the jurisdiction to hear and determine it as Constitutional Petition.

14. I disagree with the respondent’s opposition on this point because **Article 165 (3) of the Constitution** grants this court the **“jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.”**

15. The Petitioner has brought this petition under **Articles 22 and 23 of the Constitution** which provide as follows:

“Article 22

- (1) **Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.**

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as a member of, or in the interest of, a group or class of persons;**
- (c) a person acting in the public interest; or**
- (d) an association acting in the interest of one or more of its members.**

Article 23

“(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

- (a) a declaration of rights;**
- (b) an injunction;**
- (c) a conservatory order;**
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
- (e) an order for compensation; and**
- (f) an order of judicial review.”**

Article 165 (3) further provides that:

“(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal

appointed under this Constitution to consider the removal of a person from

office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.”

16. In the instant petition, the Petitioner case is that as a bona fide shareholder of the company, his rights to own property had been infringed by the irregular dissolution of the company.

17. In view of the above cited provisions of the Constitution and the gist of the petitioner's case, I find that this case rightly falls within the purview of a Constitutional petition and the Petitioner had the locus standi and was justified to file it as such.

Merits of the petition

18. It was not possible for this court to fully determine the merits of the petitioner's case since the petition was not supported by an affidavit save for the verifying affidavit that merely confirms the correctness of the averments contained in the petition contrary to **Rule 13 of the Gicheru Rules**. The Petitioner did not swear a supporting affidavit in support of the grounds contained in the petition which brings me to the question of whether this petition can stand in the absence of a supporting affidavit.

19. The Constitution of Kenya (supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) **High Court Practice and Procedure Rules, 2006** also known as **Gicheru Rules** state as follows:

Rule 13

“the petition under Rule 12 shall be supported by an affidavit.”

Rule 14

“If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit.”

20. The instant petition does not state under which Rule it was filed but **Rule 13** applies only where a

petition is filed under **Rule 12**. In turn **Rule 12** applies where a complaint and application are under **Rule 11** which states:

“where contravention of any fundamental rights and freedoms of an individual under Sections 70 to 83 (inclusive) of the Constitution is alleged or is apprehended an application shall be made directly to the High Court.”

21. In the instant case, as I have already observed in this judgment, the petition was filed without the supporting affidavit and the documents attached to the petition were, contrary to the provisions of **Rule 14 of Gicheru Rules**, not annexures to any affidavit. It therefore, follows that in terms of **Rule 14 of the said Gicheru Rules**, the petition contains allegations without the affidavit evidence intended to accompany the petition to support the allegations in the petition and this makes the petition incompetent.

22. In the case of **Patrick Ochieno Obachi & 6 others vs Kenya Anti Corruption Commission [2010] eKLR**, the court observed as follows on failure to file a supporting affidavit:

“that is a fatal technicality as it determines the substance, namely the completeness of the petition. It follows that in terms of rule 14, that petition contains allegations without the affidavit evidence intended to accompany the petition to support allegations in the petition and that makes the petition incompetent.”

23. The Petitioner argued, in his submissions, that the court, in dealing with this case pertaining to violation of fundamental rights, should not pay ‘undue regard’ to procedural technicalities. This brings me to question whether the requirement that a petition be accompanied by an affidavit in its support, to which the documents the Petitioner wishes to rely on are annexed is a mere ‘procedural technicality’ to which the court should not pay undue attention.

24. Affidavits, by their very nature, contain the evidence which a party wishes to rely on in support of his case. Without an affidavit, there is no evidence before the court that would enable a party to sustain his claim. I find that the requirement that a petition be supported by an affidavit is not a procedural technicality but a mandatory requirement which goes to the very foundation of the Petitioner’s case without which the petition cannot stand.

25. It is therefore my finding that the petition, as presented, is incompetent as the allegations contained in it are not supported by any evidence (read affidavit).

26. The verifying affidavit annexed to the petition does not meet the mandatory requirements of the **Gicheru Rules** and the documents filed with the petition are strictly speaking not annexures to any affidavit as the same have not been commissioned by the commissioner for oaths as exhibits to any affidavit.

27. The documents are therefore also not properly presented before the court. Under **order 4 Rule 1 (2) of the Civil Procedure Rules** verifying affidavits were intended to accompany Plaints in verification of the correctness of the averments contained in the plaint. At no time do the **Civil Procedure Rules** or the **Gicheru Rules** provide that petitions be accompanied by verifying affidavit. In this regard therefore, I find that the verifying affidavit filed with the petition is misplaced and of no legal effect whatsoever.

I further find that the verifying affidavit and the documents attached to the petition have no evidentiary value to this petition.

28. I associate myself with the findings of Ngugi J. in the case of **Charles Okello Mwanda vs Ethics and Anti-Corruption Commission and 3 others [2014] eKLR** when he held that the requirement that a petition be accompanied by a supporting affidavit is not a procedural technicality as the affidavit contains the evidence a party wishes to rely on in support of his case.

29. In the end, I find that the petition is fatally defective for lack of an affidavit in its support.

30. My above findings would have been sufficient to dispose of the entire petition, however, this court is still minded to determine the merits of this case and if indeed there was a violation the petitioner's rights as alleged. The petitioner's claim is that the registrar of companies did not follow the correct procedure in posting a gazette notice dated 10th July 1998 declaring the company dissolved. It is for this reason that the petitioner seeks the restoration of the company's name to the register through a declaration to the effect that the company still exists. The petitioner has not disclosed to this court the reason for the dissolution of the company or at whose instance the gazette notice of the said dissolution was done so as to enable me determine whether or not the correct procedure was followed. What is not in dispute, however, is that the gazette notice was posted striking off the company from the register.

Sections 339 (6) and 340 of the Companies Act (herein "the Act) provide:

“(6) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register the Court on an application made by the company or members or creditor before the expiration of ten years from the publication in the Gazette of the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon a certified copy of the order being delivered to the register for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

340. Where a company is dissolved, all property and rights whatsoever vested in or held in trust for the company immediately before the dissolution (including leasehold property but not including property held by the company in trust for any other person) shall, subject and without prejudice to any order which may at any time be made by the Court under section 338 or section 339, be deemed to be *bona vacantia*, and shall accordingly belong to the Government.”

31. Under section 339 (6) of the Act, any member of the company has a right to apply to restore the company to the register and court has jurisdiction to make such an order if satisfied that the company was at the time of the striking off carrying on business, or in operation or otherwise that it would be just that company be restored to the register.

32. In the instant petition, as I have already observed in this judgment, the petitioner has not sworn an affidavit to show if the company was in operation or carrying on business at the time of the striking off so as to justify its revival.

33. In interpreting the provisions of **section 339 (6) of the Act** this court takes due cognisance of the intendment of the Act itself and the manifest desire of parliament as it is now a settled principle that every section of an Act must be construed as having effect as a substantive enactment. The posting of a gazette notice per se did not connote the instant death of a company as the lawmakers provided window period of 10 years within which a person could apply for the restoration of the company. To my mind therefore, the legislature did not intend the provisions of **section 339 (6)** to be meaningless and so the phrase "before the expiration of 10 years" means that the legislature bestowed recuperative benefits upon the company which benefits the petitioner needed to secure within a time limit of 10 years after which such time logically expires.

34. In the instant case, 18 years had lapsed from the time of the gazette notice being of July, 1998 to May, 2015 when this petition was filed.

35. The sheer number of years that have lapsed since the said gazette notice of the company's dissolution go beyond the limitation period allowed for the petitioner to challenge the dissolution of the company.

The rationale for the fixing of a limitation period within which certain actions must be done or presented in court is well known and cannot be over emphasised. The fixing of the time limits was meant to bolster the notion that litigation must come to an end and for that reason, a cause of action cannot be allowed to exist for an indefinite period or to eternity. In this case, the implications of the expiry of the 10 years are far reaching and include the property of the company, if any, being taken over by the government.

36. To my mind, the expiry of the 10 years also marks the death and burial of the company as this court can only make a declaration for restoration within the confines of **section 339 (6) of the Act**.

37. It is therefore my finding that the instant petition has been overtaken by events, is time barred, and as I had already stated in this judgment, is fatally defective for lack of a supporting affidavit. For the above reasons I find that the petitioner sat on his laurels for too long and has failed to discharge the onus of proof that his rights were violated. Under the circumstances, the order that commends itself to me is the order to dismiss the petition with no orders as to costs.

Dated, signed and delivered in open court this 7th day of June 2016

HON. W. A.OKWANY

JUDGE

In the presence of:

- Mr. Nyagwencha for the Petitioner
- N/A Respondent
- Omwoyo court clerk