**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JR MISC. APPLICATION NO. 75 OF 2014**

**REPUBLIC……..……APPLICANT**

**AND**

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

**CATHERINE NYANGUI REGERU & ORS....INTERESTED PARTIES**

***EX PARTE:*** **EDWIN WAMBAA REGERU**

# JUDGEMENT

## Introduction

1. By a Notice of Motion dated 5th March, 2014, the *ex parte* applicant herein, **Edwin Wambaa Regeru** seeks the following orders:

> **1. That an order of certiorari do issue to quash the decision of the Registrar of Companies incorporating Lawrence Regeru Wambaa Holding Limited on 10th January 2014.**
>
> **2. That an order of certiorari do issue to remove and bring to this honourable court for the purpose of quashing the purported certificate of incorporation in respect of Lawrence Regeru Wambaa Holdings Limited issued by the Respondent on 10th January 2014**
>
> **3. That the costs of this application be provided for.**

## *Ex Parte* Applicant's Case

2. The application is supported by a verifying affidavit sworn by the applicant on 24th February, 2014.

3. According to the applicant, this suit arises from an attempt by some of the heirs of the estate of the late Lawrence Regeru Wambaa to incorporate a company to which the most substantial asset of the estate, L. R. No. Mombasa/Block XX/281/A – Syndicate Building will be transferred. He deposed that although himself and his brother, George Waiyaki, whose guardian ad litem he is, are heirs of the said building, they have not been involved in the incorporation of **Lawrence Regeru Wambaa Holdings Ltd** (hereinafter referred to as the company).

4. He deposed that his late father had two houses – his mother's and that of **Mrs. Emma Muthoni Wambaa** and that himself and the said **Mrs. Emma Muthoni Wambaa** are the administrators of that estate duly appointed in Nairobi High Court Succession Cause No.2051 of 2007: In the Matter of the Estate of Lawrence Regeru Wambaa (Deceased) under which he is entitled to, inter alia, 1/12 of the said L. R. No. Mombasa/Block XX/281/A – Syndicate Building which is worth over Kshs.1Billion in the Mombasa Central Business District and that since 2008, **Mrs. Emma Muthoni Wambaa** and himself have been collecting rent and using it to pay estate debts and to pay advances to the heirs. The monthly rent therefrom according to him is between Kshs.700,000/= to Kshs.1 million from which the applicant and the other heirs receive Kshs.25,000 - Kshs.60,000/= per month.

5. However since their appointment as administrators in July, 2005 the deponent deposed that **Mrs. Emma Muthoni Wambaa** and himself have been involved in much litigation as a result of disputes between some of the heirs and administrators particulars of which he disclosed and on 30th October, 2013, the beneficiaries resolved most of their differences amongst themselves and agreed on how the Certificate of Confirmation would be rectified. It was therefore agreed on how the assets were to be shared and also that that most valuable asset, L. R. No. Mombasa/Block XX/281/A- Syndicate Building, was to be transferred to a company which was to be formed by all the beneficiaries including the said **George Waiyaki** who is not able to manage his affairs and for whom the applicant was appointed by this Honourable Court a guardian ad litem.

6. The applicant averred that on 30th January, 2014, his brother **Wingfield Ng'ang'a** and his sisters **Esther Wanja** and **Catherine Nyangui** brought to him a purported Certificate of Incorporation of the company and a purported Memorandum and Articles of Association though he had not been invited to any meeting to discuss the incorporation of the company. According to him, the purported Memorandum and Articles of Association state that it was incorporated by Apollo Muinde and Associates Advocates whom he had not instructed. Following the incorporation he received a letter from the firm of W.G. Wambugu and Company Advocates requesting him to sign a transfer of the said property, L. R. No. Mombasa/Block XX/281/A – Syndicate Building, to the purported company. He also learnt from Kinyua Koech Ltd, the company which manages the said L. R. No. Mombasa/ Block XX/281/A – Syndicate Building, that the purported company wants to take over the management of the Building before even a transfer is made to it.

7. He deposed that on 31st January, 2014, I got to know that there was an intended family meeting whose holding had been concealed from him which meeting was scheduled to be held at the home of the said **Mrs. Emma Muthoni Wambaa** and he gate crashed into that meeting which he found discussing the purported affairs of the company at 2.30p.m.

8. According to legal advice from his advocates he deposed that every director and shareholder of a company has to subscribe to the Memorandum and Articles of Association which has not happened form him or **George Waiyaki** hence the position now is that the general public has been lied that he and **George Waiyaki** are subscribers whilst they are not. In his view the said **George Waiyaki**, and himself will be greatly jeopardised if the illegal incorporation of the company is allowed to stand in that their interest in the property mentioned above will be transferred to a company over which they have no control and will have no control in view of their exclusion from its incorporation. According to him, by subscribing to a Memorandum and Articles of Association of forming a trade union or any other association of one's own accord exercises the freedom of association which is protected by Article 36 of the Constitution; no one can be compelled to associate with persons upon terms that he has not accepted; the Memorandum and Articles of Association constitute a special contract which sets out the rights and duties of shareholders; as a result of their inclusion in the Memorandum and Articles of Association, they are being sought to be governed by a contract the making of which they have not participated in; this Honourable Court has jurisdiction to quash the decision of a public authority or public officer which has been taken in excess of jurisdiction; and that the purported incorporation of the company was done in excess of jurisdiction as the Registrar never took trouble to secure their signatures of find out why they did not sign it.

9. There we two further affidavits sworn on 15th April, 2014 and 0th June, 2014 in which the

applicant deposed that the replying affidavit sworn on behalf of the interested party by **Mr. Wing field Ng'ang'a** was false. According to him, since his father died on 4th February, 2007, **Mr. Wingfield Ng'ang'a** has been involved in a scramble for the estate of his late father whilst he had been involved in ensuring that the said estate is administered as required in such cases. To him, the hasty and unprocedural purported incorporation of the said company is Ng'ang'as latest endeavours in those scrambles. He added that in 2008, the applicant and the other administratrix, **Mrs. Emma Muthoni Wambaa**, instituted **Mombasa HCCC No.314 of 2008: Edwin Wambaa Regeru v Wingfield Ng'ang'a,** a suit to remove him from L. R. No. Mombasa/Block XX/281/A whose possession he had taken and collected rent for more than one year without a grant of representation and that on 10th January, 2014, **Mr. Ng'ang'a** hastily and unprocedurally purported to incorporate a company as a vehicle to enable him to return to that property. Further on 4th March, 2014, he led a party of about 8 people who physically removed the management from that building prompting the applicant and his brother **George Waiyaki** to file **Mombasa High Court ELC Civil Suit No. 58 of 2014** seeking an injunction to stop him from interfering with the management which application was allowed ex parte, has been heard and a ruling reserved for 2nd July, 2014. In 2012, the applicant and the co administratrix instituted in **Malindi High Court, Civil Suit No.104 of 2012** through which they sought an order for the return to the estate two plots which he had grabbed and in October, 2013, he conceded the claim and now he has agreed to the division of the plots amongst all the heirs as shown by a rectified grant. Further **Mr. Ng'ang'a** also grabbed a lorry belonging to the estate and the applicant was compelled to sue him after it was decided that the applicant was to inherit it. According to the applicant, it is against that background that one views his said affidavit.

10. The deponent contended that the purported Certificate of incorporation was obtained through fraud and misrepresentation of facts to the registrar of company and the same should be revoked and declared null and void.

11. With respect to the replying affidavit sworn on behalf of the Registrar of Companies by **Francis Ndun'gu** the applicant deposed that it is not true that that office received all company incorporation documents on 30th January 2013 since the document titled Name Search and Reservation dated 9th January 2014 is incomplete and A Mr. Sam who reserved that name has neither signed his part nor dated it and the same was not signed by any of the purported subscribers. Further the first page of the Memorandum and Articles of Association does no bear the purported date of incorporation 10th January 2014. In the applicant's view, the foregoing show that the Registrar of Companies does not do his job diligently and that had he done so he ought to have realised that the purported signatures of the two ex parte applicants, **Edwin Wambaa Regeru** and **George Waiyaki Regeru** were written by the same person and therefore one person purported to sign for himself and for another; that since of all twelve purported subscribers only the ex-parte applicants who did not have signatures, the Respondent to have sought clarification from them in the light of the fact one person appears to have signed for both himself and another person and why they did not uses the signature; and that **Mr. Apollo Muinde** did not witness the signatures in respect of the memorandum of association. Apart from that the applicant contended that there were other irregularities in the documentations leading to the incorporation of the subject company.

**Respondent's Case**

12.In opposition the Respondent filed a replying affidavit sworn by **Francis Ndirangu**, a state counsel in the office of the Attorney General working in the companies' registry on 1st April, 2014.

13.According to him on 30th December 2013, the respondent received incorporation documents of the company namely; Memorandum of Articles of Association of the company, duly stamped Statement of Nominal Capital, Particulars of Directors and Secretaries (Form 203), Notice of Situation of Registered Office (form 210), Declaration of Compliance with requirements of the ***Companies Act*** from Apollo Muinde Associates Advocates (form 208) and name search and reservation, after payment of the requisite registration fees.

14.Pursuant thereto the respondent registered the company as registration number CPR/2014/127974 and issued a certificate of incorporation dated 10th January 2014 after scrutinizing and satisfying ourselves that the incorporation documents filed complied with the ***Companies Act.***

15. It was therefore averred that the contention by the ex parte applicants that the memorandum had not been signed is not true since the same is signed and witnessed by one **Apollo Muinde** an advocate of the High Court of Kenya in line with section 6 and section 12 of the ***Companies Act***. To the deponent, a signature is any mark and hence the attested names written in the documents were sufficient demonstration that the ex parte applicants had participated in the registration of the company.

16.It was deposed that in accordance with section 17(2) of the ***Companies Act***, a statutory declaration by Apollo Muinde & Associates was delivered to the Registrar of Companies that the registration of the company complied with the requirements of the ***Companies Act*** and Registrar accepted the same as sufficient evidence of compliance. He therefore asserted that the certificate of incorporation issued on 10th January 2014 is conclusive evidence that all requirements of the Companies Act in respect of registration and all matters precedent and incidental thereto were complied with. To him, the application raises issues of merits and facts that are not within the jurisdiction of judicial review and hence the same are incapable of being canvassed in this matter.

17. It was averred that the Registrar of Companies is mandated by the law to register companies and the same was done with due regard to the requisite process.

**Interested Parties' Case**

18.The interested parties opposed the application vide a replying affidavit sworn by **Wingfield Ng'ang'a Regeru**, the 2nd interested party herein on 24th March, 2014.

19.According to him, this Honourable Court has no jurisdiction to grant the Orders sought. In his view, the Ex parte Applicant recourse lies elsewhere since the Registrar of Companies discharged his duties in accordance with the law and never acted without jurisdiction.

20. He deposed the ex parte Applicant attended a meeting where the affairs of the Company were discussed by all the Shareholders and that the Certificate of Incorporation is conclusive evidence of compliance. To him, if the Ex parte Applicant has any grievance the same should be addressed in a different forum hence this Application lacks merits and the same should be struck off.

**Determinations**

21.I have considered the foregoing as well as the submissions filed and the authorities cited.

22. As correctly submitted by the interested party prayer 2 in this motion cannot be granted as no leave to apply for the same was sought and granted by this court.

23. That the Registrar of Companies has the power and jurisdiction to register companies cannot be in doubt.

24. What the applicants herein are alleging is that the purported Certificate of incorporation was obtained through fraud and misrepresentation of facts to the registrar of companies.

25. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be**

**obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.....Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....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* compels 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."**

26. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was held:

**"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which 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."**

27. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty

of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

28. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

29. The respondent clearly had the power to decide whether or not the application for the incorporation of the company was merited. In so deciding it was no doubt exercising his discretion. He was enjoined to consider the material before him and arrive at his decision. That decision could be right or wrong on merits but that would not necessarily warrant the quashing thereof by way of judicial review proceedings.

30. In order to make a finding whether or not the applicant participated in the process leading to the incorporation of the company the court would have to make a determination on conflicting averments of facts as between the ex parte applicant and the interested parties. More importantly the court would have to determine whether **Apollo Muinde** actually witnessed the alleged mark or signature made by the applicant. These are issues whose resolution cannot be done by way of cold-print affidavits.

31.In judicial review proceedings the mere fact that the Tribunals decision was based on insufficient evidence, or misconstruing of the evidence which is what the applicant seems to be raising here or that in the course of the proceedings the Tribunal committed an error are not grounds for granting judicial review remedies. In reaching its determination, it must however, be recognised that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

> **"It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly..... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise..... Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction.....Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter,**

**it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction."**

40. In **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003, Omolo, JA** stated as follows;

**"The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way."**

41. As was held by **Ochieng, J** in **Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 Of 2003,** a Tribunal may have jurisdiction to hear and determine issues, but it may give orders, which were in excess of its powers. In effect, if a tribunal made orders beyond its powers, that is not necessarily synonymous with the tribunal lacking jurisdiction to entertain the dispute in the first place. Jurisdiction may, in my view, therefore be conferred at two levels. It may be that the Court lacks jurisdiction to entertain the dispute *ab initio,* in which case it ought to down its tools before taking one more step as was held in **Owners of The Motor Vessel "Lilian S" vs. Caltex Oil (K) Ltd [1989] KLR 1**. It may also be that though the Court has jurisdiction to enter into the inquiry concerned it lacks the jurisdiction to grant the relief sought. As I understand the ex parte applicants the challenge to jurisdiction falls within the second context. However, in **Uganda General Trading Co. Ltd SS. N T Patel Kampala HCCC No. 351 Of 1964 [1965] EA 149**, **Sir Udo Udoma, CJ** expressed himself as follows:

**"The objection to the jurisdiction may be due to the tendency to confuse the issue of jurisdiction with the issue of the form of action and procedure. It does not necessarily mean that because the action is not maintainable in law therefore the Court before which the case has been brought would have no jurisdiction to try it. On the other hand the court may have full jurisdiction over an action and it may yet be held that the action is not maintainable in law... The objection in the instant case is that the action is not maintainable in law because it has not been properly instituted, since the proper form and procedure which ought to originate the proceedings has not been followed. That surely cannot be an objection to the jurisdiction of the court but merely an objection to the form and procedure by which the proceedings have been originated. The mere omission to follow a prescribed procedure in instituting proceedings would not necessarily oust the jurisdiction of the court where there is one as in the instant case. It may be considered incompetent for a court with jurisdiction to exercise such jurisdiction because the matter over which jurisdiction is sought to be exercised has not been brought properly before it in accordance with a prescribed procedure and in a prescribed form. In such a case the jurisdiction of the court is not exercised because it would be incompetent to do so. Incompetency or incapability to exercise jurisdiction already possessed must therefore be distinguished from a complete want of jurisdiction, which may be regarded as a question of incapacity."**

42. It follows that a Court in judicial review proceedings would not be entitled to quash a decision made by a Tribunal merely on such grounds as the decision being against the weight of evidence; that the Tribunal in arriving at its decision misconstrued the law; that the Tribunal believed one set of evidence as against another and that the Tribunal has ignored the evidence favourable to the applicant while believing the evidence not favourable to him.

43. Apart from the foregoing section 219 of the ***Companies Act*** empowers this court inter alia where it is just and equitable to do so to wind up a company. Such winding up proceedings according to the ***Companies Act*** are meant to be commenced by way of a petition seeking that the company in question be wound up. As was appreciated by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

**"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."**

44.If the subject company was formed by fraud and misrepresentation, that may well constitute a just and equitable ground for winding up the same. However that does not warrant the grant of the remedy of judicial review sought herein.

45. Having considered the instant application it is my view and I so hold that the Notice of Motion dated 5th March, 2014 lacks merit and the same is dismissed but as this matter concerns a family in order to avoid further escalation of the dispute and promote reconciliation there will be no order as to costs.

46. It is so ordered.

**Dated at Nairobi this 9th day of February, 2015**

***G V ODUNGA***

***JUDGE***

***Delivered in the presence of:***

*Mr Mugo for Mrs Wambugu for the interested party.*

*Cc Patricia*