



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 32 OF 2012

REPUBLIC.....APPLICANT

VERSUS

1. ATTORNEY GENERAL

2. REGISTRAR OF COMPANIES.....RESPONDENTS

EXPARTE – KENSINGTON INTERNATIONAL LTD. – REGISTRATION NO. C.84444

AND

KENSINGTON INTERNATIONAL LTD. REGISTRATION NO. C.92271 (INTERESTED PARTY)

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF MANDAMUS UNDER SECTIONS 8 & 9 OF THE LAW REFORM ACT [CAP26 OF LAWS OF KENYA] AND CIVIL PROCEDURE ACT [CAP 21] OF LAWS OF KENYA ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: SECTION 20 OF COMPANIES ACT [CHAPTER 486 LAWS OF KENYA]

AND

IN THE MATTER OF: KENSINGTON INTERNATIONAL LTD. REGISTERED UNDER CERTIFICATE OF INCORPORATION NUMBER C.84444 DATED 11/2/1999 AND KENSINGTON INTERNATIONAL LTD. REGISTERED UNDER CERTIFICATE OF INCORPORATION NO. C.92271 DATED 19/12/2000

AND

IN THE MATTER OF: DIRECTORS OF KENSINGTON INTERNATIONAL LTD. CERTIFICATE NO. C 92271

1. STEPHEN WABOMBA WANGILA

2. DOUGLAS MWANGI MUTERO

RULING

1. By a Notice of Motion dated 18th December, 2012 and filed on 19th December, 2012, the ex parte applicant, Kensington International Limited, a company limited by shares registered under a Certificate of Incorporation No. C.84444 dated on 11th February, 1999 sought an Order of **Mandamus** to

(a) **CONFIRM** that the name of the company called

Kensington International Limited registered under Certificate of Incorporation Number C.84444 is the same as the name of the company called Kensington International Limited formed and registered under Certificate of Incorporation Number C.92271 on 19th December, 2000.

(b) **DEREGISTER OR CANCEL** the registration of the second company called **Kensington International Limited** a company incorporated on 19th December, 2000, and registered under Certificate of Incorporation No. C.92271.

(c) **In the alternative to No. 2 above, that the company called Kensington International Limited incorporated on 19th December, 2000 and registered under certificate No. C.92271 do CHANGE ITS NAME FORTHWITH.**

(d) **To order Kensington International Limited a company registered under Certificate of Incorporation No. C.92271 and each of its officials do pay a fine not exceeding Kenya shillings one hundred daily with effect from the day of registration of the said company under the said certificate.**

2. The Motion was supported by the Statement of Facts attached to the Chamber Summons dated 15th August, 2012 but Amended on 11th December, 2012, seeking leave of court to commence judicial review proceedings for the said orders, and the grounds on the face thereof. Though the Chamber Summons was wrongly intituled, (the Republic as the Applicant), the driver of the application has been one **COLLINS STEPHEN FORD**, of Coal Bank Farm Moosley, Hetton-Le-Hole DH 5 ODX UK who described himself in his Affidavit Verifying the Facts, (sworn in England on 4th September, 2012), as the dominant shareholder and Managing Director of Kensington International Limited No. 84444 where he owns 98% shares and the other shares are held by his daughter Anne Marie Ford and his wife Gillian Ford. In light of the strange and entirely unwarranted attacks and complaints against Judges who have ever dealt with this matter, I will let the applicant, the said Collins Stephen Ford speak through the paragraphs 3 – 20 inclusive of his Affidavit:-

“1. THAT I am the dominant shareholder and Managing Director of Kensington International Limited No. C84444 where I own 98% shares the other shares are held by my daughter Anne Marie Ford and my wife Gillian Ford. (Paragraph 3)

2. THAT I live in London but occasionally come to Kenya to conduct my business which includes importation of trucks. (Paragraph 4)

3. THAT on 11th February, 1999 I formed the applicant Company Kensington International Limited No. C.84444. (Paragraph 5)

4. THAT so as to facilitate my business of transferring lorries and trucks to this country from United Kingdom, it became convenient to form the said Company which I promoted together with my daughter aforesaid. (Paragraph 8)

5. THAT the said Company was formed with me as Director and my daughter Anne Marie Ford the Secretary, later my wife Gillian Ford was made a Director of the Company.

(Paragraph 6)

6. THAT the Applicant company was duly gazetted when incorporated in the Gazette Notice of 30th December, 1999 in page 2625. (Paragraph 9)

7. THAT henceforth up to today the Applicant has duly and annually filed its returns. (Paragraph 10)

8. THAT as a result of losses I caused a Civil Suit to be filed in Mombasa under the Chief Magistrate's Court at Mombasa CMCC No. 2437 of 2000 before transfer to High Court as Mombasa HCCC No. 306 of 2001 Kensington International Limited and Shelly Beach Hotel vs. K.R.A. (Paragraph 7)

9. THAT I believe that after the formation of the Applicant Company one Steven Wangila who used to be my Manager in the applicant Company and one Douglas Muteru with intention to unlawfully place themselves in a way to grab the case the Applicant had filed earlier in which the Applicant is the plaintiff, in a case to recover millions of shillings from Kenya Revenue Authority with such intentions they registered a parallel company in the name of the Applicant on the 19th December, 2000 eight months after the cause of action accrued against Kenya Revenue Authority and they were issued with Certificate of Incorporation No. C.92271 by the Registrar of Companies as a parallel company to the Applicant and thereafter the Directors of the 2nd Company No. C.92271 started to act suspiciously and the Registrar of Companies pretended not to know what had happened. (Paragraph 11)

10. THAT when we lodged a complaint and asked the Registrar of Companies to cancel the said Registration No. C.92271 the Registrar of Companies has in response given to us and shown contradicting conflicting and discredited positions. First by letter dated 25th October, 2003 the Registrar of Companies advised us that the Directors of No. C.92271 had refused to effect a change as required by law and advised that we move to court. (Paragraph 12)

11. THAT on 9th February, 2006 at the hearing of HCCC No. 306 of 2001 before Honourable J. Sergon Assistant Registrar of Companies Johnstone Otieno Adera when giving evidence as PW5 showed letters written to the 2nd Company by Registrar of Companies pursuant to section 20 of the Companies Act (Cap 486 Laws of Kenya) asking the 2nd Company to register itself using another name but they were not acted on by the 2nd Company and thirdly that the Registrar of Companies was considering to institute criminal proceedings against the 2nd Company. (Paragraph 13)

12. THAT the 2nd Company had not filed returns and that he had directed the 2nd Company to change its name because as it stood then there were two Companies with the same name. (Paragraph 14)

13. THAT by letter dated 30.09.2003 the Registrar of Companies in deliberate mischief wrote to the Advocate of the 2nd Company No. C.92271 saying that they should disregard any earlier correspondence about No. C.84444 since there is no other Company registered in the name of Kensington International Limited appearing in the Register except them. (Paragraph 15)

14. THAT I believe that the Registrar of Companies was hiding the existence of Kensington International Limited No. C 84444 and by feigning inability to act under Section 20 Chapter 486 Laws of Kenya he/she is now actively colluding to suppress the existence of C No. 84444. (Paragraph 16)

15. **THAT it has also come to our attention through the court clerk in Hayanga & Company Advocates that the Registrar of Companies is actively misfiling documents like resolutions, returns and statutory documents belonging to No. C.84444 into file belonging to the wrong Company No. C.92271. (Paragraph 17)**

16. **THAT the existence of two Companies in the Register is a cause of controversy in representation of the case instituted by Kensington International Limited C.84444 against Kenya Revenue Authority being HCCC NO. 306 of 2001 MOMBASA SHELLY BEACH HOTEL LTD. & KENSINGTON INTERNATIONAL LTD. VS. KENYA REVENUE AUTHORITY. (Paragraph 18)**

17. **THAT it would appear and I believe it that the interest of the Directors of No. C.92271 is to illegally usurp the H.C.C.C. NO. 306 OF 2001 and place themselves illegitimately, and fraudulently with calculated impunity as the proper litigants which is not true. (Paragraph 19)**

18. **THAT the conduct of the Registrar of Companies offers aid to this illegitimate attempt by allowing Company No. C.92271 to exist and this is happening with complete disregard of whatever position the court rules. Hence it is necessary that an order to strike out this company registered as No. C92271 be made by this Honourable Court. (Paragraph 20)**

3. In a seventeen (17) paragraph argumentative Affidavit sworn on 8th April, 2013 and filed on 10th April, 2013, one Stephen Wabomba Wangila, who in turn describes himself as the Managing Director of the **other Kensington International Limited** and in essence depones that the Judicial Review application is a sham, fatally defective, incompetent and is an abuse of the entire process of the court for being vexatious, frivolous and scandalous and that it offends the provisions of Order 53 of the Civil Procedure Rules; and that he would raise a Preliminary Objection to that effect.

4. After citing numerous cases under litigation or completed, (Milimani HCCC No. 514 of 2006) and Mombasa HCCC No. 306 of 2001, the Interested Party's Managing Director claims that the matters raised by the Ex parte Applicant are "**res judicata**" and accuses the Respondent's officers for putting up documents to show that the Applicant Company was in existence when the contrary was true, that the Police (C.I.D.) had investigated the matter and concluded that the registration of the Applicant Company was a forgery, and that the allegations of the Applicant's directors that there was mischief, fraud, impunity is without basis at all.

5. In conclusion the Interested Party's Managing Director averred that orders sought by the Applicant should not be granted, and the application should be dismissed with costs since it is an abuse of the process of the court, and lacks merit.

6. However in a further Affidavit sworn on 9th September, 2013, Collins Stephen Ford the ex parte Applicant's Managing Director expressed dismay and outrage at the blatant evil scheme of the Interested Party's Managing Director to use illegal tactics and impunity design to take away his company, which was duly registered and gazetted in Kenya Gazette No. 174 of 1999.

7. In contrast to the Interested Party's Affidavit the Replying Affidavit of Colletta Maweu, the Assistant Registrar of Companies the second Respondent was very candid. The Second Respondent acknowledged that –

(1) there are two registered companies, bearing the name Kensington International Limited. The first company was registered on 11th February, 1999 under Certificate of Incorporation Number C.84444, and the second company was registered on 19th December, 2000, under Certificate of Incorporation Number C.92271 (paragraph 3).

(2) the Registrar had acted inadvertently in registering the second company C.92271 bearing the

name Kensington International Limited which was identical to that of a previously registered company, (C.84444) (paragraph 4).

(3) on noting the anomaly the Registrar by letter dated 15th May, 2003 directed the directors of the latter company [C.92271] to change the name in line with section 20 of the Companies Act, as it was no longer tenable for two companies bearing identical names to appear on the Register and trade simultaneously as this would cause confusion to the members of the public (paragraph 5).

(4) the Interested Party (C.92271) refused to heed the Registrar's directive, and advised ex parte Applicant, the aggrieved company (C.84444), by letter dated 23rd October, 2003, to move to court to enforce compliance, after noting that section 20 of the Companies Act does not empower the Registrar to strike off a company that defaults in complying with the directive to change its name, (paragraph 6).

(5) the Registrar regrets the inconsistent positions advanced on the status of the two companies but that after thorough investigations, the Registrar has affirmed the position that there are two registered companies bearing the name Kensington International Limited registered under certificate Numbers C84444 and C92271 respectively, and that this position was communicated to the court under oath on 23rd May, 2012 in Mombasa HCCC No. 306 of 2001, Shelly Beach Hotel Limited vs. KRA when the Registrar of Companies was summoned to court to clarify the status of the two companies (paragraph 7).

(6) the court cannot compel the Registrar to deregister the second company (the Interested Party – C.92271), since section 20 of the Companies Act does not empower the Registrar to strike off a company that defaults in complying with the directive to change the name, the company and its directors are liable to a fine not exceeding one hundred shillings for every day during which the default continues as provided under section 20 (2)(b) of the Companies Act, (paragraph 8).

(7) it is just and equitable that the directors of the second company (C.92271) be given the last chance to change the name and in default the court to order that the company be dissolved or struck off the Register of Companies (paragraph 9).

8. Those were the respective averments. In addition thereto, learned counsel for the ex parte Applicant also filed written submissions dated respectively 19th November, 2014 and 27th February, 2015. Counsel for the Interested Party [C.92271] did not file any submissions, and relied entirely upon the Replying Affidavit of the Interested Party's Managing Director. I have considered the averments in the respective Affidavits as well as the written submissions by counsel for the ex parte Applicant. Two questions arise in the application herein, **firstly** what are the Registrar's powers under section 20 of the Companies Act, and **secondly**, the enforcement of those powers. To determine those twin issues, I set out below the entire provisions of section 20 of the Companies Act. The section is entitled – “Change of Name” and provides as follows:-

“S.20 (1) A company may, by special resolution and with the approval of the Registrar signified in writing change its name;

(2) If, through inadvertence or otherwise, a company on its first registration 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 default continues.

(3) 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.

(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.”

9. In so far as the first question is concerned, the Registrar’s powers under section 20 of the Companies Act are clear. In cases where he registers **“inadvertently or otherwise”** two companies under the same name, the Registrar is bound to call up and inform the latter company, to change its name. If the latter company fails 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 default continues.

10. Under Section 395 as read with Section 399 of the Companies Act, (which define an officer who is in default, and the prosecution by the Director of Public Prosecutions) the Registrar has no power to impose such fine. The Registrar has to follow the criminal law process. The Registrar must lay an information or complaint with the Director of Public Prosecutions to cause the Inspector General of Police to carry out investigations into the alleged default and thereafter prosecute the defaulting company and its chief officers, that is to say, its directors including its chairman. This is a proper case for seeking intervention by the Director of Public Prosecutions directly. It is clear the C.I.D officers who originally purported to carry out investigations into the two companies as well as officers of the Registrar of Companies were either indolent in carrying out their duties or were highly compromised to subvert the true position that two companies had been registered whether inadvertently or otherwise.

11. In the case of **REPUBLIC VS. REGISTRAR OF COMPANIES, ex parte TRANSGLOBAL FREIGHT LOGISTICS LIMITED** and **GLOBAL FREIGHT LOGISTICS LIMITED**, (Misc. Application No. 711 of 2005), the court said –

“The fact of registration through “inadvertence or otherwise”, carries with it good faith, but also many sins of commission and omission. How does the Registrar discover that a company has been registered inadvertently or otherwise? He or she does so by own research on the index of companies, or on notice by an Interested Party.”

12. In this case, some officers of the Registrar of Companies went out of their way to feed the C.I.D with essentially false information that the company registered under Certificate Number C.84444 on 30th December, 1999 did not exist. They refused to trace any record of it, including the Gazettement of all local and foreign companies registered in Kenya in the year 1999. It was a shocking discovery to Registrar of Companies and may be the C.I.D when the persistent and dogged Director of the ex parte Applicant herein came up with Gazette Number 7536 of 30th December, 1999.

13. Under our law, specifically, section 85 of the Evidence Act (Cap 80, Laws of Kenya), a Gazette is *prima facie* evidence of the matters stated herein. The said section says –

“85. The production of a copy of any written law, or of a copy of any Gazette containing any written law or any notice purporting to be made in pursuance of any written law, where such law or notice (as the case may be) purports to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of such written law or notice.”

14. It is thus clear and coupled with admission on oath by the Assistant Registrar of Companies that the Interested Party was registered inadvertently, after the registration of the ex parte Applicant that the ex parte Applicant not only had priority of registration, but was also in existence before the Interested Party was registered. For the Interested Party, the Registrar's staff, and the CID to deny its existence was an absolute perversion of truth and abuse of office. This calls for an answer to the second question, **enforcement** of the Registrar's powers.

15. This situation cries for an urgent remedy. Writing on this topic, K. W. Mackinon & Buchanan in **PALMERS COMPANY PRECEDENTS** 17th Edition, page 259 say –

“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.”

16. Citing the case of **LEVY VS. WALKER [1879] 10 Ch. D.P. 206**, the authors refer to English Companies Acts 1948, similar to sections 15, 16, 19 and 20 of the Companies Act, [Cap 486, Laws of Kenya] and say -

“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 Defendants trade name though innocently adopted is calculated to deceive EITHER:-

a. **by diverting customers from the Plaintiff to the Defendants,**

or

b. **by occasioning confusion between the two businesses.”**

17. In this case, the Interested Party's Managing Director does not deny the Applicant director's averments in paragraph 10 (c) of the Further Affidavit sworn on 9th September, 2013, and filed on 17th September, 2013, that the said Interested Party's Managing Director used to be a Manager with the Applicant Company, and used his insider knowledge to –

“try to steal my case as the rightful plaintiff by irregularly and fraudulently forcing a company with the same name as mine (C.84444).”

18. Wade and Forsyth on **Administer Administrative Law** 7th Edition pages 266 – 269 say -

“statutory duties are by no means always imposed by mandatory language with words “shall/must”. Sometimes they will be implied. Counterparts of rights as where a person may appeal to a tribunal, the tribunal has a correlative duty to hear and determine the appeal. Sometimes also language which is apparently merely permissive is construed as imposing a duty as “may” is interpreted to mean “shall” even though NO compulsory words are used. The sections of the Act may imply.”

19. The same authors in the 10th Edition of the same book at page 196 – 197 say:-

“The hallmark of discretionary power is permissive language using words such as “may” or “it shall be lawful”, as opposed to obligatory language such as “shall”. But this simple distinction is not always a sure guide for there have been many decisions in which

permissive language has been construed as obligatory. This is not so much because one form of words is interpreted to mean the opposite as because the power conferred is in the circumstances prescribed by the Act, coupled with a duty to exercise it in a proper case.

Cotton L. J. said:-

“I think that great misconception is caused by saying that in some cases “may” means “must”, so long as the English language retains its meaning, but it gives a power and then it may be a question in what cases where a Judge has a power given him by the word “may” it becomes a duty to exercise it. [R. Baker (1890) 44 Ch.D. 269 at 270].

20. The expression “**Terminus**” was the name of the Roman “**god**” of boundaries. It means a **boundary alone, an end-point of a route, a railway, road, hence the expression “termini”**, the end or confluence of routes, road, railway, canal, etc. The wording of section 20(2) of the Companies Act is expressed in permissive terms “**may change the name with approval of the Registrar**”. The scheme of the sections however clearly means that once the Registrar establishes 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, the boundary, the terminus of the name of that other company. The affected company is bound to change its name. It has no discretion not to do so. If it fails to do so, the company and its officers commit an offence and may be summarily tried and fined in terms of section 20 (2) (b) of the Companies Act.

21. The ex parte Applicant sought orders of **mandamus** to command the Respondent to do that which the law requires it to do where two companies have inadvertently or otherwise been registered. Where such an eventuality has occurred, what the law, specifically Section 20 of the Companies Act, requires the Respondent to do is to advise the last registered company to change its name. The Registrar, the Respondent did by its letter dated 15th May, 2003 advise the Interested Party that its name is “**too like the name which a company in existence is previously registered and called upon the Interested Party to effect a change of name of its company within fourteen days from the date of the letter, and in default to be struck off the Register of Companies**”. The Interested Party has declined to change its name. The Interested Party has dug-in its heels. The ex parte Applicant has called the defiance of the Interested Party “**impunity**” that is to say, disregard of the law and decisions of the administrators of the law. The ex parte Applicant has come to the praetorium, the temple of justice.

22. The court is no oracle of Delphi nor Magisterium of the Roman Justice. This court must decide according to the dictates of the law, considering the evidence as advanced in the respective Affidavits by the representatives of the three protagonists the ex parte Applicant, the Respondent, and the Interested Party.

23. The oracle tells me from the consideration of the law, the acts of the Interested Party, the prayers of the ex parte Applicant, that the court must reject the pretence of the Interested Party and come to the aid of both the ex parte Applicant and the Respondent. In that regard therefore, I find and hold that the Respondent has done what the law requires it to do. It has advised the Interested Party to change its name. The Interested Party has refused to do so. In addition the Respondent has expressed regret for the wrongs some of its officers did in the past. An order of **mandamus** though expansive in nature, cannot issue against a Respondent who has done that which the law requires or binds it to do.

24. If an order of **mandamus** will not issue in its ordinary sense, and meaning, the court is not thereby left hapless and the cries and tears of the ex parte Applicant and indeed those of the Respondent cannot be left to flow in vain. The court must invoke its residual power and authority, its inherent jurisdiction under Article 159 (2) of the Constitution to do justice to all irrespective of status, and make such orders as may be necessary to meet the ends of justice, and to prevent abuse of the process of court.

25. There is of course no abuse of the process of court in this application. But there is cause to make such orders as meet the ends of justice. In that regard therefore I make the following orders:-

(1) **Firstly**, that the Registrar of Companies shall report this matter to the Director of Public

Prosecutions for the prosecution of the Interested Party and all of its Directors for breach of Section 20(1) (b) of the Companies Act aforesaid;

(2) **Secondly**, I direct that the Interested Party must change its name forthwith, and in any event not later than fourteen days of the date hereof.

(3) **Thirdly**, I direct the Respondent by virtue of this order merely and without further application to deregister the Interested Party upon expiry of the said fourteen (14) days, and publish the fact of such deregistration or striking off the Register of Companies in the Kenya Gazette within thirty (30) days of the date hereof.

26. Finally, I also direct that the costs occasioned by the Application herein shall be borne by the Interested Party and in default, the veil shall be deemed lifted by this order, merely and be borne by Stephen Wabomba Wangila and Douglas Mwangi Mutero jointly and severally.

27. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 10th day of April, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

A.I. Hayanga for Applicant

Mr. Mwangulya for Interested Party

No Appearance for Respondents

Mutisya Court Assistant