REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NUMBER 409 OF 2013

REPUBLIC OF KENYA ……..……APPLICANT

VERSUS

THE COMPANIES REGISTRAR, REGISTRAR GENERAL DEPT

ATTORNEY GENERAL CHAMBERS..…… …….RESPONDENTS

BACTLABS EA LIMITED

GREGORIO SMARGADIS…….....…...INTERESTED PARTIES

EX PARTE BACTLAB LIMITED

JUDGMENT

Introduction

1. By a Notice of Motion dated 27th November, 2013, the ex parte applicant herein, **Bactlab Limited,** seeks the following orders:

1. **A writ or an Order of *Mandamus* do issue directed to the Respondent compelling the Respondent to strike out cancel delete or obliterate the names *Bactlab EA Limited* from its Register of Companies and to compel the Respondent to reinstate the composition of Directors and shareholders of Bactlab Ltd prevailing on the 19th of April, 2012 included therein Farah Mohamed Awad as Director and Shareholder and Hussein Ahmed Farah as shareholder.**
2. **The Honourable Court be pleased to make further orders or other orders within its inherent jurisdiction**
3. **The Applicant be awarded costs of this application.**

Applicant's Case

2. The Applicant's case, as presented through an Affidavit sworn by **Sofia Assali**, Director and Founder was that the Applicant, a limited liability company registered under the provisions of the ***Companies Act*** (hereinafter referred to as "the Act"), was registered on or about the 5th of November 2007 under registration number C-147012 and the founding members of the Applicant Company were **Sofia Assali** and **Gregorios Smaragdis**.
3. During the term of his service as Managing Director of the Applicant, the applicant contended that **Gregorios Smaragdis** together with a **Henry Figondo**, **Margaretville Machio** and **Arhelaos**

Gikonyo Maina together with Trans Africa Capital Ltd applied to the Respondent for approval of the name Bactlabs EA Limited for registration of a Limited Liability company.

4. Pursuant to the said application, the Respondent approved the name Bactlabs EA Limited for registration and use by the Interested Party in its trading and business activities in Kenya and elsewhere and the same was registered on or about the 9th of September 2011 under certificate of registration number CPR/2011/56079. The Applicant contended that without their knowledge the Interested Party operated its business from the offices of the Applicant.
5. The Applicant alleged that following the discovery by the Applicant of the mischief perpetrated on the Applicant by the Interested Party and the founders thereof in using the similarity of names and the resulting open disagreement between the Applicant and the Interested Party, the Interested Party fled with the Applicant's contracts, invoices, local purchase orders, list of customers, list of debtors, procurement tender documents and essential accounting documents and proceeded to establish business offices for the Interested Party elsewhere in Nairobi. To the applicant, the Interested Party and promoters have continued using Bactlabs EA Limited, thus causing the Applicant intolerable loss and damage by outright theft of cheques and receivables of the Applicant, fraudulent stealing and converting to their use the property of the Applicant and portraying that Bactlabs EA Limited is synonymous with the Applicant.
6. Following the applicant's complaint to the Respondent, on the 7th of November 2012 the Respondent wrote to the Interested Party instructing it to change the names of its company within six weeks of the date of the letter failure to which the Respondent would invoke the provisions of Section 20(2)(b) of the Act which notice lapsed within the first half of the month of December.
7. The applicant disclosed that in November 2012 the Interested Party instituted a Winding Up Cause No. 30 of 2012 at Milimani Commercial Courts which the Applicants believed was malicious and baseless and was meant to ward off the Respondent's demand notice of change of name and also to block any criminal complaints to be lodged by the Applicant against the Interested Party for theft of property. The Interested Party accordingly used the winding up proceedings to persuade the Respondent that it was unnecessary to change the names of the Interested Party because the Applicant was being wound up under Winding Up cause 30 of 2012. However, it was the applicant's case that at the time that the Interested Party communicated the purport of the winding up proceedings, no orders as to winding up or receivership had been issued, no orders had been registered with the Respondent and neither had a Receiver Manager or Liquidator been appointed. To date no orders as to winding up have been issued.
8. It was averred that on or about the 19th day of March 2013 the Winding up Cause No. 30 of 2012 and all proceedings was struck out and all orders therein vacated hence there are no proceedings pending in regard to Winding up Cause No. 30 of 2012 and no orders were been made therein.
9. Undeterred, the applicant deposed on the 28th of May 2013 the interested Party yet again instituted proceedings against the applicant in Winding Up Cause No. 6 of 2013 in Milimani Commercial Courts but no adverse proceedings were undertaken therein.
10. It was however the applicant's case that the Respondent's inaction on its notice dated 7th November 2012 to the Interested Party is borne out of the mistaken belief that there is a Winding up or receivership order against the Applicant and in the applicant's view, the winding up proceedings conceived by the Interested Party and the Promoters of the Interested party are designed in part to kill the Respondent's notice to the Interested Party to change its name and to kill the sting of the Applicant's complaints before the Director of Public Prosecutions and the police of theft of its property by the Interested Party.
11. The applicant however disclosed that the Directors and Founder members of the Interested Party were arraigned before the Chief Magistrate's at Milimani Commercial Courts in Magistrate's Criminal Case No. 508 of 2013 with charges of defrauding the Applicant of its property which criminal charges, in the applicant's view, are directly linked to the similarity in the names of the parties' companies which was approved recklessly and unreasonably by the Respondent and which the Applicant alleges has caused it loss and harm.
12. To the applicant, the delay of a period of nearly 1 year and/or the refusal of the Interested Party to act on the said notice to change its name is unreasonable and calculated to cause the Applicant further loss and damage in its trading activities. It was its view based on legal counsel's advice that the statutory duties to receive consider and approve applications for suitable names for registration of companies and to regulate companies registered under the provisions of the Act

falls on the Respondent hence the Respondent's delay or failure to act on its notice in violation of provisions of Section 19 and 20 of the Act is arbitrary and an abuse of due process and the Applicant believes the same is calculated to grant the Interested Party more time to cause irreparable damage and loss to the Applicant thought theft and by frivolous and malicious winding up proceedings.

Respondent's Case

13. The Respondents filed a replying affidavit sworn by **Faith Chirchir,** a State Counsel in the Department of the Registrar General in which it was averred that all procedures were followed in respect to registration of the companies herein.
14. It was the Respondent's case that on the 9th of April, 2002 Bactlab Systems (EA) Ltd was registered and a certificate of incorporation issued. Similarly, on the 5th of November 2007 Bactlab Limited was registered and a certificate of registration issued. The Respondents further added that on the 9th of September 2011 Bactlab East Africa was incorporated under the Companies Act and a certificate of registration issued.
15. The Respondents averred that on the 5th of October 2012 Bactlab Limited wrote to the Respondents complaining of double registration and requested the Respondent to write to the Directors of the Interested Party herein and ask them to change the name of Bactlab EA Limited. Pursuant thereto, on the 7th of November 2012 the respondents wrote to the Directors of Bactlab (EA) Limited asking them to change the name of their company. However, on the 20th of November 2012 the firm of Biwott Korir & Company Advocates wrote to the respondents stating that the Director of Bactlab (EA) Limited is the owner of the trademark "BACTLAB."
16. It was the respondents' case that the Registrar of Companies has no powers under the Act to revoke any registration of a company and the only option would be to invoke the provisions of Section 20(2)(a) of the Act. In their view, since the director of Bactlab (EA) Limited, the Interested Party herein is the owner of the trademark name "BACTLAB", the Registrar of Companies would not therefore write to the Directors of the said company and ask them to change their name. It was their case that the name Bactlab Limited and Bactlab (EA) Limited are not one and the same thing because one has the word "East Africa" and the other does not.
17. The Respondents therefore were of the view that an order of *mandamus* cannot issue because that same cannot be effected as this is an issue that requires adduction of evidence and examination of the certificates of incorporation. Since judicial review remedies are discretionary in nature, it was their position that the same can be denied even when the case was deserving. The Respondents therefore stated that the application was an abuse of court process and the same should be dismissed with costs to the Respondent.
18. The Respondents submitted that the registration of a trade mark under the ***Trade Marks Act*** Cap 506 Laws of Kenya entitles the owner of the Trademark to the exclusive right of the use of the trademark in relation to goods or in connection of provision of services and as such the fact that the 2nd Interested Party owns the trademark entitles him to use the same to register companies in which he has an interest and to direct him to change the name of the company would be to infringe upon his right to use his trademark. Therefore the Respondents submitted that the Registrar properly registered these companies.
19. The Respondents also submit that the 2nd interested party as a founder member of all three companies including Bactlab Systems (EA) Ltd which was registered before the Applicant, if the Applicant's argument should hold then the Applicant should not have been registered due to the existence of an earlier company.
20. The Respondents argued that whereas the power to direct change of name under section 20(2)(a) of the Act is limited to 6 months of a company being registered, the Applicant lodged its complaint more than a year after the Applicant was registered and as such they were time barred therefore any directive issued outside the time period would have been ultra vires.
21. To the Respondents, the Registrar of Companies' mandate is limited and does not extend to the day to day running of affairs of a company such that the Registrar cannot decide who will be a Director and/or Shareholder and acts on the instructions of the company and as such the company is under duty to ensure that any documents field effecting a change in the company reflects the

true position. The Respondents also noted that this issue is a subject of two court matters in HCCC 588 of 2011 and HCCC 41 of 2011 and submitted that the Registrar was ready to comply with any orders issued in regard to Directorship and shareholding.

22. To the Respondents, the issue of similarity of names is being used in the larger battle for the control of the Applicant's company. It disclosed that the Applicant Company is having internal wrangles touching on issues that require adduction of evidence on company resolutions which the Respondents argued was beyond the jurisdiction of judicial review which only deals with procedure and not merits of a decision.

The 1st Interested Party's Case

23. The Interested Party filed a replying affidavit sworn by **Margaretville Machio** in her capacity as an officer and shareholder of the Interested Party on the 9th of July 2014.
24. According to the Interested Party, the Application was not merited and was incompetent. It asserted that the Interested Party was a lawfully incorporated company which was trading within the country and East and Central Africa regions and had massively invested in Kenya and had multiple trading partners in the country and the wider East Africa region.
25. It was contended that **Bactlabs EA Limited** was lawfully incorporated with the consent of the registered owner of the trademark BCTLAB hence was a competitor in the open market. The Interested Party accused the Applicants of material non-disclosure due to the fact that the applicant did not disclose to this court that it instituted HCCC 588 of 2011 wherein the Applicant sued the Interested Party seeking the same orders and the suit was dismissed. To the interested party, this suit is an abuse of the court process and is aimed at disrupting the operations and investment of the Interested Party. The Interested Party however admitted the existence of Winding Up Cause No. 6 of 2013 but asserted that the Applicant had not exhibited any alleged confusion that had been elicited by virtue of the similarity in names.
26. Apart from that there was also a replying affidavit sworn by **Gregorios Smaragdis** on the 6th of February 2014 in which he deposed that he was a Greek national and investor in the country and claimed that he was the founder director of all Bactlab Group of Companies established in Kenya. He averred that in 2002 he incorporated Bactlab Systems (EA) Limited and then in 2007 he incorporated Bactlab Limited. He also averred that he is the sole registered proprietor of the trade mark BACTLAB. It was his case that as such he is solely responsible for giving consent to the use of the trademark BACTLAB.
27. It was his case that he was the Managing Director and shareholder of the Applicant herein and that **Sofia Assali** had no *locus standi* to institute any suits on behalf of Bactlab Limited. He added that Farah **Awad Mohammed** was removed as a Director and Shareholder in 2011 vide a resolution of majority directors and shareholders and that she instituted Civil Suit Number 41 of 2011 at the High Court seeking reinstatement as a Director and Shareholder of the Applicant but the same was dismissed with costs.
28. He disclosed that at the time of filing this suit, the Applicant had not passed any resolution to authorize its filing and neither was the firm of FN Wamalwa & Company Advocates lawfully appointed to act for the Applicant in this suit. He similarly contended that **Sofia Assali** was guilty of material non-disclosure due to concealment of the existence of Civil Suit Number 41 of 2011 in which the court issued an order that this dispute be referred to Arbitration but **Farah Awad** did not appear before the arbitrator as ordered by the court. He therefore contended that **Sofia Assali** and **Farah Awad** have not approached this court with clean hands and that the application was an abuse of court process.
29. The deponent deposed that on the 30th of July 2008 he, **Farah Awad** and **Sofia Assali** signed a joint venture agreement in which Farah **Awad** and one **Hussein Mohammed** became shareholders of the Applicant. It was his testimony that as soon as **Farah Awad** became a shareholder of the Applicant he begun to cause problems to the business with the apparent purpose of crippling its operations. Consequently, on the 22nd of November 2010 vide a special resolution of the Board of Directors, **Farah Awad** was dismissed as a Director and Shareholder of the Applicant. Thereafter, **Farah Awad Mohammed** instituted malicious complaints against him which saw suits filed in criminal court and the judicial review court.

Determination

15. It is noteworthy that the only substantive order being sought in these proceedings is an order of *mandamus*. The scope of that remedy was the subject of **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR** where it was held by the Court of Appeal that:

"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."

30. The issues which arise from that decision are that an order of *mandamus* is 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. It in effect compels the performance of a public duty 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. It therefore means that generally a demand for the performance and the failure to do so are necessary pre-requisites to the grant of the remedy though there may be exceptions. It may however be invoked to remedy the defects of justice for example where there is a specific legal right or no specific legal remedy for enforcing that right. However the mere fact that the duty is improperly performed does not call for an order of *mandamus*. It must however be appreciated that an order of *mandamus* as opposed to *certiorari* cannot quash what has already been done.
31. Generally it will not issue where there is an alternative remedy unless that alternative remedy is less convenient, beneficial and effectual. However, the order will only compel that which the party against whom the order is sought is under a legal obligation to perform. Therefore where a general duty is imposed, it cannot be directed by way of *mandamus* to be performed at once. Similarly where the legal instrument that imposes the duty, leaves discretion as to the mode of performing it in the hands of the party on whom the obligation is laid, a *mandamus* cannot command that duty to be carried out in a specific way. In other words an order of *mandamus* does not compel that a duty be carried out in a particular manner where the body entrusted with it has a discretion in the manner of carrying out the same. It is also clear that an order of *mandamus* does not act to quash a decision already made.
32. In regards to the change of name, Section 20(2)(a) of the Act provides:

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.

33. It is therefore clear that the powers of the Registrar conferred by section 20(2)(a) of the Act can only be properly exercised ***within six months of its being registered by that name***. Here it was contended, which contention was not denied that the demand for change of name was made way after the six months provided under the Act. In my view, the rationale for providing the limitation period within which the Registrar can direct a company to change its name is meant to protect both the Company and those who deal with it from being prejudiced by inactions of persons who have slept on their right and misled third parties to believe that there is no imminent risk in dealing with the company in the manner they have dealt with it. Change of names also has repercussions on other financial aspects such as with respect to validity of cheques issued in favour of the Company. Accordingly, the imposition of the limitation period serves as a useful tool in the protection of members of the public and ensures certainty apart from being a reasonable period for gauging whether the similarities in the names has any adverse effects on the existing company.
34. Since this Court can only compel the respondent to undertake a duty which the Respondent is legally enjoined to perform, to compel it to deregister the interested party would amount to compelling it to undertake an illegal action and that this Court cannot do under the guise of a judicial review order of *mandamus*.
35. Apart from that the effect of granting the order of *mandamus* as sought would be to quash the decision by the Respondent to register the interested party. But as stated hereinabove, an order of *mandamus* cannot quash what has already been done. Without seeking an order of certiorari, this application is misconceived and is rendered stillborn.

40. Judicial review remedies being discretionary, the Court would not grant them in certain circumstances even if the same are merited. As is appreciated, in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."

41. Taking into account the existence of other legal proceedings related to the subject matter of the dispute herein, in which hopefully the disputes between the parties herein can be finally resolved on their merits, it is my considered view that the parties herein ought to be left to finally dispose of their dispute in the said matters.

Order

42. Consequently, I find no merit in the Notice of Motion dated 27th November, 2013 which I hereby dismiss with costs.

Dated at Nairobi this 10th day of June, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr F N Wamalwa for the Applicant

Cc Richard