



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CAUSE NO. 250 OF 2010**

**IN THE MATTER OF AN APPLICATION BY SAIDIA CONSTRUCTION COMPANY LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**IN THE MATTER OF THE LAW REFORM ACT CAP 26**

**IN THE MATTER OF THE COMPANIES ACT CAP 486**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF AND A DIRECTIVE BY THE REGISTRAR OF COMPANIES**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**VERSUS**

**REGISTRAR OF  
COMPANIES .....RESPONDEN  
T**

**AND**

**EX**

**PARTE**

**SAIDIA CONSTRUCTION  
COMPANY**

**JUDGEMENT**

**INTRODUCTION**

1. By a Notice of Motion dated 2<sup>nd</sup> August 2010, the *ex parte* applicant herein, **Saidia Construction Company Limited**, (hereinafter referred to as the Company) seeks the following orders:

1. **AN ORDER OF CERTIORARI to remove to the High Court and quash the Respondent's**

- decision directing the Ex-parte Applicant herein to change its name failing which the Respondent shall exercise powers conferred upon the Respondent by Section 20 of the Companies Act Chapter 486 which directive was communicated to the *Ex parte* Applicant's Advocates on record through a letter dated 17<sup>th</sup> May.
2. AN ORDER OF PROHIBITION prohibiting the Respondent from requiring the Ex parte Applicant herein to change its name or changing the Ex-parte Applicant's name pursuant to the powers conferred upon the Respondent by Section 20 of the Companies Act.
  3. THAT the costs of this application be borne by the Respondent.

### EX PARTE APPLICANT'S CASE

2. The application is based on the Statutory Statement filed on 30<sup>th</sup> July 2010 and the verifying affidavit sworn by **Salat Gedi Gullet**, a director of the applicant herein, on 29<sup>th</sup> July 2010. The *ex parte* applicant's case as can be gleaned from the said documents is that on 7<sup>th</sup> July 2004, the Company was registered as a business name and assigned registration No. BN 397433 whereby the deponent was one of the proprietors together with one **Muktar Elmoge** and **Gabon Abdi Hassan**. On the 1<sup>st</sup> day of July, 2005 the deponent together with his co-proprietors agreed to open a bank account with Kenya Commercial Bank [*particulars withheld*] Branch whereby they were to be the signatories. Throughout the existence of the business name mentioned in paragraph 2 herein, the deponent contends that he solely contributed both financially and materially to the said business without any input from his co-proprietors whose only contribution came when it was time to share and distribute the profits. This state of affairs prevailed until February, 2010 when the deponent and his co-proprietors decided to end the business venture on 6<sup>th</sup> February, 2010 by which time the account held by the Company at Kenya Commercial Bank being account No. [*particulars withheld*] had a balance of Kshs. 1,440,764.20. It was decided that this sum be withdrawn to pay the debts and liabilities of the business and the balance be shared between them. Upon paying the said liabilities and debts of the business there remained Kshs 690,000 the proprietors agreed to share with the deponent getting Kshs 230,000, **Muktar Elmoge Sahal** getting Kshs 280,000 while **Gabon Abdi Hassan** getting Kshs. 230,000. The reason, according to the deponent, why **Muktar Elmoge** got a larger share is that at the time of sharing the monies, he had a son who was in hospital and it was decided that the deponent and **Gabon** forego Kshs 25,000 each. Thereafter the proprietors agreed to forthwith end their business relation due to irreconcilable differences between them.

3. Following the decision to terminate the said business relationship, the deponent and his wife decided to establish a company in the name of the Applicant herein and the same was incorporated on 29<sup>th</sup> June, 2009. The deponent, however, received a letter dated 16<sup>th</sup> April, 2010 alleging that he had converted the applicant herein into a company from a business name without including his former co proprietors **Muktar Elmoge Sahal** and **Gabon Abdi Hassan** as Shareholders and directors yet it was clear that the differences were irreconcilable and the said differences could not be translocated to a new entity. According to the deponent, the said letter was written on the basis of a letter written by his former co-proprietors dated 7<sup>th</sup> April, 2010 who purported that he had decided to convert the business name into a limited liability company yet no such decision was reached. Upon receiving the letter mentioned in paragraph 10 herein, THE deponent instructed his advocates to write to the Respondent explaining the circumstances under which the Applicant herein was registered which his advocates wrote did on 29<sup>th</sup> April, 2010. Despite the foregoing, the Respondent directed the Applicant herein to change its name otherwise the Respondent would purportedly exercise its powers as donated by Section 20 of the Companies Act which directive was communicated through a letter dated 17<sup>th</sup> May, 2010. According to the deponent, since incorporation, on 29<sup>th</sup> June, 2009, the Applicant herein has been awarded several contracts by various organisations and institutions including; the International Organisation for Migration, Northern Water Services Board and Kenya Red Cross amongst others and as a result thereof the deponent commenced these proceedings. However, the deponent contends that his Advocates on record only applied for leave to apply for orders of Certiorari but inadvertently left out the prayer for an Order of Prohibition though the Notice to the Registrar together with the attached Statement that were filed on the 15<sup>th</sup> July, 2010 contained both the aforementioned prayers. Therefore

he believes that the failure to include a prayer for Prohibition is fatal to his contemplated proceedings for Judicial Review and the said proceedings are bound to fail in the absence of a prayer for prohibition. According to the deponent, prior to the incorporation of the Applicant, it was confirmed that no other company exists which had the same name as the Applicant herein hence the directive herein together with his former co-proprietor's complaint have been made in bad faith as the applicant herein was incorporated on 29<sup>th</sup> June, 2009 and the complaint and directive herein have been made one year later. In his view, the fact that the respondent issued the applicant with a Certificate of Incorporation meant that the applicant herein had complied with the requirements concerning registration under the Companies Act Cap 486.

### **RESPONDENT'S CASE**

1. In opposition to the application, the Respondent filed an affidavit sworn by **Karen Rono**, an advocate engaged as an Assistant Registrar of Companies in the Department of Registrar General, on 6<sup>th</sup> February, 2013.
5. According to the deponent, the Respondent is the regulator and/or custodian of the Companies Act, Cap 486 which is an Act of Parliament to amend and consolidate the law relating to the incorporation, regulation and winding up of companies and other associations, and to make provision for other matters relating thereto and connected therewith. In performance of its aforesaid duties, the Respondent administers the Registration of Business Names Act, Cap 499 which is an Act of parliament to make provision for the registration of firms, individuals and corporations carrying on business under a business name, and for matters incidental thereto and connected therewith and in so far as regulations are concerned, the Registrar is guided by the rules of natural justice and additionally it is a Department in the Attorney General's Office whose role in the Constitution of Kenya, 2010, is to promote, protect, uphold the rule of law and defend the public interest.
6. According to the deponent, the Ex Parte Applicant was incorporated as a company on 29<sup>th</sup> day of June 2009 under CPR/2009/5780. Before its conversion, the Ex Parte Applicant existed under BN 397433 pursuant to the Provisions of the Business Names Act Cap 499. From the Assessment, the names of **Muktar Elmoge Sahal** and **Gabon Abdi Hassan** were outrightly left out as directors and/or shareholders of the Applicant. On 17<sup>th</sup> May, 2010 the deponent wrote to the Directors after complaints from the other partners who were left out and did state the current directors are spouses and in keeping with provisions of the Constitution of Kenya, 2010 which prioritises fast administrative action in dealing with complaints from the public. According to her section 15 of the Registration of Business Names Act provides that when a firm ceases to carry on business, the Notice of Cessation should be signed by all partners. The fact that **Muktar Elmoge Sahal** and **Gabon Abdi** were not signatories but one **Kaha Babe Abdi**, a stranger means that the Cessation is null and void and the business known as **Saidia Construction Company** is still operational until the same is properly ceased. Accordingly, the deponent invoked section 20(2) of the Companies Act to inform the directors to change its name as the same is similar and likely to cause confusion between the two existing companies and business name. According to her it would be wrong to say that the above provision is not applicable as the Registrar to Companies is the regulator of both of the legislation and furthermore, a reasonable man in the Streets would not make a distinction between **Saidia Construction Company** and **Saidia Construction Company Limited** irrespective that one is registered under **Business Names Act** and the other under Companies Act as long as both carry on business. It is therefore contended that this Honourable court should be alive to the fact that the registrar was responding to complaints from partners whose rights had been infringed and to allow **Saidia Construction Company Limited** to continue under its name as it stands is an act of impunity and travesty of justice. According to her to Change Name is a Minor requirement as the registrar of Companies has powers under the Act to strike off a company where fraud or impropriety has been alleged and this power is reserved as it would be inconveniencing to the operations of the Company and larger public at large. The Respondent's view is that it would set a very bad precedent if intervention from the registrar of Companies is blocked when responding to complaints especially where clear violations of fundamental rights have been arbitrary removed as partners, thrown out of business and lost

goodwill in the name of the **Saidia Construction Company** and there is no injustice to the Ex-parte Applicant as they are only required to Change the Name, proceed with business and there is nothing much that they must have lost.

### **SUBMISSIONS IN SUPPORT OF THE EX PARTE APPLICANT'S APPLICATION**

7. While reiterating the contents of the Motion, the Statement and the affidavits, the *ex parte* applicant submitted that section 20(2) of the Companies Act only applies where a new company is registered in a name that is similar to that of an existing company. Section 20, however, must be read with section 17(1) and 16(2) of the said Act. According to the applicant there is no company existing with the same name as the applicant since the business entity that existed with a similar name is not a company hence section 20 aforesaid cannot be invoked. The Respondent therefore acted ultra vires and his decision is null and *void ab initio*. It is further submitted that the Respondent can only invoke section 20 aforesaid within six months of the registration. Since the *ex parte* applicant was incorporated on 29<sup>th</sup> June 2009 and the directive by the respondent issued on 17<sup>th</sup> May 2010, almost eleven months from the date of incorporation, it is submitted that the directive is not only unprocedural but also irregular and bias. It is further submitted that from the date of incorporation the *ex parte* applicant became a body corporate by the name contained in the Memorandum of Association pursuant to Section 16 of the Companies Act. Moreover the issuance of a Certificate of Incorporation to the Ex Parte Applicant is evidence that the Ex Parte Applicant had complied with all the requirements of the Companies Act with respect to registration and matters precedent and incidental to registration in accordance with the provisions of Section 17(1) of the Companies Act and that anyone aggrieved with the *ex parte* applicant's use of its name, such a person can seek redress from the courts for appropriate injunctive remedies hence the *ex parte* applicant has made out a case for the grant of the orders sought.

### **1<sup>ST</sup> RESPONDENT'S SUBMISSIONS**

8. On the part of the Respondent, no submissions were filed.

### **DETERMINATIONS**

9. The issues for determination in this Motion as rightly pointed out by the *ex parte* applicant are under what circumstances can the Respondent invoke the provisions of section 20 of the Companies Act and secondly, whether in the circumstances of this case the Respondent can invoke the provisions of Section 20 of the Act.
10. Section 20(1) and (2) of the Companies Act provides as follows:

***(1) A company may, by special resolution and with the approval of the registrar signified in writing, change its name.***

***(2) (a) 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.***

***(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 the default continues.***

11. In the matter before the Court the relevant provision is section 20(2). Where there is by inadvertence or otherwise in the registration of a company by a name which is too like the name by which a company in existence is previously registered, a company may on its own motion or as directed by the Registrar change its name. Where, however, the change is to be done on the

direction of the Registrar, section 20(1) aforesaid provides that the direction is to be made within six months of its being registered by that name, and once that direction is given the change is to be effected within a period of six weeks from the date of the direction or such longer period as the registrar may think fit to allow. The rationale for this provision is not difficult to understand. The discretion given to the Registrar is meant to be exercised expeditiously and as soon as the Company is registered and before the company has undertaken activities which may be adversely affected by the said directive. In my view where no issue has arisen with respect to the registration of the name of a company within the said six months then the presumption would be that the similarities in the names has not adversely affected any person. It therefore follows that the Respondent could only issue directives under section 20(2) of the Companies Act within six months of the incorporation of the applicant. It is not in dispute that the Applicant was incorporated on 29<sup>th</sup> June 2009. The Respondent's directive could only be validly given on or before 28<sup>th</sup> December 2009. That directive was, however, given on 16<sup>th</sup> April 2010 way after the lapse of the stipulated 6 months. Clearly, therefore the Respondent had no jurisdiction to make such direction as its jurisdiction to do so was no longer available to be invoked.

12. By purporting to invoke its jurisdiction under section 20(2) after the lapse of the period provided by the law acted in excess of its jurisdiction. In **Timotheo Makenge vs. Manunga Ngochi Civil Appeal No. 25 of 1978 [1979] KLR 53; [1976-80] 1 KLR 1136**, the Court of Appeal held that Certiorari will issue from the High Court to quash a determination of an inferior tribunal for excess or lack of jurisdiction, or error of law on the face of the record or the breach of the rules of natural justice, or when the determination was procured by fraud, collusion or perjury.
13. An issue was also taken on behalf of the applicant that the entity that existed before the incorporation of the applicant was not a company and therefore section 20(1) was inapplicable. Under section 2 of the Companies Act, "company" means a company formed and registered under this Act or an existing company while "existing company" means a company formed and registered under any of the repealed Ordinances. Clearly, therefore, a company under Cap 486 of the Laws of Kenya does not include an entity registered under the Registration of Business Names Act. Therefore where there is an existing entity with a similar name, the Registrar is empowered under section 19(2) of the Companies Act to decline the registration of the company by that name on the ground that it is undesirable. However, that is not the issue before me. Suffice it to state that the definition of a "company" under section 2 of the Companies Act does not include an entity registered under Registration of Business Names Act.

## **ORDER**

14. In the result I find that the Respondent had no jurisdiction to issue the impugned directive. The same was therefore illegal. Consequently, the orders that commend themselves to me are as follows:
  - a. **AN ORDER OF CERTIORARI is hereby issued removing to this Court the Respondent's decision directing the Ex-parte Applicant herein to change its name failing which the Respondent shall exercise powers conferred upon the Respondent by Section 20 of the Companies Act Chapter 486 which directive was communicated to the Ex parte Applicant's Advocates on record through a letter dated 17<sup>th</sup> May 2010 and the said decision is hereby quashed.**
  - b. **AN ORDER OF PROHIBITION is further issued prohibiting the Respondent from requiring the Ex parte Applicant herein to change its name or changing the Ex-parte Applicant's name pursuant to the powers conferred upon the Respondent by Section 20 of the Companies Act.**
  - c. **The costs of this application are awarded to the applicant.**

Dated at Nairobi this day 11<sup>th</sup> of April 2013

**G V ODUNGA**

**JUDGE**

*Delivered in the absence of the parties who were duly notified of the date of the delivery of the judgement.*