

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM MISC. APP. NO. E1022 OF 2023

IN THE MATTER OF THE COMPANIES ACT

-AND-

IN THE MATTER AN APPLICATION TO RESTORE HAWAYE
CONSTRUCTION COMPANY LIMITED TO THE COMPANIES REGISTER

-BETWEEN-

KENYA REVENUE AUTHORITY.....APPLICANT

-AND-

HAWAYE CONSTRUCTION COMPANY LIMITED.....1ST RESPONDENT
ILIOUS ELEMA HARRO.....2ND RESPONDENT
ALEX ALI KUNNI.....3RD RESPONDENT
REGISTRAR OF COMPANIES.....4TH RESPONDENT

RULING

1. The applicant filed a Notice of Motion application dated 6th November 2023 pursuant to the provisions of Sections 916 & 917 of the Companies Act, No. 17 of 2015 and Section 3A of the Civil Procedure Act, seeking orders that the 4th respondent be directed to reinstate the 1st respondent on the Register of Companies.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Victor Mino, an Officer of the applicant. Mr. Mino averred that the 1st respondent, registered under PIN P051404326T and managed by the 2nd & 3rd respondents, owes Kshs. 47,860,952.08 in unpaid Income Tax and VAT plus accruing penalties. He

contended that despite these liabilities, the 1st respondent applied for and was struck off the Companies' Register through Gazette Notice No. 2675 of 11th March 2022, without notifying the applicant as required under Section 900 of the Companies Act, and without applying for deregistration of its tax obligations under the VAT Act and Tax Procedures Act.

3. Mr. Mino stated that the respondents' actions were intended to conceal the 1st respondent's dissolution and evade tax obligations, contrary to Articles 201(b) (i) & 210(1) of the Constitution of Kenya. He asserted that since the tax debts remain unsettled and penalties continue to accrue, the applicant seeks an order under Section 916 of the Companies Act to restore the 1st respondent to the Register of Companies in public interest, to ensure accountability and recovery of taxes.
4. In opposition to the application, the 2nd & 3rd respondents filed Grounds of Opposition dated 21st May 2024 raising the following grounds –
 - i) The application is not made in good faith;
 - ii) The application has been brought over two years from the date of gazette of the Notice of Striking Out which delay is unreasonable and has not been explained;
 - iii) The application offends various principles of law including the principle of separate corporate personality;
 - iv) There is no requirement for the applicant to be specifically informed by the 4th respondent of his actions in striking off or dissolving companies outside of the requirement to gazette the same; and
 - v) The tax liability sought by the applicant as against the 1st respondent is time barred.

5. The 2nd & 3rd respondents also filed a Notice of Preliminary Objection dated 24th February 2025 raising the following ground –
 - i) That the said application seeks substantive orders without having filed a suit. The substantive orders sought cannot be granted vide a miscellaneous application.
6. Additionally, the 2nd & 3rd respondents filed a replying affidavit sworn on 19th February 2025 by Mr. Ali Kunni, the 3rd respondent herein. He averred that before the 1st respondent was dissolved vide Gazette Notice No. 2675 dated 11th March 2022, Gazette Notice No. 12513 dated 19th November 2021 had been published giving Notice of the intended dissolution of the 1st respondent, thereby affording the applicant an opportunity to object to its dissolution, which it failed to do. Mr. Kunni asserted that Section 900 of the Companies Act does not require service of dissolution applications on the applicant before companies are dissolved. He further contended that there has been unreasonable and unexplained delay in filing the instant application, and that the applicant has also not demonstrated that either the 1st respondent company or its Directors initiated the striking off of the 1st respondent from the Companies' Register.
7. The instant application was canvassed by way of written submissions which were highlighted on 6th March 2025. The applicant's submissions were filed on 11th February 2025 & 3rd March 2025 by Ms Mary Ngoiri, Advocate, whereas the 2nd & 3rd respondents' submissions were filed by the law firm of Mucheru Law LLP on 27th February 2025.
8. Ms Ngoiri, learned Counsel for the applicant relied on Articles 201(b)(i) & 210(1) of the Constitution, Sections 916, 917 & 918 of the Companies Act and submitted that the applicant is entitled to seek restoration of the 1st respondent to the Register of Companies as a creditor with an outstanding tax claim of

Kshs.47,860,952.08 being Income Tax of Kshs.8,352,249.57 & VAT of Kshs.39,508,702.51 plus penalties of Kshs.1,000,000/= for failure to deregister tax obligations. She argued that under Section 900 of the Companies Act, the 1st respondent ought to have served the applicant with its dissolution application since it was indebted to the applicant, but it deliberately failed to do so.

9. Ms Ngoiri contended that Section 32 of the Tax Procedures Act makes tax a debt due to the Government, payable to the Commissioner, thus it is not time-barred. Further, that the 1st respondent also failed to cancel its VAT registration as required under the VAT Act and the Tax Procedures Act, demonstrating an attempt to evade taxes. Counsel cited Sections 917(4) & 918 of the Companies Act and asserted that the instant application is properly before this Court having been filed in compliance with the relevant provisions. Ms Ngoiri relied on the cases of **In re Habo Group of Companies** [2023] KEHC 22231 (KLR) & **Sylvester Barake Maina & another v Registrar of Companies** [2019] KEHC 7758 (KLR), to buttress her submissions.
10. Mr. Gathu, learned Counsel for the 2nd & 3rd respondents submitted that under Order 3 Rule 1 of the Civil Procedure Rules, 2010, and Section 19 of the Civil Procedure Act, every suit must be instituted by a plaint or other prescribed manner, not by a Notice of Motion. He cited the Court of Appeal case of **Geoffrey Ndungu Theuri v Law Society of Kenya** [1988] KECA 81 (KLR), and the case of **Proto Energy Limited v Hashi Energy Limited** [2019] KEHC 12311 (KLR) and argued that a Notice of Motion cannot originate proceedings, as it must be filed within an existing suit. He contended that since the applicant is seeking substantive orders for restoration of the 1st respondent through a miscellaneous application rather than a properly instituted suit, the instant application is defective and should be dismissed.

11. Mr. Gathu referred to the Court of Appeal case of the **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others** [2015] KECA 397 (KLR) and contended that the alleged tax debt of Kshs.47,860,952.08 is unsupported since the iTax Ledger produced does not reflect the said figure and being electronic evidence, it is inadmissible for failure to comply with the provisions of Section 106B of the Evidence Act. He stated that the applicant lacks the requisite *locus standi* under Section 916(2) of the Companies Act to file the application herein. The above notwithstanding, Counsel submitted that the taxes being claimed are time-barred pursuant to the provisions of Sections 29(5) & (6) of the Tax Procedures Act.
12. In a rejoinder, Ms Ngoiri relied on the decisions made in **Kenya Revenue Authority v Okla Holdings Limited & 2 others** [2024] KEHC 8090 (KLR) and **In re Habo Group of Companies** (supra), and submitted that under Section 916 of the Companies Act and Order 51 Rule 1 Civil Procedure Rules, 2010, an application for restoration of a company to the Register is made by way of a Notice of Motion. She argued that a substantive suit can only proceed once the 1st respondent is restored to the Companies' Register. Counsel contended that under Section 32 of the Tax Procedures Act, taxes remain a debt due to the Government even after dissolution of a company, which means that dissolution of the 1st respondent did not extinguish its tax liability.

ANALYSIS AND DETERMINATION.

13. Upon consideration of the instant application, the grounds on the face of it and the affidavit filed in support thereof, as well as the Grounds of Opposition, the Notice of Preliminary Objection and the replying affidavit by the 2nd & 3rd respondents and the written submissions by Counsel for the parties, the issues that arise for determination are –

- i) Whether the 2nd & 3rd respondents' Notice of Preliminary Objection is merited; and**
- ii) Whether the 4th respondent be directed to reinstate the 1st respondent on the Register of Companies.**

Whether the 2nd & 3rd respondents' Notice of Preliminary Objection is merited.

14. In order for a Preliminary Objection to succeed, it should raise pure points of law, it should be argued on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. What constitutes a valid Preliminary Objection was considered by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd** [1969] EA 696 as follows –

So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

15. In the said case, Sir Charles Newbold P., stated thus-

... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is

sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.

16. The 2nd & 3rd respondents contend that the instant application is fatally defective and ought to be dismissed as it seeks substantive orders without the applicant having filed a substantive suit.
17. Section 916 of the Companies Act provides for application to Court for restoration of a company to the Register of Companies. It provides that –

Application to Court for restoration to the Register

1) An application may be made to the Court to restore to the Register a company –

a) that has been dissolved after being liquidated under the law relating to insolvency;

b) that is taken to have been dissolved following administration under that Act; or

c) that has been struck off the Register -

i) under section 894 or 895; or

ii) under section 897, whether or not the company has in consequence been dissolved.

2) Such an application may be made by -

a) the Attorney-General;

b) a former director of the company;

c) a person having an interest in land in which the company had a superior or derivative interest;

d) a person who has an interest in land or other property –

- i) that was subject to rights vested in the company; or*
- ii) that was benefited by obligations owed by the company;*
- e) a person who, but for the dissolution of the company, would have a contractual relationship with it;*
- f) a person with a potential legal claim against the company;*
- g) manager or trustee of a pension fund established for the benefit of employees of the company;*
- h) a former member of the company, or the executor or administrator of such a person;*
- i) a person who was a creditor of the company at the time of its being struck off the Register or dissolved;*
- j) a former liquidator of the company;*
- k) if the company was struck off the Register under section 897, a person of a description specified by regulations referred to in section 900(1)(f) or 901(2)(f); or*
- l) any other person appearing to the Court to have an interest in the matter.*

18. The above provisions are clear that in order for Courts to make an order for restoration of a company to the Register of Companies, it has to be moved vide an application, and not by way of a substantive suit. Applications are provided for under Order 51 of the Civil Procedure Rules, 2010. Order 51 Rule 1 states that –

All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.

19. A company that has been dissolved has no legal personality until it is restored. Therefore, one cannot file a substantive suit against a dissolved company as it is a non-existent entity. It is only after a company has been restored to the Companies' Register that it regains the capacity to sue or be sued in a substantive claim. From the foregoing, I am inclined to agree with the applicant that proceedings for restoration of a company to the Companies' Register are properly commenced vide a Notice of Motion application. Additionally, it is not in contest that several Courts within Kenya have consistently affirmed that company restoration proceedings are initiated through miscellaneous applications, and not by the filing of complaints or originating summons.
20. I am therefore persuaded that the 2nd & 3rd respondents' contention that the instant application is fatally defective as no suit was filed is misplaced, and has no legal basis. As such, this Court finds that the 2nd & 3rd respondents' Notice of Preliminary Objection is not merited. It is hereby dismissed.

Whether the 4th respondent should be directed to reinstate the 1st respondent on the Register of Companies.

21. Upon perusal of Gazette Notice No. 2675 of 11th March 2022, it is clear that the 1st respondent was dissolved and its name struck off the Register of Companies pursuant to the provisions of Section 897(4) of the Companies Act. On perusal of the provisions of Section 897 of the Companies Act, it is clear that it provides for striking off of a company on a company's application. This Court therefore finds that contrary to the respondent's assertion, it is irrefutable that the 1st respondent applied for its name to be struck off the Register of Companies.
22. In compliance with the provisions of Section 897(3) of the Companies Act, the Registrar of Companies vide Gazette Notice No. 12513 dated 19th November

2021 published a Notice in the Kenya Gazette notifying the public of the 1st respondent's application and inviting any person to show cause why the name of the 1st respondent company should not be struck off. It is however evident that the applicant has neither alleged nor demonstrated that any such objection was lodged within the stipulated three-month period, thus the Registrar, in compliance with Section 897(4) of the Companies Act proceeded to strike off the name of the 1st respondent company from the Register on 28th February 2021.

23. On perusal of the application herein, it is clear that the applicant claims that it is a creditor of the 1st respondent company and it has moved this Court seeking restoration orders on the ground that the 1st respondent owes it unpaid taxes amounting to Kshs.47,860,952.08. It further contends that the 1st respondent failed to apply for deregistration of its tax obligations in accordance with Section 36 of the Value Added Tax Act and Sections 10 & 14 of the Tax Procedures Act. The applicant contends that as a consequence thereof, the 1st respondent has accrued penalties amounting to Kshs.1,000,000/=. The 2nd & 3rd respondents in response aver that Section 900 of the Companies Act does not require service of dissolution applications on the applicant before companies are dissolved.

24. Section 900 of the Companies Act provides that –

1) A person who makes an application under section 897 on behalf of a company shall ensure that, within seven days after the day on which the application is made, a copy of the application is given to every person who at any time on that day is –

a) a member of the company;

b) an employee of the company;

- c) a creditor of the company;*
- d) a director of the company;*
- e) a manager or trustee of any pension fund established for the benefit of employees of the company; or*
- f) a person of a class prescribed by the regulations for the purpose of this paragraph.*

- 2) Subsection (1) does not require a copy of the application to be given to a director who is a party to the application.*
- 3) The duty imposed by this section ceases to apply if the application is withdrawn before the end of the period for giving the copy application.*
- 4) A person who fails to comply with the subsection (1) (otherwise than with the intention referred to in subsection (6) commits an offence and on conviction is liable to a fine not exceeding fifty thousand shillings.*
- 5) In proceedings for an offence under subsection (4), it is a defence for the person charged with the offence to establish on a balance of probabilities that the person took all reasonable steps to comply with the requirement imposed by subsection (1).*
- 6) A person who fails to comply with subsection (1) with the intention of concealing the making of the application from a person referred to in paragraphs (a) to (f) of that subsection commits an aggravated offence and on conviction is liable to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding two years, or to both.*

25. It is evident from the provisions of Section 900(1) of the Companies Act that a copy of the application under Section 897 of the Companies Act must be given

to among others, every person who at the time of the application is a creditor of the company. In support of the allegation that the applicant was a creditor of the 1st respondent company before an application for its dissolution was made, the applicant produced an iTax General Ledger for the 1st respondent which shows that the 1st respondent owes the applicant unpaid Income Tax and VAT. The 2nd & 3rd respondents contended that even if the aforesaid taxes were due from it, they are time barred pursuant to the provisions of Sections 29(5) & (6) of the Tax Procedures Act. In addition, that the iTax Ledger being electronic evidence is inadmissible for failure to comply with the provisions of Section 106B of the Evidence Act.

26. The validity or otherwise of the taxes being claimed by the applicant from the 1st respondent is a matter to be determined through the set procedures under the Tax Procedures Act. It is also noteworthy that the 2nd & 3rd respondents have not disputed that at the time they applied for the dissolution or deregistration of the 1st respondent, the 1st respondent company owed taxes to the applicant. In my considered view, this constitutes *prima facie* evidence of an existing tax obligation, thereby rendering the applicant a creditor within the meaning of Section 900 of the Companies Act, and the applicant ought to have been served with the dissolution application. It is not in contest that the application for dissolution of the 1st respondent under Section 897 of the Companies Act was not served on the applicant, thus resulting in non-compliance with the mandatory provisions of Section 900(1) of the Companies Act.
27. In view of the above and the fact that the instant application was filed before the lapse of the six (6) years period allowed by the law, I am persuaded that the applicant has made out a case to warrant being granted the orders sought herein. To this end, I concur with the Court's finding in the case of **Kenya Revenue**

Authority v Okla Holdings Limited & 2 others (supra), where the Court when faced with similar circumstances, allowed a similar application.

28. The upshot is that the instant application is merited. It is hereby allowed in the following terms -

- i) The 4th respondent is hereby directed to reinstate the 1st respondent on the Register of Companies; and**
- ii) There shall be no orders as to costs.**

It is so ordered

DATED, SIGNED and DELIVERED at NAIROBI on this 14th day of November, 2025. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Ngoiri for the applicant

Mr. Ogara h/b for Mr. Gathu for the respondent

Ms B. Wokabi – Court Assistant.