IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & OUKO, JJ.A)

CIVIL APPLICATION NO. 145 OF 2017

BETWEEN

ZARA PROPERTIES LIMITED (CPR/2010/24490).....APPLICANT

VERSUS

ZARA PROPERTIES LIMITED) (C. 106174).....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an application for stay of execution pending an intended appeal against the Judgment and Decree made at the High Court of Kenya at Nairobi (Tuiyot, J.) dated and delivered on 8th June, 2017

in

HCCC No. 700 of 2010)

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RULING OF THE COURT

It is common factor that the first step in forming a company is to decide on a suitable name. Like a natural person, a distinct name is important in identifying a juridical person, hence the requirement in **section 13 (2) (a)** of the Companies Act, that an application for incorporation must state the company's proposed name. Unlike a natural person's name a company's name is an important asset, being one of a company's distinct features which, together with others make it a unique entity. The High Court of Justice case of **Aerators Ltd v Tollit & Others** (1902) 2 Ch 319 illustrates this distinction very well. The plaintiffs, **Aerators Ltd,** commenced an action to restrain the defendants from registering a company under the name of the **Automatic Aerator Patents Ltd**, arguing that the name selected by the defendants so closely resembles their own name as to be calculated to deceive. In dismissing the action and to the extent relevant for our purpose in this application, **Farwell J.** observed that;

> **"It will be observed that a Company has a greater right than an individual in respect of names that are identical, and a John Smith cannot prevent other persons of the same name from using their own names: but John Smith Ltd., can prevent the registration of another company as John Smith Ltd. I do not, however, consider that it follows that the Legislature has intended to give Companies any greater rights than individuals possess in respect of names which are not identical but only similar."**

Some of the defining characteristics of a company include the fact that it is a separate legal entity distinct from its members, with its own distinguishable name and seal, which is its official signature. A company's assets and liabilities are separate and distinct from those of its members. It is capable of incurring debt, borrowing money, having a bank account, employing staff, entering into contracts and suing and being sued separately. It has a perpetual succession unless, in accordance with the law specifically wound up.

Because of these attributes, the law imposes certain restrictions on the promoters' freedom to formulate the corporate name. For instance, **section 54** requires that a limited company must end its name with the suffix – '*limited'* if it is a public company. Because of the importance of a name of a company, and to avoid one company from passing off as another, it is critical, when incorporating a new business or even when changing the name of an existing company that care be taken in making the choice of a name so as not to infringe on the rights of established businesses that are already registered. The choice must equally comply with the requirements of the Companies Act; that is, it must not contain certain sensitive words without permission; must not be offensive under **section 49** and must not suggest connection with the government under **section 50.**

We have said all the above because the dispute, the subject of this application, relates to similarity in names of two companies. The applicant is **Zara Properties Limited** and the 1st respondent is also **Zara Properties Limited**. They are only distinguished in the suit and this application by their registration numbers. For example, the applicant's registration number is **CPR/2010/24490)** while the 1st respondent's is **C. 106174.**

It is a common factor that the 1st respondent had existed prior to changing its original name from Prompt Fire Protection Limited to Zara Properties Limited. It is contended that on 14th October, 2009, wishing to change its name, the 1st respondent applied to the Registrar of Companies, represented in this application by the 2nd respondent, to reserve for it the name **Zara Properties Limited.** The Registrar confirmed the availability of the name but did not immediately release the certificate confirming the change of name until 2nd December, 2009. The 1st respondent then learnt that the Registrar had also registered the applicant with the same name. The former moved the High Court in HCCC No. 700 of 2010 for a declaration that the applicant's name was undesirable and also for an order of injunction to permanently restrain it from using the name **Zara Properties Limited.**

In resisting the action, the applicant insisted that its incorporation was done in due compliance with the law; and that it was only a victim in the confusion. The 2nd respondent, for its part, denied any wrongdoing and instead demanded from the 1st respondent proof of the authenticity of the documents it had relied on as evidence of its registration. In the alternative, the 2nd respondent warned that, in view of the stalemate, it would invoke the equitable doctrine, that where there are two equities, the first in time prevails and further that equity follows the law.

Parties called oral evidence in proof of their respective cases. The only thing we note for the purpose of this application is the assertion by the applicant that the 1st respondent fraudulently initiated the change of its former name to **Zara Properties Limited** with the sole purpose by its promoters to "steal" a parcel of land known as L.R. No.209/12261 which is registered in the name of Zara Properties Limited (the applicant). Of course the 1st respondent denied this. For our part, on this point, we are satisfied, from the evidence on record that at the time of the trial there was ELC Case No.183 of 2011 awaiting the determination of the question of ownership of the parcel of land in question.

The learned Judge isolated two issues for determination, namely, who between **Zara Properties Limited** (C.106174) and **Zara Properties Limited** (CPR/2010/24490) was the proper and legal registered entity; and who would bear the cost of the suit.

Applying **sections 16** and **17** of the repealed Companies Act to the facts before him, the learned Judge made a general determination that a certificate of incorporation in respect of any association is conclusive

evidence that all the requirements under the Act in respect of registration have been complied with, and that the association is a company authorized to be registered and duly registered under the Act.

However, in the case before the learned Judge, there were two certificates of incorporation duly issued by the Registrar, there being a rebuttable presumption of law that all requirements in respect of registration of the two entities were complied with.

In answer to the first issue, which indeed was the main question, the learned Judge rejected the attempt by the applicant to impeach the 1st respondent's Certificate of Change of Name and the allegation that the change was actuated by fraudulent intention to acquire the former's parcel of land. In his view, such a claim could not be raised at the trial without it having been specifically pleaded. He concluded;

> **"The Court will <u>therefore accept that the two Certificates</u> <u>are conclusive evidence that all requirements of the Act in respect to Registration and of matters precedent and incidental thereto were complied with when each of the Certificates were issued (Section 17(1) of The Act).</u>**
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> **41. It is, obviously, undisputed that the Plaintiff and 2nd Defendant now bear completely identical names. This without doubt is undesirable. Fortunately, the law contemplates that through inadvertence or otherwise this may happen."** (Our own emphasis).

The Judge found the solution to this problem in **Section 20 (2)** that provides that if, through inadvertence, a company is registered by a name which, in the opinion of the Registrar, is too like the name by which another company in existence is previously registered, the first-mentioned company may change its name with the sanction of the Registrar. The Registrar may direct the first mentioned company to change it within six weeks of the date of the direction or such longer period as the Registrar may decide. The section further provides for a penalty for noncompliance with the Registrar's direction.

On the basis of the foregoing, the learned Judge explained that since the Certificate of Change of Name in favour of the 1st respondent was earlier in time having been issued on 2nd December 2009 while that of the applicant issued on 5th June, 2010, the former would prevail. In the result he entered judgment for the 1st respondent by declaring that the applicant's name was undesirable; directing the Registrar to issue a notice under **Section 20(2)** of the Act to the applicant to change its name from **Zara Properties Limited** to any other name within 14 days; and warned that should the applicant fail, it would be restrained by an order of permanent injunction from using the name **Zara Properties Limited.**

This decision naturally aggrieved the applicant who has evinced, by filling a notice of appeal, its intention to challenge it before this Court. Fearing the execution of those orders, the applicant has filed a motion under the Court's Rules and wishes this Court, in the meantime, to stay them pending the lodging, hearing and determination of its intended appeal. Being an application made under **Rule 5(2) (b)** of the Court's Rules, our task is elementary. Those rules support a presumption that the general discretion to stay execution will not be exercised merely because there is an appeal or one is intended. More is required of the applicant before any stay orders can be granted. The principles governing the grant of an order of stay of execution pending the hearing and determination of an appeal are old hat, and authorities are legion. We only reiterate the principles here, not for their novelty, but emphasis. The judgment of this Court in **<u>Stanley Ng'ethe Kinyanjui V Tony Ketter & 5 others,</u>** Civil Appeal No.183 of 2013, admirably summarizes those principles.

Prima facie, a successful party is entitled to the benefit of the judgment obtained from the courts below and the presumption that the judgment is correct. The onus is, however, on him to demonstrate that a stay is justified by proving the existence of two things; an appeal that is arguable and the likelihood of rendering nugatory a successful appeal by the rejection of the application for stay.

From the draft memorandum of appeal, we believe the applicant will be challenging, on appeal once filed, the impugned judgment for failing to consider the evidence that the change of name and registration of

the 1st respondent was a fraudulent intention in the course of "grabbing" the applicant's parcel of land; for ignoring the glaring contradiction in the 2nd respondent's statement of defence, which was in support of the applicant's case and oral evidence which was an about-turn; and for granting orders not sought in the plaint. Of significance, however, the applicant has questioned the manner in which the Certificate of Change of Name was issued to the 1st respondent, specifically it urged the learned Judge to note that, although the date the Certificate of Change of Name was issued on 2nd December, 2009, the 1st respondent wrote to the Registrar on 23rd August, 2010, several months after the date of the certificate, inquiring the status of the application for change of name. The applicant also asked the Judge to draw an adverse conclusion from the speed at which the Certificate of Change of Name was issued to the 1st respondent, that is, on the same day as the date of the minutes of the resolution of the former company to change its name were presented to the Registrar.

Again the question will be whether, for example, it was open to the Judge to accept that the two certificates were conclusive evidence that all requirements of the Act in respect to registration of both companies were complied with and in the same breath find that the applicant's registration was issued through inadvertence? Was the notice to the applicant issued by the Registrar pursuant to the orders of the Judge regular?

These, in our judgment, are not idle complaints and they need not be many for the purpose of a **5(2) (b)** rule application. We stress, however, that these and other questions will only be answered at the hearing of the appeal. For us, at this point, it is enough to say that we are satisfied that the intended appeal is not frivolous.

On the nugatory aspect of the application, we reiterate what we said at the beginning of this ruling that the character of a company is its name, without which, as **William Shakespeare** said in **Othello**, Act III, Scene 3, *'tis something, nothing."*

Without expressing any firm views, the applicant is apprehensive that the name may be used to further certain objectives that may be detrimental to its interests. Already, the Registrar has issued a notice under **section 20 (2)** aforesaid. That section has a penal and other consequences for failure to comply with the notice.

The applicant has satisfied us on each of the two principles and deserves a conservatory order of stay of execution.

We accordingly allow the application dated 27th June, 2017 and order the stay of the judgment and decree made on 8th June, 2017 and consequential orders pending the lodgment, hearing and determination of the intended appeal. Costs will be in the appeal.

Dated and delivered at Nairobi this 24th Day of November, 2017.

R.N NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR