



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1255 of 1996

JACKSON N. WACHUGA.....PLAINTIFF/APPLICANT

VERSUS

EASTERN KITUI STORES LIMITED.....DEFENDANT

AND

- 1. ALI SHEIKHAN**
- 2. SALIM SHEIKHAN**
- 3. FAUD SHEIKHAN**
- 4. SHEIKHAN SALIM ZEIN ALIAS**

SHEIKH SALIM ZEIN.....DIRECTORS/RESPONDENTS

RULING

On 23rd June 2006, Waweru J, in his judgment arising from an appeal from the decision of the Deputy Registrar of this court stated as follows in regard to the defendant's status as a registered company (*at page 5*):

*“A company that has been struck off the register, and hence dissolved cannot be said to be in existence. There is no dispute here that the defendant/judgment/debtor was struck off the register by the Registrar of Companies under the provisions of **Section 339 of Cap. 486** and thereby dissolved. The defendant/judgment debtor is no longer in existence ...Section 338(1) gives the High Court power to declare dissolution of a company void at anytime within two (2) years of the date of the dissolution on an application being made for that purpose by the liquidator of the company or by any other person who appears to the court to be interested. Section 339(6) gives the court power, on application made by the company or member or creditor, before the expiration of ten (10) years from the publication in the Gazette of the notice of the company having been struck off the register, if satisfied that the company was at the time of striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order that the name of the company be restored to the register. It is common ground that there are no orders as aforesaid that have been made.”*

The defendant company was dissolved by the Registrar of Companies pursuant to a notice placed in the Kenya Gazette of the 18th March 2005 (*Gazette Notice No. 2057*). The Registrar dissolved the defendant company pursuant to **Section 339(5)** of the **Companies Act (Cap. 486 Laws of Kenya)**. On 23rd March 2007, the Deputy Registrar of Companies issued another Gazette notice (*vide Gazette Notice No.2653*) of the same date deleting the name of the defendant company from among the companies that were dissolved *vide Gazette notice No.2057 of 2005*.

Upon becoming aware of this development, the plaintiff did on 24th October 2007 file a notice of motion under the provisions of **Order XLIV Rule 1** of the **Civil Procedure Rules** seeking to review the said judgment of Waweru J delivered on 23rd June 2006. The plaintiff further sought orders of the court for the reinstatement of the orders of the

Deputy Registrar of this court issued on 2nd December 2005 compelling the directors of the defendant company to attend court and be examined on the assets of the defendant company and whether the defendant company has any assets that can be utilized to satisfy the decree made in favour of the plaintiff by the court. The plaintiff contends that the deletion of the name of the defendant company from the list of companies which were dissolved by the Registrar of Companies was a new and important matter that should persuade the court to exercise its discretion in favour of the plaintiff and review the said judgment of the court. The application is supported by the annexed affidavit of Jackson N. Wachuga, the plaintiff.

The application is opposed. The 'former' directors of the defendant (*who had earlier been enjoined as parties to the suit by the court*) filed grounds in opposition to the application. They stated that the Registrar of Companies had no power to purport to bring back to life a company dissolved pursuant to **Section 339(5)** of the **Companies Act**. They were of the view that the Gazette Notice No.2653 of 23rd March 2007 was made with jurisdiction, was null and void and therefore of no legal consequences. They further stated that the application for review was not merited in the circumstances since the plaintiff had failed to disclose any sufficient ground to enable this court exercise its discretion in his favour. They complained that there was a delay in bringing the application before court and therefore the plaintiff was undeserving of the orders sought in his application. Other 'former' directors of the defendant company represented by Wekesa & Company Advocates echoed the sentiments expressed by other 'former' directors. They stated that the Registrar of Companies had acted without authority when he purported to revive a company which had been dissolved pursuant to the provisions of **Section 339(5)** of the **Companies Act**. They asserted that the purported restoration of the defendant company in the register was a nullity *ab initio* and therefore could not form a basis for an application to review the judgment on record.

At the hearing of the application, I heard rival arguments made by Mr. Wachira Nderitu, on behalf of the plaintiff and by Mr. Nyakundi and Mr. Gichuki King'ara on behalf of the 'former' directors of the defendant company. I think the parties to this application are in agreement that the success of the application for review is dependent on the decision whether the registrar of companies has power to restore into the Register of Companies, a company which has been dissolved pursuant to **Section 339(5)** of the **Companies Act**.

The said **Section** provides that;

"At the expiration of the time mentioned in the notice the Registrar may, unless cause to the contrary is previously shown by the company, or the liquidator, as the case may be, strike the name of the company off the register, and shall publish notice thereof in the Gazette, and on the publication in the Gazette of this notice the company shall be dissolved:

Provided that –

- (i) *Liability, if any, of every director, officer and member of the company shall continue and may be enforced as if the company had not been dissolved;*
- (ii) *nothing in this subsection shall affect the power of the court to wind up a company the name of which has been struck off the register."*

I am in agreement with the reasoning of Waweru J (*in the portion of his judgment quoted at the beginning of this ruling*), that once the Registrar has dissolved a company, he lacks power to restore the same back to the register. If any interested party wishes to have the company restored to the register, such a party must make an appropriate application to the court as provided by **Section 339(6)** of the **Companies Act**. The Registrar has neither the authority nor jurisdiction to restore a company which he had dissolved pursuant to the powers donated to him by **Section 339(5)** of the **Companies Act**. It is only the High Court which has the jurisdiction to restore such a company back to the register of companies. The Registrar cannot purport to exercise authority he does not have by reviving a dissolved company through a backdoor route of making a corrigenda in the Kenya Gazette. If the Registrar genuinely make a mistake in publishing the Gazette notice dissolving a company, he is at liberty to apply to the High Court for appropriate orders restoring the company inadvertently or mistakenly dissolved when exercising his powers pursuant to the provisions of **Section 339(5)** of the **Companies Act**.

In the premises, it is evident that the substratum or the main plank of the plaintiff's application for review cannot withstand the force of the argument presented to the court by the 'former' directors of the defendant company. The defendant company having been dissolved on 18th March 2005 vide Gazette Notice No.2057 of the same date remains dissolved. It is no longer in existence. It is dead as a dodo. For the company to be restored back to life, it will take the intervention of the High Court as provided by **Section 339(6) of the Companies Act**. The Registrar of companies decision to breath life to defendant company by gazetting a notice of corrigenda vide Gazette Notice No. 2653 of 23rd March 2007 was an exercise in futility. He was flogging a dead horse. Such a horse cannot be expected to rise from its death-bed and compete at the Ngong Racecourse. It is destined for the graveyard. There is no new and important matter

as envisaged by **Order XLVI rule 1** of the **Civil Procedure Rules** that would entitle this court to exercise its discretion to review and set aside the judgment of Waweru J. No ground have been placed before this court to persuade it to review the said judgment.

The upshot of the above reasons is that the plaintiff's application is for dismissal. It has no merit. It is hereby dismissed with costs to the 'former' directors of the defendant company.

DATED at NAIROBI this 9th day of OCTOBER 2008.

L. KIMARU

JUDGE