



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISCELLANEOUS CAUSE NO.408 OF 2010**

**IN THE MATTER OF MUTATI TRANSPORTERS LIMITED**

**AND**

**IN THE MATTER OF THE COMPANIES ACT**

**AND IN THE MATTER OF AN APPLICATION TO RESTORE THE NAME OF MUTATI TRANSPORTERS LIMITED TO THE REGISTER OF COMPANIES UNDER SECTION 339 OF THE COMPANIES ACT CAP.486 OF THE LAWS OF KENYA**

**DR. ESTHER KANINI MUTAKHA.....PETITIONER/APPLICANT**

**VERSUS**

**MUTATI TRANSPORTERS LIMITED AND OTHERS.....1<sup>ST</sup> RESPONDENT**

**MARGARET NJERI MBURU.....2<sup>ND</sup> RESPONDENT**

**GATE HOUSE LIMITED.....3<sup>RD</sup> RESPONDENT**

**THE REGISTRAR OF COMPANIES.....4<sup>TH</sup> RESPONDENT**

**RULING**

This court found for the petitioner on 23<sup>rd</sup> May, 2011 and declared that the dissolution of and the striking off of the 1<sup>st</sup> respondent from the companies register was void and of no legal effect. It was ordered that the name of the 1<sup>st</sup> respondent be restored forthwith to the register by the registrar and that upon such restoration, the company shall satisfy its liability to the petitioner with interest at court rate.

The petitioner has come back with an application for orders that:

i) the respondents be restrained from selling, disposing of, charging, transferring, wasting or alienating any of the properties and shares previously or presently held in the name of Mutati Transporters Limited, including but not limited to the Land title No.NAKURU MUNICIPALITY BLOCK 9/8 – Gate House;

ii) that the decree/order delivered on 23<sup>rd</sup> May, 2011 be reviewed by adding or including an order that:

**“THAT the 1<sup>st</sup> Respondent Company Mutati Transporters Limited’s shares and its properties including Land title Number NAKURU MUNICIPALITY BLOCK 9/8 be restored to and vested in and be transferred in the name of the said Company.”**

(Emphasis mine)

iii) the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents should forthwith sign and execute all and any necessary transfer documents required for effecting the transfer to Mutati Transporters Limited;

iv) in default of the Respondents executing the transfer documents, the Deputy Registrar be directed to execute all such transfers.

In opposition, the 2<sup>nd</sup> respondent has sworn an affidavit and counsel has also filed a notice of preliminary objection the combined effect of which can be summarized as follows:

i) that the application is fatally defective and ought to be struck out;

ii) that indeed, it is the respondents who ought to seek a review of the orders on the ground that it is not clear whether the petition has been determined and whether it was determined without directions being taken;

iii) that the petitioner has not specified which “*properties*” the company is restrained from dealing or to be restored;

iv) that the reliefs sought in the present application are not sought in the petition;

v) that the court ought to make a finding that there was no application upon which the orders in question were issued.

I have considered the foregoing arguments and the authorities cited, **The Church Commissioner of Mount Kenya & Another** V. **Vicar in charge and Parish Committee CPK Kanunga Parish & Another**, Civil Appeal No.258 of 1996 and **Trust Bank Limited** V. **Amalo Company Limited**, (2002) 2 KLR 627.

The application is expressed to be brought under the provisions of **Order 45 rule 1** and **Order 40 rule 1** of the **Civil Procedure Rules, 2010**, among other provisions. Starting with prayers for injunction (1) above, for the respondents to sign and execute transfer documents (iii) above and for the Deputy Registrar to execute the same in default by the respondents, it must be noted that those prayers were not sought in the petition and are therefore not available in an application for review. That leaves for consideration only prayer for review (ii) above. I have set out in (ii) above the prayer as framed in the application. What I have underlined

**“..... and be transferred in the name of the said.....”**

are additions to the prayer in the petition. Having so observed, an application for review will be granted under **order 45(1)** aforesaid. If, among other things:

- i) the applicant has discovered a new and important matter or evidence which after exercise of due diligence, was not available at the time the order was made or;
- ii) on account of some mistake or error apparent on the face of the record or;
- iii) for any other sufficient reason.

Submitting on the above, learned counsel for the applicant stated that the application is premised on the ground that there is a mistake or error apparent on the face of the record and also on the ground “*for any other sufficient reason.*”

Indeed the petition sought under paragraph (ii) that:

**“.....the company, Mutati Transporters Limited’s (sic) shares and its properties including Land title Number NAKURU MUNICIPALITY BLOCK 9/8 be restored to and be vested in the company.”**

The court in its judgment did not say anything above vesting of the suit property in the company. Was that deliberate or was that a mistake" It is only the trial judge (myself) who can confirm that. Under **sections 338, 339 and 340** of the **Companies Act**, the court has wide discretion to give such directions and make such provisions or make such orders upon such terms (regarding the company property) as it thinks fit.

Having found as a matter of fact that the suit property was being distributed to various beneficiaries after its alleged dissolution, it was expedient to order its restoration to the company. Failure to do so in the judgment does not, however, amount to a mistake or error but is an omission.

Moving under the rubric of “*any other sufficient reason*” it is now ordered that the order will and is hereby reviewed by including prayer (ii) of the Petition, namely, that NAKURU MUNICIPALITY BLOCK 9/8 be restored to and vested in the company, Mutati Transporters Limited.

The last matter I intend to deal with is the question whether the petition was determined or whether what was heard was an application. Learned counsel for the respondents submitted that the petition could not have been heard without directions. He however, did not provide any procedure or the law or what ought to have happened.

Apart from providing that an application under the Companies (Winding up) Rules be brought by way of a petition, (**Rules 21**), there is no provision that there be interlocutory applications in respect of any petition under **section 339** of the **Companies Act**. But **Section 202(1)** aforesaid provides that:

**“202(1) No proceedings under the Act or these Rules shall be invalid by reasons of any formal defects or any irregularity, unless the court before which any objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.”**

**Rule 203** provides further that in the absence of any provision in the Act or Rules, the practice, procedure and regulations shall be in accordance with the rules and practice of the court.

The petitioner filed only the petition, perhaps she found no need or purpose for any interlocutory relief to warrant an application. Learned counsel for the respondents argued in response to the petition and did not complain or seek that the petition be determined by any other way apart from affidavit evidence. Counsel has also not pointed out any prejudice to the respondents.

For the reasons earlier stated, this application is allowed in the terms set out earlier. I make no orders as to costs.

**Dated, Signed and Delivered at Nakuru this 16<sup>th</sup> day of December, 2011.**

**W. OUKO**

**JUDGE**



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