THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT)

HCCS No. 33 OF 1996

JACK WAVAMUNNO…… PLAINTIFF

VERSUS

KAI ANDERSON & OTHERS ……..DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE JAMES OGOOLA

JUDGMENT

Plaintiff and the 3rd Defendants are shareholders/directors in the 2rd Defendant Company. Upon acquiring a loan of ECUs 100,000 from the European Development Fund (EDF), 2' Defendant was appointed agent of Plaintiff. Thereupon, Plaintiff surrendered his Land Title on Plot 17 Kawuku to 2nd Defendant for use as security for the above EDF loan — see Power of Attorney (Exhibit P.3). The above land title was mortgaged to UNITED ASSURANCE COMPANY for agreeing to guarantee the EDF loan. Subsequently, Plaintiff wishing to relinquish his shares in the 2nd Defendant Company signed an Agreement (Exh. P.6) on 28/06/95 to sell his 60 shares to 1st and 3rd Defendants. According to Plaintiff, the 1st and 3Id Defendants agreed to pay for the 60 shares within 7 days of the date of the Agreement; to redeem Plaintiff's title deed on the Kawuku land within 28 days of the date of the Agreement; and, in the event of 2nd Defendant's failure to repay the EDF loan, then each shareholder undertook to repay a *pro rata* share of the loan.

Plaintiff contends that Defendants have failed to honour the redemption of his land title and that they also failed to repay the EDF loan — whereupon UNITED ASSURANCE COMPANY sold the suit land in 1996. Plaintiff therefore prays for payment of the market value of his land as well as for general damages, and the costs of this suit.

At the commencement of the suit, the parties agreed the following facts:

(a) that Plaintiff was indeed the registered proprietor of the suit land;

(b) that the suit land was sold off by UNITED ASSURANCE COMPANY under the terms of the mortgage.

In addition to the above agreed facts, the parties also agreed the following issues:
(1) whether there was a share transfer contract between Plaintiff and the 1st and 3rd Defendants;
(2) whether the share transfer was subject to the Memorandum of Understanding amongst the shareholders of the 2 Defendant (Exhibit R5);
(3) whether Defendants breached the Share Transfer Agreement, if so whether such breach occasioned loss of Plaintiff's suit land;
(4) whether 2nd Defendant owed Plaintiff a duty of care under the terms of the Power of Attorney (Exhibit P.3) [to ensure repayment of the EDF loan and redemption of Plaintiffs land]; if so, whether there was a breach of that duty, and whether such breach occasioned loss of Plaintiff's suit property; and
(5) whether Plaintiff is entitled to the remedies sought.

In the course of the hearings, Plaintiff called one witness (PWI) — the Plaintiff himself (Mr. Jack Wavamunno). Defendants elected to call no witness(es) at all. Neither did they formally tender into evidence any documents at all. Moreover, while the 1st and 2nd Defendants filed a joint written statement of defence, the 3rd Defendant filed no defence at all. [In the premises, Court hereby enters judgment for the Plaintiff against the 3 Defendant for failure to file a defence, contrary to 09 r7 of the Civil Procedure Rules.]

I will now deal with the agreed issues in the order in which they were presented.

By their written submissions, Defendants contend (as regards the first agreed issue) that the Share Transfer Agreement was legally defective in as much as:
(i) the Agreement was neither signed nor sealed (as required by law) by the two companies: M/S CAPRICORN, and M/S FISHTEC;
(ii) there was no company resolution by M/S CAPRICORN (as required by law); authorising the sale of its shares in FISHTEC;
(iii) there was no company resolution by M/S FISHTEC (as required by law) authorising that company to buy shares from both the Plaintiff and M/S CAPRICORN; and

(iv) there was no company resolution by M/S CAPRICORN authorising Plaintiff to contract on behalf of that company.

In light of all the defects alleged above, Defendants submitted that the Share Transfer Agreement was illegal, null and void and, therefore, not binding on **1st** and **3rd** Defendants — see Wright & **Sons Ltd v. Romford Borough Council [1957] IQB 431;** also see Halsbury's Laws **of England** (3rd **Edn) Vol. 6, p.427.**

In my view, this case stands or falls on the determination of the first agreed issue: namely, whether the Share Transfer Agreement is valid or invalid. Primarily, Defendants' contention is that the Agreement was neither signed nor sealed by the two companies involved — CAPRICORN and FISHTEC, as required by law.

I am satisfied that indeed the Share Transfer Agreement (Exhibit P.6) was neither signed nor sealed by either CAPRICORN or FISHTEC as they should have done by requirement of law. This defect is self-evident on the face of the Agreement itself. Additionally, however, the Plaintiff himself (as PW1) testified, in cross-examination, to the effect that he signed the Agreement on his own behalf and on behalf of CAPRICORN — but that there was no Company stamp and no company seal on that Agreement. Secondly, PWI, who purported to have signed for CAPRICORN (presumably his own Company), had no authorisation from that company to contract on its behalf. There is no company resolution by CAPRICORN to that effect.
In addition to all the above defects submitted by the Defendants, it is also quite evident that the purported sale and transfer of shares in this case did not satisfy a veritable number of the Company's own Articles of Association (Exhibit P.1). Chief among these are the following:
(a) Regulation **5** — which forbids the Company's funds from being employed to purchase the Company's shares (contravention of which is punishable by a stiff fine under section 56(2) of the Companies Act);
(b) **Regulation 6 —** which vests in the Company's Directors the authority to "allot or otherwise dispose of shares";
(c) **Regulation 18** — which requires share transfers to be "in writing";
(d) **Regulation 19** — which requires the share transferor and transferee to execute the transfer instrument;

(e) **Regulation 20** — which forbids any share transfer "unless and until the right of pre-emption" has been exhausted;
(f) **Regulation 21** — which requires a shareholder desiring to sell/transfer any shares, to first give an advance notice of his intention to the Company's Directors; which notice then constitutes the Company's Board of Directors as his agent for the sale of the shares at a price to be agreed upon between the seller and the Directors.

In the instant case, there is no evidence at all — let alone any indication — to the effect that the requirements of the above Articles of Association were satisfied. In the result, the purported sale and transfer of shares must be held to be invalid.

I am fortified in this holding by the authority of Wright & Son Ltd **v. Romford Borough** Council *(supra).* In that case, an agreement though in writing and signed was, nonetheless, held to be non-binding on the grounds that it was not sealed. GODDARD CJ held that:

"I cannot agree that [Section 266 of the Local Government Act, 1933] affects the age-long requirement of the common law as to the necessity of a seal to bind a corporation. Had Parliament intended to make so drastic an alteration in the law it would surely have so provided in clear terms.

I can find no words entitling me to say that if a corporation does comply with their standing orders the seal is no longer necessary either to bind them or to confer contractual rights upon them."

The underlying reason for this "age-long" common law rule, is to afford immunity to corporations to the end that" a corporation was not bound unless their contracts were under seal" — see p.433 of Wright's case *(supra).*

Having held as I have done on the first issue (that the Share Transfer Agreement was invalid and non-binding), it follows *ipso facto* that (the second and third agreed issues are also answered in the negative (i.e. the purported share transfer could not be subject to the Memorandum of Understanding amongst the shareholders of the 2nd Defendant; nor could Defendants breach the *invalid* Share Transfer Agreement).

As regards the second set of agreed issues, however, the position is vastly different. These are issues No. 4 and No. 5, to the effect of whether 2 Defendant owed Plaintiff a duty of care under the Power of Attorney (Exhibit P3) to ensure repayment of the EDF loan and, consequently, redemption of Plaintiffs' .Kawuku land — and, if so, whether breach of that duty by 2 Defendant

occasioned loss of Plaintiffs property. It is at once evident that this issue is separate and distinct from the first issue (dealing with sale and transfer of shares). The underlying documents to this second set of issues (i.e. the Power of Attorney, the EDF loan agreement, and the Mortgage Deed) are separate and distinct from the documents underlying the first set of issues (i.e. Share Transfer Agreement). Also the intentions of the parties as between each set of issues is separate and distinct — in the first issue, the parties intended to divest their shares in the 2' Defendant company; while in the second issue, the parties intended to access a loan facility for use in the operations of the 2nd Defendant. In view of all these factors, I am inclined to treat the second set of issues on a very different footing from the one I treated the first set of issues.

It is quite clear in my mind that, thanks to Plaintiffs offer of his Kawuku land as a mortgage, the 2nd Defendant ended up enjoying the benefits of the EDF loan, to the tune of ECUs 100,000. In the course of the scheduling conference of this suit, all the parties to the suit agreed expressly and without any reservations:
(i) that Plaintiff was indeed the registered proprietor of the suit land;
(ii) that the suit land was mortgaged for purposes of the 2nd Defendant's operations; and
(iii) that UNITED ASSURANCE COMPANY sold off that mortgaged property under the terms of the mortgage.

The terms of the mortgage required, *inter alia*, repayment of the loan by 2nd Defendant. 2 Defendant obviously breached that requirement. Similarly, the Power of Attorney authorising 2nd Defendant to mortgage Plaintiffs suit land required the 2nd Defendant to repay the EDF loan in accordance with the terms of the mortgage. 2 Defendant's failure to honour that obligation constituted a breach of its duty under the Power of Attorney to repay the loan and, thereby, to redeem Plaintiff's mortgaged property. That failure on the part of the 2nd Defendant to repay the loan resulted directly in the sale of the mortgaged property. In my considered view, the responsibility for that loss redounds directly to the 2nd Defendant's failure. 2nd Defendant must

compensate for that loss. However, owing to the unchallenged understanding reached by all the parties (see Memorandum of Agreement: Exhibit P5) under which each shareholder (in the 2nd Defendant company) undertook to pay a *pro rata* share of the EDF loan (in the event that 2' Defendant failed to repay that loan), the Plaintiff himself and his company CAPRICORN, must meet 40% and 20%, respectively, of the loss of his suit property.

Accordingly, judgment is hereby entered for the Plaintiff against the 2nd and 3rd Defendants, jointly and severally:

(a) in the amount of 40% of shs.81m/- (the agreed market value of the suit property at the material time);

(b) interest on the above decretal amount at the rate of *19%* p.a. from the date of filing this suit, to today's date of judgment; and, thereafter, at the Court rate on the total amount in (a) and (b) above, until payment in full; and

(c) the costs of this suit.

Ordered accordingly.

James Ogoola

JUDGE

09/07/02

DELIVERED IN OPEN COURT, BEFORE:

Oscar Kihika, Esq — Counsel for Plaintiff

J.M. Egetu — Court Clerk

James Ogoola

JUDGE

09/07/02