THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

HCT-00-CC-MA-148 -2012

(*Arising from HCT-00-CC-CS-0114-2012*)

ALFRED K.K. MUBANDA::APPLICANT

VERSUS

1. **CHRISTINE NYANDERA }**
2. **CHRISTINE NAYIGA KABUGOOBE }**
3. **LUSI MARGARET NAKACWA }**
4. **YAYERI NAMULINDWA }**
5. **NAKABULE IRENE }**
6. **DAMALIE NALUBEGA }**
7. **SAMALI NAMAYANJA }**
8. **TOM LUBEGA MULINDWA }**
9. **TIMOTHY KIMULI MULINDWA }**
10. **PHILIP MUTAGUBYA }**
11. **MAWAGALI }**
12. **SEPIRIYA MATOVU. M }**
13. **ROGERS MULINDWA }**

14.ANDREA TABULA }

15.KERENI MULINDWA }

16.UGANDA FOOD SUPPLY LIMITED::::::::::::::::::::}RESPONDENTS

BEFORE HON. LADY JUSTICE HELLEN OBURA

RULING

Alfred K.K. Mubanda, the applicant, brought this application under Order 41 rules 1, 2 and 9 of the Civil Procedure Rules SI 71-1(CPR) and Section 98 of the Civil Procedure Act (CPA) seeking for orders that:

1. A temporary injunction be issued restraining the respondents from alienating, changing and/or dealing in land comprised in LRV 3894 Folio 24 Ranch No. 14A, Masaka Ranching Scheme at Kabulya, Lyantonde, Masaka and all other properties of the company until disposal of the main suit.

2. The respondents pay costs of this application.

The grounds of this application are contained in the affidavit in support deposed by the applicant himself. The grounds are that:

- On the 27th April 1971, Sepiriya Tabula Mulindwa ("Deceased" also the father of the 1st to 15th respondents) and the applicant incorporated a private limited liability company known as Uganda Food Supply Ltd (hereinafter referred to as the 16th respondent company) and thus were the only subscribers of the Memorandum of Association of that Company.

- The share capital of the company was Uganda Shillings Twenty Four Thousand (UGX 24,000/=) divided into 240 shares of Uganda Shillings One Hundred (UGX 100/=) each. The deceased and the applicant were holders of 140 shares and 100 shares respectively.

- The applicant upon carrying out a search in 2011 at the companies registry, discovered that an amended Memorandum and Articles of Association of the 16th respondent company had been registered on the 22nd November 2001, by the 1st to 15th respondents wherein his name had been omitted, removed or deleted without his consent and/or approval and replaced by some of the deceased's children. The share capital of the company had also been increased and these were done without any company resolution.

- The respondents have disposed of some of the properties of the company and have started to subdivide the above mentioned land belonging to the company amongst themselves and selling off the same to defeat the applicant's interests and of the company.

- The applicant has filed a suit challenging the actions of the respondents which is pending before this court.

- The applicant will suffer irreparable injury if a temporary injunction does not issue to restrain the respondents from disposing of the company property.

This application was opposed by the respondents on the grounds contained in two affidavits in reply both deposed by Mr. Kimuli Timothy Mulindwa, the 9th

respondent. The first affidavit in reply filed in this court on 11th May 2012 was deposed on behalf of the 16th respondent while the second affidavit in reply filed on 7th August 2012was deposed on his behalf and on behalf of the 1st, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 14th and 15th respondents.

In the first affidavit in reply, Mr. Kimuli Timothy Mulindwa denied the applicant's contentions stating that the memorandum and articles of association allegedly filed on 22nd November 2001 did not change the status quo ante in respect to the shareholding or disqualification of the applicant as claimed. According to him the changes in the company share holding and capital increase were sanctioned, endorsed and/or ratified by the applicant as evidenced by his signature on the annual return made on 31st September 1976 marked "A" but field on 22nd November 2001 in his capacity as administrator of the estate of the Mrs. Allen Mulindwa and Mr. S. T Mulindwa.

He deposed that according to the records available at the companies registry the applicant ceased to be a shareholder of the 16th respondent company in 1972. He stated that on 15th November 2001 the applicant signed and filed a notification of change of Directors and Secretary in the 16th respondent company as indicated in annexture "B". Mr. Kimuli further referred to a special resolution marked annexture "C" signed by the applicant on 1st July 2011 reflecting that 140 ordinary shares were held in favour of Mrs. Allen Mulindwa while 100 ordinary shares were held in favour of Mr. S.T Mulindwa thus showing that the applicant was not a shareholder. The allegation of the applicant's name being omitted without his consent was dismissed as having no merit in light of the changes effected by the applicant as administrator of the estate of Mrs. Allen Mulindwa and Mr. S.T Mulindwa.

He also denied the allegation that the company's property has been disposed of or any steps taken to alienate it. He further referred to annexture "D" and "E" for his contention that the applicant's signature on the pleadings in this case was dubious.

The applicant swore an affidavit in rejoinder in which he reiterated the averments in his affidavit in support and denied ever ratifying any fraud committed by the respondents on the company register. He also accepted having acted only as administrator of the estate of the late S.T Mulindwa by transferring the shares to his beneficiaries according the deceased's will. He maintained that the respondents had advertised the company's property for sale by virtue of annexture "A" to the affidavit in rejoinder. He also contended that the first fifteen respondents were in the process of winding up the 16th respondent company to defeat his interests as well as that of the company.

He referred to annexture "B" to the affidavit in rejoinder which is an advertisement for voluntary winding up. The applicant maintained that he incorporated the 16th respondent company together with the late S.T Mulindwa and subsequently acquired a number of properties as verified by the affidavit of Sam Kubulwamwana Mulindwa in annexture "C" to the affidavit in rejoinder. He also stated that both signatures appearing on the affidavits in this application are his.

The gist of the second affidavit in reply was basically a denial of the applicant's assertions. The deponent contended that the records at the companies' registry were properly registered. He also denied depriving the applicant of any rights in the company as shareholder on the basis that he endorsed his exit from the company in 1974 and cannot now claim to be a shareholder or official since then.

He however conceded that the action of disposing of some properties and subdividing the land belonging to the company was in accordance with the special resolution of the company to have the same wound up. He attached annexture "A" to this affidavit as the special resolution for that purpose. He also denied advertising the company's property for sale by himself as director/secretary or by the 1st respondent who is also a director of the 16th respondent.

He deposed that the applicant was not party to the application for the lease comprised in LRV 3894 Folio 24 Ranch No. 14A Masaka. He attached several documents as annexture "B" to show that the land was applied for by the late S.T. Mulindwa who also stocked the ranch. He attacked the contents of annexture "C" to the rejoinder for being false, partisan, speculative and fabrications without cogent proof.

Unlike the other respondents, Mr. Rogers Mulindwa, the 13th respondent deposed an affidavit in reply in which he supported the application for a temporary injunction.

When this application came up for hearing on the 20th August 2012, the applicant was represented by Mr. Jet Tumwebaze, the 7th and 13th respondents were represented by Mr. Rwalinda Godfrey while Mr. Kiyemba Mutale represented the rest of the respondents.

Mr. Tumwebaze argued that the law governing the grant of an interlocutory injunction was expounded in the case of ***Geilla v Cassman Brown and Co. Ltd [1973] EA 358*** where it was held at page 360 that the conditions for the grant of an

interlocutory injunction are now settled. First, an applicant must show a prima facie case with a probability of success, Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience.

According to him, the applicant had stated in paragraph 3 of the affidavit in support that he was a shareholder in the 16th respondent company and attached a copy of the Articles and Memorandum of Association as proof. He contended that by that evidence the applicant had shown that he has a prima facie case with a probability of success in the main suit.

On the second condition of irreparable damage, Mr. Tumwebaze argued based on what was deposed in the affidavit in rejoinder that the applicant had invested heavily in the 16th respondent company which acquired farm land that was stocked and developed by the applicant together with the late S.T Mulindwa. It was his contention that the respondents had advertised this land for sale to defeat the applicant's interest as per annexture "A" to the affidavit in rejoinder. He concluded that if this application fails the land would be sold and damages would not atone for the injury as the applicant's interest was in land for farming.

It was also the case for the applicant that he will not be adequately compensated if this application fails because the 16th respondent is in the process of being voluntarily wound up as per annexture "B" to the affidavit in rejoinder.

With regard to the balance of convenience, Mr. Tumwebaze argued that the respondents would not suffer any injury unlike the applicant who would suffer

grossly if the application is denied. His view was that the justice of this case favoured the grant of a temporary injunction to preserve the status quo until the main dispute is heard and determined.

Mr. Kiyemba Mutale, counsel for the abovementioned respondents opposed the application. He agreed with the principles for the grant of an interlocutory injunction as stated by counsel for the applicant.

He argued that the applicant had not shown a prima facie case that can succeed. He referred to annexture “A” to the first affidavit in reply as the document on which the applicant signed away his rights when he endorsed a document showing that his shares were held by S.T Mulindwa. He also contended that the applicant had no cause of action.

He referred to annexture “C” to the first affidavit in reply which spelt out the names of the shareholders and how their shares were transferred to the beneficiaries. According to annexture “C” 140 shares were for Mrs. Allen Mulindwa while 100 shares were for S.T Mulindwa. 90 shares were distributed and 150 remained floating. Mr. Mutale’s view was that the changes were endorsed on 15/11/2001 over 11 years from today which raises the question of limitation as the suit should have been filed within 6 years.

On the second condition of irreparable injury, Mr. Mutale argued that the land is for ranching and this court is capable of assessing the injury that is commensurate with the loss of land. He believed that his clients would be in a position to pay the damages for the injury.

In so far as the balance of convenience is concerned, Mr. Mutale argued that the respondents are shareholders who have rights to enjoy the proceeds upon winding up unlike the applicant who had not shown any rights. According to him delay in winding up would affect them and yet if the company was wound up the applicant would have nothing to lose since his allegations of participating and stocking the ranch were not proven. He referred to annexture "B" of the second affidavit in reply to show that the stocking of the ranch was done by the late S.T Mulindwa.

Mr. Rwalinda Godfrey informed court that the 7th and 13th respondents did not oppose the application.

In his submissions in rejoinder, counsel for the applicant argued that the issue of limitation should be dealt with in the main suit. He claimed that there were continuous acts being committed. He submitted that by 2001 the applicant was out of the country and only came back when the property was advertised for sale. He disputed the contention that annexture "C" to the first affidavit in reply amounted to the applicant signing off his rights.

It is now a settled principle of law that the purpose of a temporary injunction is to preserve matters in status quo until questions to be investigated in the suit can be finally disposed of. See ***Kiyimba Kaggwa v Abdu Nasser Katende [1985] HCB 43.***
The applicant sought to stop the respondents from alienating land comprised in LRV 3894 Folio 24 Ranch No 14A Masaka Ranching Scheme, Lyantonde, Masaka and all other properties of the company until disposal of the main suit. Annexture "A" to the applicant's affidavit in rejoinder is the advertisement for sale of 350 miles of land at Shs 800,000 per acre. From this advertisement it is not clear whether the land to be

sold is the same as described above or whether it belongs to the 16th respondent, company.

However in the second affidavit in reply it was conceded that the action of disposing of some properties and subdividing the land belonging to the company was in accordance with the special resolution of the company to have the same wound up. The fact that the company had commenced voluntary winding up proceedings was also not in contention. Therefore there is a status quo to be maintained to allow this court look into and investigate the dispute between the parties in the main suit.

In considering the first condition, I find very instructive the holding of Lord Diplock in the case of **American Cynamide Co. v Ethicon [1975] 1 ALL E.R. 504** to the effect that for purposes of grant of a temporary injunction it is sufficient for the applicant to prove that triable issues have arisen that merit judicial consideration. There is no requirement for the plaintiff to establish a strong prima facie case with a high probability of success. All the Plaintiff needs to show by his action is that there are serious questions to be tried and the action is not frivolous or vexatious.

I have had the opportunity of reading the pleadings in the main suit with the relevant documents attached. Under Paragraph 3 of the plaint in the main suit, it is stated:

> ***"The Plaintiff brings this action against the defendants jointly/severally, on his own behalf and on behalf of the company in a derivative action to protect and safeguard his interest and those of the company and its assets, seeking reinstatement of the plaintiff's name as a member or shareholder of the company; cancellation and or nullification of all entries illegally entered on the company's***

register and/or transactions made or entered into by the defendants, a permanent injunction restraining the 1st to 15th defendants, their agents and servants or those claiming under them, from changing, alienating and dealing in land comprised in LRV 3894 Folio 24 Ranch No. 14A, Masaka Ranching scheme at Kabula Lyantonde, Masaka and all other properties of the company, penalty be imposed on the 1st to 15th defendants for falsely and deceitfully impersonating the plaintiff, Orders for General damages, interest on pecuniary awards and costs of the suit."

Counsel for the applicant argued that since the applicant had stated in his affidavit in support that he was a shareholder, he had shown that he had a prima facie case with a probability of success.

According to counsel for the respondent the applicant had not shown a prima facie case with a probability of success because he was not a shareholder having signed away his rights when he endorsed annexture "A" showing that his shares were held by S.T Mulindwa. He also contended that the applicant had no cause of action and also raised the question of limitation as the suit should have been filed within 6 years from 2001 when the changes were alleged to have been made.

I have perused all the certified copies of documents availed to this court from Uganda Registration Services Bureau (URSB) through the applicant's counsel. I do not know whether these were all the documents given by URSB because the covering letter that forwarded it the applicant's counsel was never brought to court. I noted that some documents were pulled out of the binding and others were left lose. It is possible that some vital documents could have been removed. I am of the

considered view that those documents should have been forwarded directly to court without passing them through counsel of one of the parties who has interest in the matter.

Be that as it may, I do find that indeed a copy of the original article and memorandum of association and the certificate of incorporation filed in 1971 indicated that the late S.T. Mulindwa and Mr. Alfred K.K. Mubanda were the subscribers to the shares of the 16th respondent company. However, the return of allotment of shares filed in December 1972 indicated that 140 shares were allotted to Mr. Mulindwa Tabula Sepiriya and 100 shares allotted to Mulindwa Allen. There was no mention of the applicant anywhere. That document in my view supports the argument of the respondents that the applicant ceased to be a shareholder of the 16th respondent company in 1972.

If at all there was any fraudulent changing of the shareholding of the company then it could only be blamed on the late Mulindwa who effected the changes way back in 1972. His children/ beneficiaries of his estate who are now being sued started running the affairs of the company upon shares being transferred to them in 2001 by the applicant himself as one of executors of their deceased father's will.

I must also observe that the actual shareholding of a company is not necessarily determined by the shares indicated on the memorandum of association at the time of registration. The amount of shares stated there is normally done in compliance with section 4 of the Companies Act which requires the amount of share capital with which the company proposes to be registered and the division of the share capital into a fixed amount to be stated. Each subscriber is also required to write opposite his or her name the number of shares he or she takes.

The actual allotment of shares is normally done subsequently and a return filed pursuant to section 54 of the Companies Act. The records from URSB show that no other return of allotment was filed except the one done in December 1972.

I also wish to point out that the applicant stated in paragraph 4 (i) of his plaint in the main suit that as one of the executors of the will of the late S.T. Mulindwa he transferred the deceased's shares to his different beneficiaries in accordance with the will. He attached fifteen transfer of share stock forms he filed in the registry of companies dated 5th November 2001in relation to those transfers. It was after the transfer of shares by the applicant that the beneficiaries started reorganising the company.

Annexture "C" to the affidavit in reply dated 11th May 2012 is a copy of a special resolution dated 5th November 2001authorising transfer of the said shares. That resolution which was signed by the applicant in his capacity as the administrator of the estate of Mr. S.T. Mulindwa and Mrs. Allen Mulindwa showed that Mrs. Allen Mulindwa had 140 shares and Mr. S.T. Mulindwa had 100 shares in the 16th respondent company. I have no reason to doubt that the applicant signed the said special resolution because its contents relate to the transfer of shares which the applicant himself admitted to have done. I also note that the special resolution was made and signed at the same time with the transfer of share stock forms.

The applicant alleges in the main suit that the allotment of shares in the company was done by the late Mulindwa in 1972 when he was in exile but failed to state when he came back from exile. However, it is not in dispute that by 2001 the applicant was in the country and that is why he was able to transfer shares to the beneficiaries.

One wonders why it took the applicant so long, moreover as one of the most active executors of the last will of the late S.T. Mulindwa, to realise that he was no longer a shareholder in the company which he claimed to have invested in heavily. It is unbelievable that a shareholder in a company would not bother to find out the status of the company and as it were the fate of his investments even after the demise of the only other member in 1991.

In my view the applicant's defence in the main suit that he was away and did not know about the changes that took place in the shareholding of the company in 1972 until the year 2011 when he conducted a search would be very weak given the circumstances highlighted above.

In addition, the applicant alleged that he invested heavily in the 16th respondent company. However, this statement was not backed by any documentary evidence. I find it irregular for the applicant to rely on annexture "C" to his affidavit in rejoinder as the evidence for his assertion. annexture "C" is an affidavit in support deposed by a one Sam Kubulwamwana Mulindwa alleging that the applicant together with the late S.T Mulindwa imported 300 Boran Steers in 1973, constructed a permanent home, Dip tank and two valley dams on the ranch.

That affidavit was stated to be in support of the application and yet it was annexed to the affidavit in rejoinder sworn by the applicant. In my view that was irregular because an affidavit in reply cannot be an annexture to an affidavit in rejoinder. For that reason, this court would ignore it. In any event, that affidavit in my view would not even add any value to the applicant's case as it contains mere allegations without any supporting document.

On the other hand, the respondents have adduced evidence as per annexture “B” to the second affidavit in reply to show that the land where the ranch is located was acquired by the late Mulindwa in 1968 before the 16th respondent company was incorporated and the stocking of the ranch was also done by him. This evidence was not challenged and so I am inclined to accept it.

In view of the above evaluation of the evidence before this court, I find that the applicant has not shown any prima facie case with a probability of success or even raised any triable issues because the respondents were not responsible for the changes made to the company in 1972 that effectively removed him from the company. The applicant’s case is further weakened by the fact that he has not at this stage provided any evidence that would prima-facie show that he invested in the company. For that reason, I find that no triable issues that merit judicial consideration are raised in the main suit. The applicant has therefore not met the first condition for grant of an interim injunction.

On the second condition, it was the case for the applicant that he would not be adequately compensated if this application is not decided in his favour because the 16th respondent is in the process of being voluntarily wound up as per annexture “B” to the affidavit in rejoinder. Counsel for the applicant argued that the applicant had invested heavily in the 16th respondent company which had acquired land. He argued further that the farm had been stocked and developed by the applicant together with the late S.T Mulindwa.

As I have already observed above, this allegation is not supported by any documentary evidence. However, in the event that the applicant adduces evidence in

the main suit and wins the case, I believe this court would be capable of assessing and awarding damages to him that would be commensurate with the loss of land. In that sense there would be no irreparable injury as claimed.

In view of the above findings on the two conditions, it would not be necessary to consider the third condition because this court is not in doubt. However, just to mention in passing, I find that the balance of convenience favours refusal to grant the temporary injunction because the applicant in my view would not be as inconvenienced as the respondents if the application is granted.

In the result, this application must fail and it is accordingly dismissed. Costs shall be in the main cause.

The interim order of injunction granted on the 24th April 2012 is accordingly vacated.

I so order.

Dated this 5th day of December 2012

Hellen Obura

JUDGE

Ruling delivered in chambers at 12.30 pm in the presence of Mr. Jet Tumwebaze for the applicant who was absent and Mr. Kiyemba Mutale for all the respondents except the 7th and 13th who were absent with their counsel.

JUDGE
05/12/12