

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

HCCS NO 38 OF 2011

ALI AHMAD}.....PLAINTIFF

VERSUS

- 1. MOHAMAD AHMAD}**
- 2. GOMBA FANCY STORES}**
- 3. THE REGISTRAR OF COMPANIES}.....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Plaintiffs action against the defendants jointly and severally is for a declaration that the transfer and registration of 1000 shares into the second defendant is illegal, unlawful and ultra vires the company's Articles of Association. Secondly it is for recovery by the plaintiff of his 1000 shares in the second defendant stated to be illegally and/or fraudulently converted, expropriated, transferred and registered in the names of the first defendant. Thirdly it is for an order for cancellation of the transfer and registration of the 1000 shares in the name of the defendant, an order for reinstatement of the plaintiffs name as member and shareholder of 1000 shares in the second defendant with costs of the suit. Lastly is for an order that the second defendant renders a true account of all assets and liabilities of the company and all monies received and expended by the company since incorporation to date.

The first and second defendants jointly and severally denied the contents of the plaint. The third defendant filed a defence objecting to the suit on the ground that she was not a party to the suit. The defence was filed by the Uganda Registration Services Bureau.

Mediation efforts between the parties failed. On the 10th of May 2012 the matter came before the court and the parties agreed to negotiate with the aid of a third-party. Consequently the parties were given time to negotiate and the suit was fixed for mention thereafter. On 14 June 2012, the court was informed by counsels that mediation efforts to reconcile the brothers failed. The plaintiff and the first defendant are brothers. Counsel Evelyn Okello appeared for the defendant while Counsel Moses Kabega appeared for the plaintiff when the court was informed that the real question between the parties was "Whether the registered transfer of 1000 shares from the plaintiff to the first defendant in the second defendant company was a valid transfer?"

By consent of counsel and direction of Court it was agreed that the parties would jointly instruct a handwriting expert/forensic expert to examine the signature and writing on the questioned document and compare it with the known and agreed specimen signatures/writings of the plaintiff and come up with the report which will be presented in court.

Subsequently counsels disagreed on the forensic expert reports and filed two reports. One by Sylvia dated 11 July 2012 and another one by Samuel Ezati dated 18th of August 2012. Both reports are from the Department of Scientific Aids Laboratory.

On 6 September 2012 the court ruled that the two reports will be reviewed by both experts who had looked at different specimens to compare with the questioned signature in the transfer instrument for the 1000 shares. Counsels for the parties were to review all the specimen signatures and agree on them and the specimen signatures agreed upon will be used to submit a joint report by the two forensic experts from the Department of Scientific Aids Laboratory.

Subsequently the plaintiff's counsel sought permission of court to question the forensic experts on the joint report of the Scientific Aids Laboratory of the Police Headquarters dated 12th of November 2012 and admitted in evidence as court exhibit 2.

By this time Counsel Abbas Bukenya represented the plaintiff while Counsel Frederick Ochieng – Obbo represented the defendants.

Upon examination of the forensic experts, counsels addressed the court in written submissions.

The plaintiff's submissions:

The parties were referred to a referee within the ambit of section 26 (1) and (2) of the Judicature Act. The plaintiff's counsel noted that the referee had earlier on produced a report in respect of the matter in issue. The issue submitted on by the plaintiff's counsel are the following:

1. Whether the transfer of shares/document was signed by the plaintiff?
2. Whether the said transfer could in view of Articles of Association be used to effect the transfer of shares?
3. Whether in the administration of justice, the findings of the referee can be relied on by the court to determine the case?

As far as the proceedings of the referee are concerned, the referee tendered two documents in evidence. The first document is his witness statement. The second document is a report dated 12th of November 2012 Court Exhibit 1 and a report dated 18th of November 2012 Court Exhibit 2. The plaintiff's counsel submitted that Ezati Samuel the referee was examined by both counsels. It was the referee's testimony that he addressed Exhibit 1 only to Messieurs Frederick Francis and Associates and not to Messieurs Kabega, Bogezi and Bukenya Advocates, counsels for the plaintiff. He further testified that he never copied the said report to counsels for the plaintiff.

This demonstrated unfairness and imbalance in the interest of justice on the part of the referee. Secondly the referee admitted that his instructions came from Messieurs Frederick Francis and Associates. The referee was more senior and experienced than his colleague, was shown transfer of shares stock sheet and confirmed that the questioned signature did not bear the name "Ahmed" which were in the articles of Association of the second defendant. He conceded that the finding was not reflected in his report exhibit P1 dated 12th of November 2012. This is contrary to its finding in the report as he never disclosed it. Counsel relied on the case of **Shokatali Abdullah Dhalia vs. Sadrudin Meralli SCCA number 32 of 1994** for the holding that a contradiction which is major lead to a possibility that a witness is not telling the truth. Consequently the plaintiff's counsel submits that there was bias against the plaintiff when the referee selectively left out the name for the benefit of and in favour of the defendants. Counsel submitted that the referee admitted that the signatures on the transfer of stock documents do not tally with that on the governing Articles of Association of the second defendant company. The conclusion is that the signatories of the two documents are different.

The referee admitted to have made a report dated 18th of August 2012 and confirmed it to be authentic and also admitted that in both reports he used the same transfer of share stock document and articles of Association of the second defendant company. He made a finding that the questioned signature is of a different module from the specimen signatures used. The specimen signatures are consistent with each other and are not representative of the questioned signature. The totality of counsel submissions is that the discrepancies shown in the testimony of the referee indicate that the signature appearing on the transfer of shares stock is completely different from that appearing on the official articles of Association of the second defendant and does not qualify to pass title in the shares.

Counsel submitted that in view of section 26 (2) of the Judicature Act, the joint report by the referees ought not to be adopted wholly or used summarily to pass judgment by way of dismissal. This is because it does not address the issue whether such transfer of share stock bearing a signature different from that on official articles of Association were originated by the same person or not and can therefore in law pass title in the shares to another person. The balance and fair administration of justice requires the court ought to call an official from the Registrar General's Office/Company Registry to testify on the issue. Secondly section 27 (b) of the Judicature Act only restricts the referee to matters of fact as opposed to law. The court ought not that the referee had nothing to do with the law nor did the report address any legal issues which are pertinent in the determination of the case. Finally counsel submitted that the matters of mixed law and fact as related to the third issue set up by counsel and cannot be used to extinguish or conclude the case without affording the plaintiff a chance to lead further evidence.

Defendants Submissions in reply

In reply the defendants counsel submitted that the first defendant incorporated a company with the plaintiff and the plaintiff transferred his shares to the first defendant by signing transfer forms. The shares were transferred to the first defendant and the plaintiff claims that the transfers were fraudulent.

During the scheduling conference on the 10th of May 2012, the plaintiff's lawyers had received a forensic report dated 16th of March 2012 signed by A.M Ntarirwa which was contested by lawyers for the plaintiff. On 10th of May 2012 the court directed a joint submission of the

specimens to be used but analysis was done independently by two different forensic examiners who make their reports based on different specimens examined. The reports are dated 11th of July 2012 signed by Sylvia Chelangat and the other report signed by Samuel Ezati dated 18th of August 2012. The report of 11th of July 2012 was rejected by the plaintiffs while that of Samuel Ezati was rejected by the defendants.

By consent of counsels for both parties, the court directed both counsels to review the report, identify the specimens to be examined by the referee's and jointly submit the specimens for inquiry. The referees received specimens A, B, C, D, E, F, G, H, I, J and they jointly examined the specimens and compared it with the questioned transfer forms and came up with a conclusive and comprehensive report dated 12th of November 2012, marked as court exhibit 2 and signed by both referees.

On the first issue of whether the transfer of stock document was signed by the plaintiff?

The defendants counsel submits that the proceedings of 12 November 2012 shows that the referee Mr Samuel Ezati pointed out his conclusions in the report based on the number of similarities observed between the questioned signature and the specimen signatures provided and in his opinion there is strong evidence to show that the author of the specimen signatures availed also authored the questioned signatures. The report was a collective effort between Samuel Ezati and Sylvia Chelangat. Counsel contended that this final report superseded all the previous reports. The fact that the referee did not address or copy the report to the plaintiff's lawyers does not in any way change the contents of the report. The letter requesting for the joint report came from both lawyers by letters dated 9th of September 2012 and from the defendants on 11 October 2012 respectively. The report dated 18th of August 2012 was rejected by counsel.

Whether the said transfer could in view of articles of Association be used to effect the transfer of shares?

It is the defendant's submission that the plaintiff had two signatures namely the short form and the long form that he used to use while transacting company business and this was amply demonstrated by the various exhibits the referees examined. As to whether the signature would effect a transfer is basically a matter of internal company management rules decided by the directors. It is apparent from the proceedings that the court was dealing substantially with the

question of transfer of shares and since the referee's have reported in the affirmative that the plaintiff signed transfer forms, counsel submitted that this finding is binding on the parties and the court.

Whether in the administration of justice the findings of the referee can be relied on by court to determine the case?

On this issue the defendants counsel submitted that it is a matter of law that the reference was derived from section 26 (1), (2) and section 27 (a) and (b) of the Judicature Act and is as binding as a judgement. The referee is an officer of the court for all intents and purposes according to section 28 of the Judicature Act. The decision of this court is binding because the same rules of procedure of the court to reach a decision has been followed and the issue in dispute has been resolved by the referee's under section 26 (1) of the Judicature Act. Consequently the report of the special referee ought to be adopted wholly and enforced as a judgement against the plaintiff under section 26 (2) of the Judicature Act.

The defendant's counsel submits that it was by consent of counsels in court that the matter before the court would be resolved primarily by resolving the question of who authored the signatures on the transfer forms. Counsels by consent and upon advice of court agreed to joint specimens to be submitted to a special referee who would consider the question of whether the plaintiff signed the transfer forms, and this has been confirmed in the affirmative by the referee during cross-examination. Counsel relied on the case of **Mutungo Women's Cooperative Savings and Credit Society Ltd versus Equity Bank (U) Ltd** where judgement was entered on the basis of a report of a referee (Auditors) under section 27 of the Judicature Act. Though the facts are different, in principle the rationale for the decision came from the referee. Consequently the court ought to enter judgment and dismiss the suit with costs against the plaintiff.

Ruling

I have carefully considered the proceedings of the court for reference of the question of who authored the transfer forms to forensic experts. Some controversy has thereafter arisen as to whether the reports are binding or whether the court can disregard the report.

I will start with the record of the court. Initially and on the 10th of May 2012 when the counsels and the parties and their representatives appeared in court, the court was informed that the parties had agreed to negotiate with the aid of a third-party. They were given an opportunity to negotiate and to report again on 14 June 2012. On 14 June 2012 it was reported that all attempts to reconcile the plaintiff and the first defendant who are brothers were futile. Counsels informed court that the issue was whether the registrar transfer of 1000 shares from the plaintiff to the first defendant in the second defendant company was a valid transfer. The record shows that it was agreed that counsels would instruct jointly a handwriting expert/forensic expert to examine the signature and writing on the questioned document and compare it with agreed specimen signatures/writings of the plaintiff and the expert would come up with a report which will be presented in court. The determination of whether the transfers were forged would obviously give foundation to determination of the question of whether the transfers were valid. If the transfers were forgeries, then obviously it would be invalid. However if they were not forgeries the question is whether there is any other matter for trial concerning the transfer of shares.

On 12 July 2012, the court did not formally receive any report and the matter was fixed for 6 September 2012 for counsels to submit on the report. It was reported that the defendant did not agree to the expert but the plaintiff proceeded to get a handwriting experts report which was filed on court record. The defendant also got a handwriting expert report. The court ruled that the Department of the Scientific Aids Laboratory, Police Headquarters would review both reports. One dated 11 July 2012 and another one dated 18th of August 2012. Counsels would review all specimen signatures and agree on them before submitting them for the joint review exercise. On 14 March 2013 the court was informed that there were three reports. The first report was made by AM Ntarirwa dated 16th of March 2012. That report was contested by the plaintiffs. There was another report dated 11 July 2012 by Chelangat Sylvia. The third report was procured by the plaintiffs independently and dated 18th of August 2012 signed by one Ezati Samuel. The two reports were made after the reference.

Finally on 12 November 2013 Samuel Ezati appeared to present a joint report made by Chelangat Sylvia and Mr Ezati Samuel. He was examined by both counsels and they subsequently addressed the court in written submissions on the implications of the reference report.

Section 26 of the Judicature Act provides as follows:

"(1) The High Court may, in accordance with the rules of court, refer to an official or special referee for inquiry and report any question arising in any cause or matter, other than in a criminal proceeding.

(2) The report of an official or special referee may be adopted wholly or partly by the High Court and if so adopted may be enforced as a judgement or order of the High Court."

Subsection 1 of section 26 quoted above gives the High Court discretion in accordance with the rules of court to refer to an official or special referee for inquiry and report any question arising in any cause or matter other than in a criminal proceeding. In the matter before the court, the court did not exercise any discretionary powers under the rules of court to refer any matter to an official or special referee and section 26 (1) of the Judicature Act is inapplicable. This is because the reference was made by consent of counsels albeit on the advice of the court. Subsection 2 of section 26 only deals with the report of an official or special referee and because subsection 1 is inapplicable, it is also inapplicable to the circumstances of this case.

The applicable rule is section 27 which deals with trial by a referee or arbitrator. Section 27 of the Judicature Act provides that where in any cause or matter other than a criminal proceeding where all the parties interested who are not under disability consent, and secondly subsection (b) where the "cause or matter requires any prolonged examination of documents or any scientific or legal investigation which cannot in the opinion of the High Court, conveniently be conducted by the High Court through its ordinary officers", the matter may be referred to a referee. Therefore it is very apparent that the court and the parties moved under section 27 (a) and (b) of the Judicature Act. This is because the parties agreed to the appointment jointly of the forensic/handwriting expert to consider the questioned document against specimen signatures to be provided by the parties. Secondly section 28 of the Judicature Act provides that in all cases of reference to a referee or arbitrator, the referee or arbitrator shall be deemed to be an officer of the High Court and subject to the rules of court and shall have such powers and conduct the reference in such manner as the High Court may direct. In this case, all that the referee was required to establish was whether the questioned signature was the signature of the plaintiff. The

matter in contention which is the subject matter of the reference is whether the transfer forms for 1000 shares alleged to have been executed by the plaintiff in favour of the first defendant was executed by the plaintiff. This is a question of whether the plaintiff actually signed the transfer document which was registered with the Registrar of Companies and reflected in the company returns.

Consequently the task of the referee was to establish a question of fact. Section 27 of the Judicature Act deals with trial and therefore the question of whether the signature was that of the plaintiff or was a forgery was the only matter for trial by the referee. The mode of production of evidence was by availing to the forensic expert, agreed specimen signatures of the plaintiff which will form data for comparison of the questioned signature for purposes of a scientific investigation or a forensic investigation by the referee.

Consequently the referees made their findings of fact and the same has been tendered in court as part of the findings of the court. For the moment I need not refer to the findings of the referee. The second question for consideration is whether that was the conclusion of the trial. This depends on the effect of the findings and the matters which under the rules are for resolution of the suit.

In the joint scheduling memorandum signed by both counsels and filed on court record on the 9th of May 2012, the following are the agreed facts. Firstly that the second defendant was incorporated in 1984 with a share capital of Uganda shillings 5,000,000/= divided into 5000 shares of shillings 1000 each. Secondly at incorporation, the plaintiff, the first defendant and Majid Ahmad, all brothers subscribed and were later each allotted and paid up shares then worth Uganda shillings 1,000,000/= only. Thirdly the third defendant is the registrar of companies with capacity to sue and be sued. Among the agreed issues was firstly whether the plaintiff transferred his 1000 shares to the first defendant. Secondly whether the first and second defendants connived and contravened the Articles of Association of the second defendant and illegally, fraudulently and unlawfully expropriated and transferred the plaintiff's shares. The third issue is on the remedies available to the parties.

Paragraph 3 (i) of the plaint prays for declaration that the transfer and registration of 1000 shares into the second defendant is illegal, unlawful and ultra vires the company's articles of

Association. This is denied by paragraph 4 of the written statement of defence of the first and second defendants.

I have carefully considered section 27 of the Judicature Act. The particular provision is section 27 (b) which is relevant to the matter before the court. Firstly in subparagraph (a) the parties interested and are not under disability should consent to the trial by referee or an arbitrator. Secondly under subparagraph (b), it is not necessarily the entire dispute that maybe referred but may be any particular matter or the whole matter depending on the circumstances of the case. Section 27 (b) of the Judicature Act provides as follows:

"The cause or matter requires any prolonged examination of documents or any scientific or legal investigation which cannot, in the opinion of the High Court, conveniently be conducted by the High Court through its ordinary officers; or..."

There is no doubt in my mind that the matter or cause the subject matter of the reference to the forensic experts required scientific investigation on the issue of whether the transfer forms transferring 1000 shares from the plaintiff to the first defendant and in the second defendant company was duly executed by the plaintiff. There was no order that the specific issue which was referred to the forensic referee would finally resolve the dispute. It was only implied by counsels that the dispute could be resolved through such examination/investigation and report. As indicated above, both counsels were required to agree on the specimen signatures of the plaintiff for purposes of comparison with the questioned signature on the transfer forms. That is exactly what the referees did.

The controversy that arose by the submission of several reports was resolved by asking the two forensic examiners to reconcile their findings by considering the same specimen signatures and coming up with a joint report. It was also noted that the forensic experts came from the same department. Consequently the final report based on the reconciliation effort to examine common specimen signatures was conducted.

If there are any other matters for resolution, it would depend on the issues arising from the pleadings. Under order 15 rules 1 of the Civil Procedure Rules issues of fact or law arise when a material proposition of fact or law is affirmed by one party and denied by the other. The forensic examiner dealt with questions of fact and determined the questions. The court has a right to rely

on experts to deal with certain questions of fact which require scientific investigation. The trial by experts is a trial by the court of the matter referred for scientific investigation, auditing etc.

Consequently the pleadings includes the issue of whether the transfer of the shares is ultra vires the Articles of Association of the second defendant.

In those circumstances, the court will not pronounce itself finally on the suit before hearing any other issues arising from the pleadings. The report of the forensic examiner will obviously form part of the judgement after the suit has been heard in its entirety. The remainder of the suit if any will be fixed for hearing on the basis of witness statements already filed in court.

Delivered this 25th day of November 2013

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Abbas Bukenya for the plaintiff

Plaintiff not in court

First Defendant in court

Defendants counsel absent

Christopher Madrama Izama

Judge

25 November 2013