THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO 180 OF 2010

KENYA SEED COMPANY LIMITED}.....PLAINTIFF

VERSUS

1. **NATHANIEL KIPKORIR TUM}**
2. **EUFRAZIO JULIAO GOES}.....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff's action against the Defendants jointly and severally as disclosed in the plaint is for declarations that the shares they hold in the business concern known as Mount Elgon Seed Company Ltd was held in trust for the Plaintiff. The Plaintiff seeks orders for transfer of the shares from the Defendants to the Plaintiff or its appointed nominee, general damages for breach of the fiduciary duty owed to the Plaintiff by the Defendants and costs of the suit.

The Defendants admit holding shares in the business concern known as Mount Elgon Seed Company Ltd but denied that the shares were held in trust for the Plaintiff. At the hearing of the suit Counsels Siraje Ali represented the Plaintiff while Counsel Oscar Kihika represented the Defendants.

In the joint scheduling memorandum the following facts are admitted:

1. The Plaintiff is a limited liability company incorporated under the laws of Kenya.
2. The first and second Defendants are the former Managing Director and Finance Director respectively of the Plaintiff Company.
3. The Plaintiff produces 90% of the seed maize in Kenya and is a major exporter of seed maize and other seeds to the rest of the Great Lakes Region.
4. In 2002 during the tenure of the Defendants as Managing Director and Finance Director respectively of the Plaintiff Company, the Plaintiff Company through its board of directors decided to expand operations in the Great Lakes Region which necessitated the incorporation of subsidiaries in Uganda and Tanzania.

5. Pursuant to this position the Plaintiff company commissioned it chief accountant to present a paper on the Plaintiff company's expansion programme, the viability of expansion and the modalities of the expansion in the Great Lakes Region
6. In the year 2003, the government of Kenya, made changes within the administration of the Plaintiff Company and as a result the Defendants no longer held any positions in the company.
7. The matter referred to under paragraph 11 of the Defendant's written statement of defence, as pending in the Court of Appeal of Kenya was determined by the said Court of Appeal of Kenya on 10 December 2013.

The agreed issue for trial is:

Whether the shares held by the Defendants in Mount Elgon Seed Company Ltd are held by them in trust for the Plaintiff or are held by them in their own right?

The Plaintiff called one witness Mr Edward Muwanga PW1 while Counsel for the Defendant opted to proceed on the basis of agreed documents and facts and did not call any witnesses. Subsequently the court was addressed in written submissions.

The Plaintiff's submissions

The brief facts averred in the year 2002 and during the tenure of the Defendants as Managing Director and Finance Director respectively, the Plaintiff decided to expand its operations in Uganda by incorporating subsidiaries therein. To do so would be Plaintiff company commissions it chief accountant to present a paper on the Plaintiff's behalf for the proposed expansion programme. The report of the chief accountant was tabled and discussed and the Plaintiffs board of directors shared by the first Defendant and attended by the second Defendant agreed to incorporate Mount Elgon Seed Company Ltd as a company wholly owned by the Plaintiff Company. At the incorporation of Mount Elgon Seed Company Ltd, the authorised share capital was Uganda shillings 5,000,000/= divided into 5000 shares out of which the Defendants by virtue of their position in the Plaintiff company took up one share each as promoters and initial subscribers of the company's memorandum and articles of Association. In the year 2003, the Government of Kenya, made changes in the administration of Kenya Seed Company Ltd as a result of which the Defendants were removed from their positions in the company. On 24 April 2006 the Plaintiff's lawyers Messieurs Kimamo Kuria Advocates wrote to the Defendants requesting them to transfer back to the company shares that had been allotted to them by virtue of their positions as managing director and finance director of Kenya Seed Company Ltd respectively. On 17 May 2006 the Defendants wrote back to the Plaintiff's lawyers stating that the shares belonged to them in their private capacities and could only transfer them to the Plaintiff Company upon a sale or a willing buyer and willing seller basis.

The Plaintiff's case is that the Defendants were noted in the memorandum and articles of Association of Mt Elgon Seed Company Ltd as the promoters or initial subscribers of the said

company and as trustees for the Plaintiff in their fiduciary capacities as managing director and finance director respectively. This is borne out by the fact that their respective offices are also reflected in the memorandum and articles of Association. The intention of the Plaintiff to permit the Defendants to take up shares is reflected in the various minutes of board meetings which show that it was strictly for purposes of registration of the company and not to bestow upon the Defendant any proprietary interest in the subsidiary company. Counsel for the Plaintiff maintains that due to their respective fiduciary capacities, the Defendants acted on behalf of the company and did not have any proprietary interest in the shares of the subsidiary company. PW1 Mr Muwanga at the material time was a senior officer with Livingston registrars and had been instructed by the Plaintiff Company to incorporate Mt Elgon Seed Company in Uganda. His testimony is that the Defendants had one share each in Mount Elgon seed company Ltd as trustees for the Plaintiff and not as owners of the said shares in their own right. Furthermore PW1 testified that the costs of incorporation were borne solely by the Plaintiff and the Defendants did not spend any money towards incorporation or purchase of shares.

On the contention of the Defendants in their written statement of defence that the Defendant has called the shares in their own right and not as trustees and that the memorandum and articles of Association of Mount Elgon seed company Ltd expressly prohibits the holding of shares upon any trust, article 2.6 which prohibits the holding of shares upon trust sets up exceptions to the general rule. These include situations where the holding of shares in trust is expressly permitted under the articles of Association; where the holding of shares in trust is expressly permitted under the law; and thirdly where a court of competent jurisdiction makes an order stating that the shares in question are being held under trust. On that basis this court can determine that the shares are held by the Defendants in trust for the Plaintiff. Counsel relied on the definition of a trust in Black's Law Dictionary as a right enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title. Furthermore for a trust to be valid, it must involve specific property, reflect the settlor's intent, and be created for a lawful purpose. Counsel further relied on the definition of the trust under section 1 of the Trustees Act cap 164 laws of Uganda which extends the meaning of trust to implied and constructive trusts. Counsel also relied on the definition of a trust **in Gathiba vs. Gathiba [2001] 2 EA 342** where the court approved the definition in Osborn's Concise Law Dictionary. On the basis of those definitions Counsel submitted that the shares were held by the Defendants upon a resulting trust for Kenya Seed Company Ltd.

With reference to the definition in Black's Law Dictionary, the minutes of the Board of Directors meeting reflects the intention of the Plaintiff Company for the shares to be held by the Defendants for the benefit of the Plaintiff. Secondly shares are a form of specific property. Thirdly Mount Elgon Seed Company Ltd was incorporated for a lawful purpose to promote the activities of the Plaintiff Company in Uganda. Furthermore the facts and circumstances fall within the definition of a resulting trust in the case of **Gathiba vs. Gathiba [2001] 2 EA 342**. In that case it was held that a resulting trust is an implied trust where the beneficial interest in

property comes back, or results for the benefit of the person or his representative who transferred the property to the trustee or provided the means of obtaining it. These include where upon purchase, property is conveyed into the name of someone other than the purchaser, there is a resulting trust in favour of him or her who advances the purchase money but not where it would defeat the policy of the law. In conclusion Counsel submitted that the shares held by the Defendants in Mount Elgon Seed Company Ltd, result in favour of the Plaintiff as the person who provided the means of obtaining it. Under the circumstances the Plaintiff has made of the case on the balance of probability that the two shares in Mount Elgon Seed Company Ltd held by the Defendants are held by them under a resulting trust for the Plaintiff.

Submissions of the Defendants Counsel in reply

The Defendants Counsel submitted that the Defendants hold the shares in Mount Elgon Seed Company Ltd in their private capacities and can only transfer them to the Plaintiff upon a sale on a willing buyer and willing seller basis.

The Defendants were noted in the memorandum and articles of Association of Mount Elgon Seed Company Ltd as the promoters and/or initial subscribers of the company and not as trustees for the Plaintiff in their fiduciary capacities as Managing Director and Finance Director respectively. The writing of the Defendant's respective offices in the memorandum and articles of Association occurred because they were required to do so. This is because the form in which their offices were stated required them to indicate their names, postal addresses and occupations and that is what they did. This cannot be used to imply that they hold the shares as trustees.

The Defendants Counsel submitted that Mount Elgon Seed Company Ltd was incorporated under the provisions of the repealed Companies Act Cap 110. Counsel relied on section 27 (1) of the Companies Act Cap 110 which provides that the subscribers to the memorandum of the company shall be deemed to have agreed to become members of the company and on its registration to be entered as members in the register of members. Upon registration of the company, a subscriber automatically becomes a member and holder of the shares for which he or she has signed the even if the company commits to fulfil its duty to him or her or to put him or her on the register or to allot the shares to him or her.

There is no express clause in the memorandum and articles of association of Mount Elgon Seed Company Ltd indicating that the Defendants are subscribed therein as trustees for the Plaintiff. A promoter stands in a fiduciary position with respect to the company which he promotes from the time he subscribes until when he ceases to be a promoter thereof according to Halsbury's Laws of England page 94 paragraph 194. Furthermore the Defendants were the promoters/subscribers were not acting as directors of Kenya Seed Company Ltd notwithstanding their position as directors therein and notwithstanding the mention of their title as directors in Mount Elgon Seed Company Ltd. The Defendants Counsel reiterated submissions that the Defendants were acting in a whole new capacity separate from the roles in the Plaintiff Company. Furthermore the only

duty Defendants owed in this new capacity was to Mount Elgon Seed Company Ltd and not to Kenya Seed Company Ltd which is a different entity.

As far as the evidence is concerned minutes of the 204th meeting of the board of directors of the Plaintiff Company only discloses that the Plaintiff Company had been advised that it would be in the company's interest to have separate companies incorporated in both Uganda and Tanzania. The members present in the meeting proposed names for the companies and it is stated that the board unanimously approved the request to have the companies incorporated. The minutes of the 205th meeting of the board of directors of the Plaintiff Company held on 17 October 2002 only states that the directors settled on the names of the companies in Uganda and Kenya. Furthermore the minutes of the 206 meeting of the Board of Directors of the Plaintiff Company held on 18 November 2002 only states that it was confirmed that the company names had been reserved. Nothing in the minutes discloses that the Defendant would take up shares neither is it indicated that the Defendants on their own opted to subscribe for shares. There is no indication in the minutes that it was not the intention of the Plaintiff for the Defendants to have proprietary interest in Mount Elgon Seed Company Ltd. Furthermore under section 3 (1) of the Companies Act Cap 110 the minimum number of shareholders in any private company was 2. The effect of the Plaintiff's submission that the Defendants hold shares in trust for Kenya seed company would amount to there being only one shareholder in Mount Elgon Seed Company Ltd contrary to section 3 (1) of the Companies Act cap 110 (repealed). To assert that the Defendants had no proprietary interest will amount to an attempt to use the courts of law to give effect to an illegality. Counsel further relied on the case of **Makula International Ltd versus Cardinal Nsubuga Wamala [1982] HCB 11**. In that case it was held that a court of law cannot sanction what is illegal and illegality once brought to the attention of the court overrides all questions of pleading, including any admissions made thereon.

Article 2.6 of the articles of Association of Mount Elgon Seed Company Ltd prohibits any person from being recognised by the company as holding any share upon a trust. It further provides that the company shall not be bound or compelled to recognise any equitable, contingent, future or partial interest in any share except as otherwise provided for under the articles or under an order of a court of competent jurisdiction. The company only recognises an absolute right to the entirety of the shares in the registered holder. The articles set out the intention of the shareholders at the time of incorporation.

On the question of whether the court can determine whether the shares held by the Defendants in Mount Elgon Seed Company Ltd are held by them in trust for the Plaintiff company, on the ground that the prohibition under article 2.6 of the articles of association do not apply to such a case, the Defendants Counsel submitted that the Plaintiff only seeks to prove the intention of the parties at the time of incorporation and not necessarily the detailed effect of this provision. The article reinforces the assertion that a resulting trust was created is only an afterthought and not the intention of the parties. The articles of Association supplement the statutory provision that

the company is entitled to create a shareholder as the absolute owner of his registered shares and the company is not bound to recognise any equitable interest in the shares.

On the question of whether the cost of incorporation was borne by the Plaintiff, the Defendant's position is that no evidence was led to prove the assertion. On the contrary the Defendant's Counsel maintains that the shares were allotted to the Defendants for valuable consideration as categorically pleaded in paragraph 13 of the written statement of defence. It is further asserted that the Defendants invested heavily in Mount Elgon Seed Company Ltd through share subscription and reinvestment of earnings from the company business.

Counsel for the Plaintiff contended that the Plaintiff is the de facto controller of Mount Elgon Seed Company Ltd having several powers including power to appoint the board of directors and management. However PW1 testified under cross examination that the Plaintiff held no shares in Mount Elgon Seed Company Ltd and could therefore not be described as a holding or controlling entity. In any case the Defendants Counsel maintains that it has no bearing on the fact of the Defendant being shareholders. The majority shareholder would ordinarily be the de facto controller of the company and that it does not strictly depend on the proprietary interest in the company moreover it is not proof of trust.

The Defendants Counsel further submitted that the trust is a relationship recognised by equity. It arises where property is vested in a person or persons known as trustees who are under a duty to hold it for the benefit of other persons known as the beneficiaries. He further relied on the definition of a resulting trust in Black's Law Dictionary. In the definition a resulting trust is a trust imposed by law when property is transferred under circumstances suggesting that the transferor did not intend the transferee to have beneficial interest in the property. 'Resulting trust' is also referred to as 'implied trust' or 'presumptive trust'. Counsel contended that for the court to arrive at the conclusion that there was a resulting trust; oral evidence must prove the fact of payment by the beneficiary to establish the trust. Secondly the evidence must indicate that the beneficiary who claims as the real buyer provided the money as the purchaser and the money advanced being conveyed to the person in whose name the property was transferred or conveyed or issued. Where evidence establishes that was the intention of the person who took the conveyance should have beneficial interest, the person who provided the purchase money cannot later change his or her mind to claim a trust relationship. In the case of **Vandervell versus Inland Revenue Commissioners [1967] 1 All ER 1,** more light is cast on the definition of resulting trusts. Where a document creates a trust, it is a matter of construction of the document. However where the document is silent then there can be said to be a resulting trust but this is only a presumption and easily rebutted. All the relevant facts and circumstances can be considered in order to ascertain the intention with a view of rebutting the presumption. In summary of the holding of Mellish L.J. in the case of Fawkes vs. Pascoe referred to, Counsel contended that there can be no resulting trust where legal title to property is transferred to the holder for valuable consideration. He contended that the Defendants acquired their shares in Mount Elgon Seed Company Ltd for valuable consideration. Secondly the parole evidence rule

applies where the alleged resulting trust arises from a document which is capable of construction and not extraneous evidence except the document can be admissible aid to the court in reaching a decision on the matter. Furthermore the existence of a resulting trust is a mere presumption that is easily rebuttable by evidence. Article 2.6 of the articles of Association showed the clear intention that the Defendants would be vested with legal and beneficial ownership of the shares they subscribed for in Mount Elgon Seed Company Ltd. Lastly the presumption of resulting trust would arise where the donor intended to transfer the property to another or the transfer failed due to some mistake or failure to comply with legal requirements. Furthermore the case of **Gathiba versus Gathiba [2001] 2 EA 342** it was further held that there is a resulting trust in favour of him or her who advances the purchase money but not where it would defeat the policy of the law or where there is a presumption of advancement. In the instant case to hold that a resulting trust was created would be contrary to the law. This is because the Companies Act Cap 110 prescribes a minimum of two persons to incorporate a company.

On the Plaintiff's prayer for declaration that the Defendants hold the shares in trust for the Plaintiff and for an order of transfer of the shares to the Plaintiff or its nominee, the Plaintiff has failed to establish that it has any legal claim to the Defendant's shares as a beneficiary. In the circumstances the Plaintiff is not entitled to any of the reliefs sought in the suit and the suit should be dismissed with costs.

The Plaintiff's submissions in rejoinder

In rejoinder the Plaintiff's Counsel submitted that the Plaintiff will demonstrate that the Defendant did not acquire the shares for valuable consideration because the proof alleged does not meet the standard of proof required by law. First of all under section 101 (1) of the Evidence Act the burden is on the person who desires any court to give judgement as to any legal right or liability dependent on the existence of facts to prove that those facts exist. Secondly under subsection 2 of the above cited section of the Evidence Act, it is provided that where a person is bound to prove the existence of a fact, it is said that the burden of proof lies on that person. Under section 106 of the Evidence Act, where a fact is especially within the knowledge of any person, the burden of proving that fact is upon that person. Under section 2 (3) of the Evidence Act a fact is proved when considering the matters before it when the court either believes it to exist or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist. During the trial neither of the Defendants led evidence. Neither of the Defendant attended court to give evidence on the alleged consideration they had given for the shares in Mount Elgon Seed Company Ltd. Moreover the consideration allegedly given by them was a fact especially within their knowledge.

The Plaintiff's Counsel further submitted that the only reference to the consideration allegedly paid by the Defendants is an averment in paragraph 13 of the written statement of defence. However the Defendants neither testified nor adduced any other oral testimonies or documentary

evidence to prove their averments in the written statement of defence. The Defendant failed to prove that they gave valuable consideration for their shares in Mount Elgon Seed Company Ltd.

Furthermore the Plaintiff’s Counsel contests the parole evidence rule which excludes extraneous evidence except the document that a resulting trust only arises where the document vesting the property is silent as to the purpose of the transfer. The Plaintiff's case is that the resulting trust arises out of the minutes of the meeting of the board of directors of the Plaintiff company and tax invoice number 307 from Livingstone Registrars which shows that the Plaintiff Company paid for the incorporation of Mount Elgon Seed Company Ltd. And at the trial the Defendants did not deny the contents of the minutes of the board of directors meetings or the tax invoice number 307.

Concerning the provisions of article 2.6 of the articles of Association expressly excluding the possibility of a resulting trust as submitted by the Defendant, Counsel referred on an excerpt of Lord Upjohn's speech in the case of **Vandervell versus Inland Revenue Commissioners** (supra) shows that there is a presumption where a document is silent that the resulting trust arises in favour of the transferor until that presumption is rebutted. All the relevant facts and circumstances can be considered in order to ascertain the intention of the transferor with a view of rebutting this presumption.

Concerning article 2.6 of the articles of Association the question is whether it rebuts the presumption that the shares of Mount Elgon Seed Company Ltd are held in trust by the Defendants for the benefit of the Plaintiff. Article 2.6 clearly provides that the company will not recognise any share being held in trust except where it is provided for under the articles of Association. Secondly, it excludes situations where it is provided for by the law. Thirdly it excludes situations where a court of competent jurisdiction makes an order that the shares in question are held in trust. Article 2.6 therefore creates exceptions and circumstances where the company would recognise its shares as being held under a trusteeship arrangement. Counsel reiterated submissions and made reference to excerpts of the meetings of the board of directors of the Plaintiff. He made reference to the 204th meeting of the board of directors of 1st of July 2002 page 34 of the list of documents. Secondly meeting 205 exhibit P9 at page 36. The minutes of the 260 meeting at page 53 of the list of documents. Exhibit P7 which is a progress report presented to the board of directors by the first Defendant in his capacity as the managing director of the Plaintiff. In the minutes of the board the company is referred to as the subsidiary in Uganda after its incorporation. The minutes clearly demonstrate that Mount Elgon Seed Company was incorporated as a subsidiary of the Plaintiff for purposes of expanding the Plaintiffs business in Uganda.

Concerning the submission that for the honourable court to hold that there was a resulting trust in favour of the Plaintiff would be contrary to law since it would mean that the Plaintiff is the sole shareholder of Mount Elgon Seed Company Ltd contrary to section 3 (1) of the repealed Companies Act Cap 110, this section is no longer good law. This is because section 4 (1) of the

Companies Act 2012, permit a sole shareholder to hold all the shares of the private company. The illegality complained about by the Defendants would only arise after a finding by the court that a resulting trust obtained in favour of the Plaintiff. In this case no illegality would arise since there is no longer a requirement under the law for a private company to have a minimum shareholding of two persons. For the sake of argument the Plaintiff's Counsel contends that even if section 3 (1) of the repealed Companies Act Cap 110 was still good law, no illegality would arise as the Plaintiff would have the option at the material time to nominate a person of its choice to hold one of the shares in trust for it. In the premises the Plaintiff's Counsel maintains that the Plaintiff has proved its case on the balance of probabilities that the shares held by the Defendants in Mount Elgon Seed Company Ltd are held about them on a resulting trust for the Plaintiff and judgement ought to be given in favour of the Plaintiff.

Judgment

I have duly considered the pleadings of the parties, the agreed facts and documents, the written submissions of Counsels and authorities cited. The only issue for determination is **whether the shares held by the Defendants in Mount Elgon Seed Company Ltd are held by them in trust for the Plaintiff or are held by them in their own right?**

At the hearing of the suit Counsel for the Defendants opted to proceed on the basis of admitted facts and documents and did not call any witnesses. On the other hand the Plaintiff called one witness who was cross examined and the suit proceeded to final submissions by way of written submissions by Counsel.

The crux of the dispute arises from the fact that the Defendants are the two sole subscribers to the memorandum and articles of association of Mount Elgon Seed Company Ltd. Mount Elgon Seed Company Ltd was apparently and according to the documentary evidence which I shall refer to in due course incorporated in Uganda and intended to be a subsidiary company of Kenya Seed Company Ltd, the Plaintiff in this suit. Mount Elgon Seed Company Ltd was incorporated according to exhibit P3 on 13 December 2002 with the first Defendant and the second Defendant subscribing to 1 share each and being the only two subscribers at the time of incorporation of the company in Uganda. According to the agreed facts in the year 2003 the Government of Kenya made changes within the administration of the Plaintiff Company and as a result the Defendants no longer hold any positions in the Plaintiff Company.

The Defendants held the position of Managing Director of the Plaintiff Company as far as the first Defendant is concerned and the Finance Director of the Plaintiff as far as the second Defendant is concerned. The genesis of incorporation of Mount Elgon Seed Company Ltd in Uganda is clearly reflected in several minutes of the Board of Directors meeting of the Plaintiff Company. I would refer to these minutes in turn.

Exhibit P4 are the minutes of the 204th meeting of the Board of Directors held on Monday 1st of July 2002. Under any other business Min.8/7/2002 the board was informed that the Plaintiff's

branches in Uganda and Tanzania led to a number of tax problems. After discussions the board unanimously approved a proposal to incorporate two companies in Tanzania and Uganda. Management was asked to keep the board informed regularly on the progress of the plan of incorporation of the two companies. The Plaintiff also relied on exhibit P9 which is a report of an intended expansion programme of the Plaintiff Company being a plan to expand the activities of the Plaintiff in marketing seeds in the Great Lakes Region. At page 4 of the financial report presented by the Chief Accountant and dated 16th of October 2002 it was proposed that the new company will be registered with a share capital of Uganda shillings 5,000,000/= divided into 1000 shillings per share. The registered share capital of the Tanzanian Company would be Tanzanian shillings 10,000,000/= at shillings 1000 per share. Exhibit P5 is yet another board meeting dated 17th of October 2002 in which the expansion programme of the Plaintiff was discussed. Minute 7/10/2002 on any other business give the rationale for expansion of the Plaintiffs business into Uganda and Tanzania which included double taxation problems, tendering problems and expansion limitations. It was agreed that the Ugandan company would be incorporated under the names “Nile Seed Company Ltd" or Mount Elgon Seed Company Ltd". Exhibit P6 are the minutes of the 206th meeting of the Board of Directors held on Monday 18th of November 2002. On the expansion programme it was indicated that the names "Mount Elgon Seed Company" had been obtained and reserved for use while that of "Nile Seed Company Ltd" was not available in Uganda.

Exhibit P7 is a progress report to the directors for board meeting to be held on 18 November 2002 by the first Defendant as the Managing Director in which he reports that the incorporation of the new separate entities in Tanzania and Uganda were at an advanced stage.

I have further considered the evidence of incorporation of the company namely Mount Elgon Seed Company Ltd, whose Memorandum and Articles of Association is exhibit P3. The company was incorporated on 13 December 2002 in Uganda and under the laws of Uganda (repealed Companies Act cap 85 laws of Uganda (now 110)). Specifically clause 4 of the objects clause indicates that the liability of the members is limited and that the share capital of the company is Uganda shillings 5,000,000/= divided into 5000 shares of Uganda shillings 1000 each. At page 11 of the memorandum of association the first Defendant subscribe to 1 share as a subscriber and the second Defendant subscribed to 1 share as a subscriber and signatures are appended on the 21st day of November 2002. Article 16.4 of the articles of association provides that the office of director shall not require any share qualification. Furthermore article 16.1 provides that unless otherwise determined by the company in a general meeting, the number of directors shall not be less than two or more than nine. From the above facts the legal situation is that the Defendants control Mount Elgon Seed Company Ltd. No return of allotment has been given or adduced in evidence to show whether the Plaintiff Company subsequently subscribed to the shares in Mount Elgon Seed Company Ltd.

The Defendants Counsel contended among other things that the submission of the Plaintiff's Counsel that there was a resulting trust in favour of the Plaintiff company when Mount Elgon

Seed Company Ltd was incorporated is contrary to section 3 (1) of the repealed Companies Act cap 110 which provides that any two or more persons associated for any lawful purpose may subscribe their names in the memorandum of association and otherwise to form an incorporated company. In other words the submission is that for there to be any company incorporated under the above Act, there has to be a minimum of two subscribers to the memorandum of association. Counsel contended that the resulting trust in favour of the Plaintiff would be an illegality as it would imply that the Plaintiff was incorporated with only one person as a subscriber. Counsel further relied on the case of **Makula International versus Cardinal Nsubuga [1982] HCB 11** for the proposition of law that an illegality once brought to the notice of court overrides all questions of pleadings including any admissions made therein. Secondly that the court cannot sanction an illegality by making a declaration that the company shares in Mount Elgon Seed Company Ltd held by the Defendants as subscribers subscribing to 1 share each are held in trust for the Plaintiff. The Plaintiff's Counsel on the other hand submitted that the new Companies Act 2012 permits a company to be incorporated by one subscriber only. Alternatively that under clause 2.6 of the articles of association of Mount Elgon Seed Company Ltd, a resulting trust may be recognised and declared by a court of law and until such a declaration or order is made, the company is duly subscribed by two persons namely the Defendants. It is a submission to the effect that even if the court makes such an order, it is now lawful under the Companies Act 2012 to have one person as the only subscriber to the memorandum of association of a company and it cannot be illegal for the number of subscribers to fall below the former statutory minimum of two persons.

In my opinion the point of law has to be partially resolved on the basis of the law before considering the evidence of whether the Defendants hold the shares stated against each of their names in the memorandum of association in trust for the Plaintiff. The point of law is to the effect that the court cannot grant the remedies sought by the Plaintiffs on the ground that to hold that the shares are held in trust for the Plaintiff would be tantamount to holding that the company was incorporated by one subscriber contrary to section 3 (1) of the repealed Companies Act Cap 110.

I have duly considered some of the statutory provisions of the Companies Act Cap 110 (repealed). There is no controversy about the fact that the company was incorporated under the repealed Companies Act Cap 110. Under section 4 requirements with respect to the memorandum are provided. Under section 4 (4) (a) thereof no subscriber of the memorandum may take less than one share. Furthermore under subsection (4) (c) of section 4, each subscriber must write opposite to his or her name the number of shares he or she takes. It is a further requirement for the memorandum to be signed by its subscriber in the presence of at least one attested witness who should write his or her occupation and postal address (see section 5 (1) of the Companies Act Cap 110). Section 5 (2) further requires that opposite the signature of every subscriber should be written his or her full name together with his or her occupation and postal address.

The Companies Act Cap 110 therefore required a minimum of two persons to subscribe to the memorandum and articles of association prior to its incorporation. Upon registration or incorporation the memorandum and articles of association constitute a contract between the subscribers or members. The subscribers are deemed to become members of the company under section 27 (1) of the repealed Companies Act cap 110 and shall be entered as members in the register of members. Before taking leave of the statutory provisions, the Companies Act Cap 110 envisaged a private company having its membership reduced below two. Where the membership falls below two members, and the company carries on business for more than six months, the surviving member is liable for all the debts of the company contracted during that time and may be sued for the payment of those debts (see section 32). Consequently having the membership fall below the statutory minimum is not illegal per se. The above statutory provisions ensure that the company is incorporated with a minimum number. Consequently the point of law submitted on is narrowed down to the issue of whether the incorporation of the company is illegal on the ground that the incorporation was done by one party through two trustees. I have carefully considered the point and I must point out that this seems not to be the result anticipated by the Defendants Counsel in submitting on the question of the minimum numbers required for incorporation of a company.

Notwithstanding the above findings, the provisions of section 3 (1) of the repealed Companies Act Cap 110, which the Defendant's Counsel relied on to specify the statutory minimum, deals with subscription to the memorandum of association prior to incorporation and not after incorporation. Section 32 on the other hand deals with a situation where the number of shareholders or members of a private company is reduced to fewer than two members after due incorporation. I will therefore confine the submission to the point at which a court of law may declare under article 2.6 of the articles of association that the Defendants hold their respective shares in trust for the Plaintiff. Upon those premises I agree with the Plaintiff's Counsel that there would be no illegality under the new Companies Act 2012 for purposes of incorporation. The new Companies Act however does not have retrospective effect on the incorporation of Mount Elgon Seed Company Ltd. I must further add that the illegality that can be considered is illegality on incorporation of the company. Under the repealed Companies Act only two or more members can subscribe to the memorandum of association of a private limited liability company. The memorandum cannot be subscribed to by only one person as that would be unlawful. Because only one share was subscribed against each name, the submissions of the Plaintiff would suggest that the Plaintiff was hiding its identity under the two Defendants for purposes of compliance with the law of incorporation of a private company at the material time Mount Elgon Seed Company Ltd was incorporated. I do not however see any evidence from the board meetings that this was the intention of the Plaintiff. Before concluding the question of illegality, I will consider the intention of the Plaintiff from the available evidence.

Furthermore, before making conclusions on the evidence that I have summarised above I will commence by making reference to the authorities Counsel addressed court on concerning the

issue of whether there was a resulting trust in favour of the Plaintiff as a beneficiary and the Defendants are the trustees. Black's Law Dictionary 7th Edition at page 1417 defines a resulting trust as a trust imposed by law when property is transferred under circumstances suggesting that the transferor did not intend for the transferee to have the beneficial interest in the property. Both Counsel further addressed the court on the case of **Vandervell versus Inland Revenue Commissioners [1967] 1 All ER 1** and I refer to the judgment of Lord Reid at page 5 agreeing with the definition of a resulting trust in Underhill On Trusts 11th edition page 172 that:

> *"When it appears to have been the intention of the donor that the donee should not take beneficially there will be a resulting trust in favour of the donor."*

According to Upjohn at page 8 the principles to ascertain whether there is a resulting trust are as follows:

> *"Where A transfers, or directs a trustee for him to transfer, the legal estate in property to B otherwise than for valuable consideration it is a question of the intention of A in making the transfer whether B is to take beneficially or on trust and, if the latter, on what trusts. If, as a matter of construction of the document transferring the legal estate, it is possible to discern A's intentions, that is an end of the matter, and no extraneous evidence is admissible to correct and qualify his intentions so ascertained. If, however, as in this case (a common form share transfer), the document is silent, then there is said to arise a resulting trust in favour of A; but this is only a presumption and is easily rebutted. All the relevant facts and circumstances can be considered in order to ascertain A's intentions with a view to rebutting this presumption."*

Both Counsels referred to the above passage. The passage deals with the transfer of legal estate from one party to another. Secondly it provides that where the documentation involved discloses the intention of the transferor, there would be no need to look for extraneous evidence to ascertain the intention of the transferor. Where the document of transfer is silent there is said to be a resulting trust in favour of the transferor which presumption is easily rebutted by evidence. In such cases all the relevant facts and circumstances will be investigated to ascertain the intention of the transferor.

I would like to set out the distinction between the Plaintiff's case and the matter considered in the case of **Vandervell versus Inland Revenue Commissioners** (supra). In the Plaintiffs case the clear intention of its board of directors was to create a subsidiary company in Uganda and Tanzania. Secondly there was a clear intention to have two representatives of the board of the Plaintiff to take care of the Plaintiff's interest in the subsidiary company. Thirdly there was no transfer of shares. The company was being incorporated for the very first time and no provision was made as to how the shareholding of the company would be other than to provide for what the nominal share capital of the company would be. In the case of **Vandervell versus Inland Revenue Commissioners** the analogies given by their Lordships deal with the transfer of

property without indicating the intention to transfer the property in the names of a person whether to take beneficially or as a trustee for the transferor. In such cases, the legal interest in the property moves from the transferor to the transferee without a clear intention of the transferor as to who takes beneficial interest of the property. In the Plaintiffs case there is a clear intention of incorporating a subsidiary company for specified purposes only.

As far as that intention is concerned, a company was indeed incorporated and the only evidence adduced in court shows that the two Defendants took only one share each and have not allotted the remainder of the shares. The obligation of the Defendants would be to ensure that the Plaintiff is properly represented and owns the business of expansion of the Plaintiff's business depending on the circumstances of how much money the Plaintiff was willing to put in. One share each represents less than 1% of the nominal share capital of Mount Elgon Seed Company Ltd. Clause 4 of the memorandum of association clearly provides that the capital of the company is Uganda shillings 5,000,000/= divided into 5000 shares of Uganda shillings 1000 each. Two shares amounts to 0.04% of the nominal share capital of the company. It is also evident that the Defendant's duty was to incorporate Mount Elgon Seed Company Ltd and subsequently take further steps to ensure that the interest of the Plaintiff is realised. Those interests are not necessarily realisable by taking over the 0.04% shares which was a statutory requirement for incorporation of the company anyway.

The circumstances of the Plaintiff's case are peculiar in that the situation arose from a change in the management of the Plaintiff Company. The Defendants were previously Managing Director and Finance Director respectively of the Plaintiff Company. Exhibit P 11 is a letter dated 17th of May 2006 written to the lawyers of the Plaintiff Company in which the first Defendant writes that the status and appointment of the new board in the Plaintiff were matters to be decided by the courts in Kenya. Consequently the change in the management of the Plaintiff Company resulted in litigation in Kenya. By the time the Defendants filed their written statement of defence, the matter was pending in the Court of Appeal of Kenya. It was however determined by the Court of Appeal of Kenya on 10 December 2013. This appears in the agreed facts in the joint scheduling memorandum of Counsel. It appears from exhibit P 11 that the Plaintiffs lawyers had requested the Defendants to sign resignation letters and they indicated that they did not wish to sell their shares in the Plaintiff company or its subsidiaries including Mount Elgon Seed Company and the other company incorporated in Tanzania namely Kibo Seed Company Ltd. Exhibit P 10 is a letter from Kimamo Kuria advocates in which the advocates indicated that there were acting on behalf of the Plaintiff company Board. They indicate in the letter that by the time of incorporation of Mount Elgon Seed Company Ltd the first Defendant took one share by virtue of his position as Managing Director. In light of the changes in the directorship of the company/Plaintiff company the advocates requested the first Defendant to sign enclosed documents and return the same within seven days to facilitate transfer of shares. A similar letter was written to the second Defendant and was adduced in evidence as exhibit P12.

What has unfolded is therefore a dispute between the new management of the Plaintiff Company and the Defendants after the Defendants had been removed from management of the Plaintiff Company. No evidence has been produced about what happened between the time of incorporation of Mount Elgon Seed Company Ltd in December 2002 and the year 2006 when the matters resulted in the exchange of correspondence referred to above. There is no evidence about how the Defendants related to the Plaintiff Company on matters concerning the advancement of the Plaintiffs business of selling seeds in the Great Lakes Region. It is my firm conclusion that it was a legal requirement for incorporation of Mount Elgon Seed Company for there to be at least two subscribers. The Defendants fulfilled the bare minimum requirement under the Companies Act cap 110 (repealed). Subsequently, their duty was to facilitate the Plaintiff's interests. Those interests could be facilitated and actualised without affecting the 0.04% shares held by the Defendants reflected in the memorandum of association.

The obligations of the Defendants to the Plaintiff are not about the two shares held by the Defendants but about advancing the interest of the Plaintiff in its expansion programme. This may include allotting the necessary shares to fulfil the objectives of the Plaintiff.

I have considered the reference in the memorandum of Association to the Defendants as directors. I have already indicated that it was a requirement of the law under section 5 (2) of the repealed Companies Act Cap 110 for the Defendants to write their occupation and postal addresses against their names. That is not necessarily evidence that they held the shares in trust for the Plaintiff but compliance with the provisions of law for them to state their occupation and postal addresses.

Secondly I was addressed on the question of the evidential burden of the Defendants to testify on the question of whether they gave valuable consideration for the shares. I do not find this argument convincing simply because the parties filed a joint scheduling memorandum in which they agreed to certain facts and documents without indicating on whose behalf the facts and documents were admitted. The Defendant opted not call any of the Defendants as witnesses or to call any other witnesses in the matter. The Defendant is entitled to rely on the documentary evidence and agreed facts if at all it discloses sufficient materials to make their defence.

The case of the Plaintiff is simply a case in which there was a change in management which has generated a dispute. The Plaintiff has not lost its rights to advance its causes through Mount Elgon Seed Company Ltd. It has not lost the right to subscribe to the shares of Mount Elgon Seed Company Ltd. I do not agree that a resulting trust accrued upon the incorporation of Mount Elgon Seed Company Ltd. There was no transfer of property to the Defendants. What happened according to PW1 is that the Plaintiff organised the incorporation of Mount Elgon Seed Company Ltd and the Defendants subscribed to the bare minimum amount of shares allowed for a private company to be incorporated in the year 2002 under the Companies Act Cap 110 laws of Uganda which has since been repealed by the Companies Act 2012. I further agree that this is not evidence on the question of whether the Plaintiffs paid valuable consideration or the Defendants

paid valuable consideration for the shares. There was only a bare minimum subscription of one share each by the Defendants.

It was necessary to prove to the court whether the business of the Plaintiff was taken over by Mount Elgon Seed Company Ltd. There is no indication whatsoever whether the business of the Plaintiff which had hitherto existed in Uganda and had been run by the Plaintiff's branches was taken over by Mount Elgon Seed Company Ltd. There is no evidence that that business has been transferred to the Defendants or to Mount Elgon Seed Company Ltd. Expending money on incorporation only indicated that the Plaintiff was executing its plan to expand its business in Uganda in particular and the Great Lakes Region in general. It did not result in a transfer of property. In any case Mount Elgon Seed Company Ltd remains a separate entity from the Plaintiff duly incorporated under the laws of Uganda. Lastly I have examined the use of the term 'promoter' and whether the Defendants are mere promoters. According to **Words and Phrases Legally Defined, third edition volume 3 at page 441** the term "promoter" is not a legal term but a term of business. It is a convenient way of designating those who set in motion the machinery for incorporation of a company. Between pages 441 at 442 it is provided as follows:

> *"The term "promoter" is a term not of law, but of business, usually summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence. In every case the relief granted must depend on the establishment of such relations between the promoter and the birth, formation, and floating of the company, as to render it contrary to good faith that the promoter should derive a secret profit from the promotion. A man who carries about an advertising board in one sense promotes the company, but in order to see whether relief is obtainable by the company what is to be looked to is not a word or name, but the acts and the relations of the parties. Whaley Bridge Calico Printing Co v Green (1880) 5 QBD 109 at 111, Per Brown J"*

The Plaintiff is a promoter of the new company but is not yet a shareholder. It is in any case a private company. The Defendants did what was required by the law and further steps are to be taken. They did not lose their subscription status in Mount Elgon Seed Company Limited simply because they lost their management position in the Plaintiff. My conclusion is that in the absence of evidence of the business of the Plaintiff being taken over through conversion thereof to the Defendants benefit, by Mount Elgon Seed Company Ltd, there are no materials to suggest that the Defendants derived a secret profit by subscribing to the shares of Mount Elgon Seed Company Ltd. There is no evidence of transfer of the Plaintiffs businesses in Uganda to the new entity. If anything there is no evidence of how the Defendants transacted business on behalf of the Plaintiff between the years December 2002 up to 2014. There is no evidence of any complaint that the Plaintiff was dissatisfied by how the Defendants managed Mount Elgon Seed Company Ltd. In the circumstances the Plaintiff has not proved its case even on the balance of probabilities. Furthermore nothing has stopped the Plaintiff and there is no legal impediment that I can see which prevents the Plaintiff from meeting with the Defendants to work out how the

interests of the Plaintiff can be realised or is being realised through the new company. Nothing bars the Plaintiff from taking a majority of the shares in the new company. There is no evidence that the Defendants have refused to cooperate with the Plaintiff in the business interests of the Plaintiff. There is no evidence of breach of duty in relation to advancement of the Plaintiffs interests in Uganda by the Defendants. What was demanded of the Defendants is for them to surrender their shares to the Plaintiff which share are the statutory bare minimum. For the moment I see no basis for the Plaintiff's demand since the holding of shares by the Defendants does not necessarily prejudice the Plaintiff's interests. The Plaintiff's action is accordingly dismissed with costs.

Judgment delivered in open court this 14th day of February 2014

Christopher Madrama Izama

Judge

Ruling/Judgment delivered in the presence of:

Siraje Ali for the Plaintiff but Plaintiff not in attendance

Oscar Kihika for the Defendant but Defendants not in attendance

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

14th February 2014