

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

HCT - 00 - CC - CS - 0499 - 2012

HAKIM SEMUWEMBA ::
PLAINTIFF

VERSUS

PIUS KAMUGISHA & 3 OTHERS ::
DEFENDANTS

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

The Plaintiff Hakim Semuwemba seeks judgment against Pius Kamugisha, Innocent Nahabwe, Robert Busingye and Blue Cube Ltd., the Defendants in these proceedings. He seeks a declaration that the 4th Defendant has been mismanaged by the 1st, 2nd and 3rd Defendants. He also seeks for an account to be taken in respect of the company affairs starting 2007 to date.

Furthermore, he seeks an order directing the Defendants to give account of the company's income and that the Plaintiff be paid dividends as a share holder.

The Plaintiff further seeks damages for breach of fiduciary duty, general damages, interest and costs of the suit.

During the hearing, the parties all agreed that the determining issue in this suit was whether the Plaintiff, who had left the company on 29th June 2009 had done so after selling his shares or not.

The facts to the background of these proceedings are fairly straight forward. The Plaintiff, 1st Defendant and the 3rd Defendant were all originally working with a company called SMS Media. It was a company that gave them the idea to form their own which they eventually did and registered as Blue Cube Ltd. The 3 were to be later joined by the 2nd Defendant, Nahabwe Innocent.

Each of these founding members had a shareholding of 33%. When they were joined by the 2nd Defendant following a resolution dated 10th September 2007, they agreed that he be assigned 10% of the unassigned shares of the company and that the other company directors namely; Robert Busingye, Pius Kamugisha and Hakim Semuwemba would each transfer 5% of their shares to Nahabwe.

The 4 shareholders now each held 25% shareholding.

According to PW2 Blue Cube was supposed to develop SMS content and transmit it through the networks to the subscribers of different companies. The money that was deducted from the subscribers phones, would be shared between the network companies and Blue Cube Ltd.

From the evidence of all the parties, it is clear that they had a difficult beginning with very little money flowing into the company and to sustain it, the 4 shareholders had to make contributions to the 4th Defendant by way of cash and non cash assets.

The shareholders were allocated responsibilities where the Plaintiff was placed in charge of Finance and Administration, the 3rd Defendant was the Technical Officer, the 1st Defendant was in-charge of Production and the Chief Executive Officer while the 2nd Defendant was the in-charge of Marketing.

Like in most cash strapped companies, the Plaintiff and the Defendants had misunderstandings. One of the causes of this was failure to give sufficient time to the company especially by the Plaintiff who had work somewhere else and was in most cases unavailable during working hours and yet he was in charge of Finance and Administration.

Some of the misunderstandings are clearly seen in the communication between the Plaintiff and the 1st Defendant mostly on issues of money and time expended in running the company.

In an email dated 2nd May 2009, the 1st Defendant in response to the Plaintiff's demand that they share the profits of the year replied as follows;

"I am also of the opinion that we build a company but not share profits every month. What would happen if we need to recapitalize? Would that mean that shareholders contribute again?"

The mails also indicated that the Administrator who was the Plaintiff was difficult to find at the company's premises. In one of his emails to his colleagues dated 4th March 2009, the Plaintiff wrote:-

“Please at any opportunity the board manages to sit. I can still not as yet guarantee that I will be present!!, I wish that the board puts to me exactly what am supposed to handle I do. This will form a written and formal yardstick against which the board would judge my performance.

I still think I will do the best I can under the circumstances of my prison like job, getting to our office late when everybody has packed up or is packing up; getting to our office when Innocent has moved off with the laptop!!. etcetra, etcetra!”

In yet another email, the 1st Defendant wrote to the Chief Finance Officer who was the Plaintiff,

“Chief Finance Officer, you mean you do not know what you are supposed to do? What does Finance and Administration do? Did you ask us to put it in writing? (some of it could be in writing somewhere. Just look in the right places)”

That things were not okay in the company is also seen in an email date 4th March 2009 from Innocent Nahabwe (2nd Defendant) to Pius Kamugisha (1st Defendant). Discussing the Plaintiff, the 2nd Defendant wrote criticizing the Plaintiff that

“That is regrettable especially when clearly what is at stake is the future of this business. As of now I see everything is on track apart from our financial direction. Certainly I would be the last to know what a Chief Finance Officer has to do. I therefore will not derive much into defining his role and expectations let alone would be deliverable. In simple

terms, I would also like our bills to be monitored and paid on time.”

Later in the email, the 2nd Defendant writes,

“This is obviously not rocket science and a few minutes on a weekend or even at work would have this sorted especially when you have an assistant. Of course this assistant would be trained either on phone or on one of those evenings when you make it to Kampala not so late.”

The foregoing is clear criticism of the working habits and competence of the Plaintiff. It is things such as the above that formed the basis of the friction between the Plaintiff and the Defendants. There came a time when the parties could not see eye to eye. An offer to leave the company was discussed and 20 million shillings was paid out to the Plaintiff to leave the company. While the Defendants contend that the payment was for purchase of the Plaintiff's shares, the Plaintiff contends that he never sold his shares but he *“took it as a departure payment after all at that very point the company had been working for a whole year.”*

Turning back to the issue before court, as to whether the Plaintiff sold his shares when he received 20 million shillings, it is important to look at the procedure of transferring shares within Blue Cube Ltd.

Article 5 - 12 of the 4th Defendant Company's Article of Association provide for transfer and transmission of shares.

Article 5 provides that any party proposing to transfer shares shall give notice in writing to the other parties, which notice shall specify the number of shares the transfer or proposes to transfer.

The rest of the articles are to the effect that any member may transfer all or any of his shares by instrument in writing in any usual or common form, priority should be given to the existing shareholders, the instrument of transfer is accompanied by the Certificate of Share which it relates, among others. It was the Defendant's case that the Plaintiff sold his shares to the company.

In their defence, the Plaintiffs tendered a deed of acknowledgment Exh. D2, the deed reads in part;

"I, Hakim Semuwemba of Box 8797 Kampala, do hereby acknowledge that I received Shs. 20,000,000/= (Uganda Shillings twenty million only) being full and final compensation for the shares I sold back to Blue Cube from Galisonga, Kasasa & Nassali; who are paying me on behalf of Blue Cube Ltd."

The Defendants also relied on a Transfer Share Stock Ext. D6 in which he is said to have transferred all his 25% shares to Blue Cube Ltd on the 29 June 2009. It is the Plaintiff's case that the Defendant's perpetrated fraud by forging his signature on the share transfer form, filed it with Uganda Registration Services Bureau and totally alienated him from the affairs of the company.

By the foregoing the Plaintiff imputed fraud on the Defendants. It is well established that fraud means actual fraud or some act of dishonesty.

In **Waimiha Saw Milling Co. Ltd V Waione Timber Co. Ltd** (1926) AC 101 at p. 106, **Lord Bushmaster** said 'Now fraud implies some act of dishonesty.)

In civil proceedings, a person who alleges fraud must specially plead and strictly prove it. Although the standard of proof in civil cases is on a balance of probabilities where fraud is pleaded, the standard of proof is higher. **E. Kanyange V E. Bwana** (1994)2 KALR 29, **Urmilla V Barclays Bank International Ltd & Anor** (1979) KLR 76 where their Lordships held that allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt. A higher standard of proof is required to establish such findings proportionate to the gravity of the offence concerned.

In reaching this position, their Lordships relied on **Ratilal Gordhanbhi Patel V Lalji Makanji** (1957) EA 314

In the instant case, both parties put a lot of reliance on the handwriting expert's reports. The documents differed in one particular that while one report was based on examination of photocopies, the other was based on examination of original documents. A fact on which the handwriting expert blamed for the divergent results in the reports.

In the Report dated 3rd April 2012 marked Exhibit P. 7, the handwriting expert PW4, Ms. Sylvia Chelangat examined a certified true copy of a transfer of share stock from in consideration of the sum of 250,000/= paid by Blue Cube to Hakim Semuwemba bearing questioned signature and handwritings. She compared it to specimen handwriting and signatures of the Plaintiff, 2nd Defendant and Galisonga Julius (the

Company Secretary). Her finding was that there was strong evidence that Galisonga Julius filled out the Transfer of Shares Stock Form and that it was most likely that the Plaintiff did not sign the form.

It was the evidence of the Defendant that the handwriting expert was availed original documents namely; the special resolution dated 10th September 2007 transferring shares to Nahabwe Innocent which the Plaintiff accepted to have signed, an original letter addressed to the management of Colline House, Pilkington Road Kampala which was signed by the Plaintiff and not denied by him. The handwriting expert compared these signatures of Hakim on this document with that on the original deed of acknowledgment and concluded that there was strong evidence that the author was one and the same person. She explained the departure from her findings in her earlier report in which she had found that the handwritings differed from that of the Plaintiff as being occasioned from the fact that her earlier findings were based on photocopies, while the subsequent one dated 11th September 2013 was based on original documents.

Since the Plaintiff relied on fraud, it was his duty to prove dishonesty on the part of the Defendants. The documentary evidence relied on was not helpful to him because as earlier said hereinabove, the handwriting expert came up with contradictory reports.

If anything she gave more reliance to the original documents relied upon by the Defendant than the photocopied relied upon by the Plaintiff whose limitation in analysis, PW4 made clear.

The sum total is that the Plaintiff's evidence fell short of proving fraud on part of the Defendants.

The question that arises therefore is that when the Defendants paid the Plaintiff the 20,000,000/= (twenty million shillings), what was he paying for? What was the company to benefit? It must have been in the absence of any other explanation, that they were paying for shares. What is important here is that they paid out money to the Plaintiff and I would find it very difficult that in paying, they got nothing for the bargain and that the whole property in the shares remained that of the Plaintiff, notwithstanding, the existence of exhibit D.2 which had been executed and which bore a signature of great similarity to that of the Plaintiff and the money that had been received. When the Plaintiff in the instant case was asked what the 20,000,000/= (twenty million shillings) he received was for, he said,

“I took it as departure payment.”

In his evidence he said they had earlier discussed the sale of shares so as to divide it among the four (4). This discussion must have formed the background to the payment of the 20,000,000/=.

Furthermore, in deciding whether the payment was for shares or not, the conduct of the Plaintiff after payment is relevant. The Plaintiff is a chartered certified accountant. He was a former lecturer of Accountancy, a professional accountant, had been a financial controller of the 4th Defendant and therefore knew the workings of companies and the benefits to shareholders.

He received the 20,000,000/= shillings on the 20th June 2009 and stayed away from the company until 2011, over two years later. He did not attend meetings, nor question the company about company meetings or ask for payments as a shareholder. Taking into account

his experience, one is safe to conclude that he stayed away from the company because he had sold his shares.

In my view what woke him up two years later was the interview that appeared in the New Vision dated 17th August 2012 attached to the Plaintiff's pleadings as 'D' depicting the 2nd Defendant, Innocent Nahabwe as a successful businessman, whose riches came from Blue Cube Mobile Solutions.

Having come to the conclusion that the Plaintiff in receiving the 20,000,000/= (twenty million shillings) knew that it was payment for shares and indeed he severed all relations and interest in the 4th Defendant, the suit against the 4 Defendants cannot stand and is hereby dismissed with costs.

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David K. Wangutusi
JUDGE

Date: 13 - 05 - 2014