THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO. 318 OF 2016

MS FANG MIN::PLAINTIFF

VERSUS

1. **UGANDA HUI NENG MINING LIMITED (NOMINAL DEFENDANT)**
2. **GUANGZHOU DONGSONG ENERGY GROUP CO. LTD**
3. **LV WEIDONG**
4. **MAO JIE } DEFENDANTS**
5. **YANG JUNJIA**
6. **GUANGZHOU DONGSONG ENERGY GROUP (U) (LTD)**

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

Ms Fang Min hereinafter referred to as the Plaintiff sued Uganda Hui Neng Mining Limited (Nominal Defendant), Guangzhou Dong Song Energy Group Co. Ltd, L.V Weidong, Mao Jie, Yang Junjia and Guangzhou Dong Song Energy Group (U) Ltd who are referred to as the 1st,2nd,3rd,4th,5th and 6th Defendants respectively.

The pleadings indicate that the 1st Defendant is a Nominal Defendant in this derivative action brought by the Plaintiff who is a sole minority shareholder.

The 2nd Defendant was incorporated in China and registered in Uganda. The 3rd Defendant is an original subscriber to the Memorandum and Articles of Association of the 1st Defendant while the 4th and 5th Defendants were signatories to the 1st Defendant's Memorandum and Articles of Association but held no shares.

The 6th Defendant was incorporated in Uganda and took over the task of development of mineral extraction.

In the suit the Plaintiff seeks to recover property that she alleges was fraudulently expropriated by the 3rd,4th, 5th and 6th Defendants from the 1st Defendant. In addition to the claims on behalf of the 1st Defendant, the Plaintiff also sues in her own respect as a minority shareholder in the 1st Defendant. Her suit is based on what she claims is fraud perpetuated by the Defendants superintended by the 3rd, 4th and 5th Defendants.

The Plaintiff alleges that the 3rd Defendant being majority shareholder used the 2nd Defendant as a vehicle to fraudulently expropriate the 1st Defendant's property and commit fraud on the minority.

That in the days when the Plaintiff and the 3rd Defendant saw eye to eye, the Plaintiff on mutual agreement with the 3rd Defendant pushed in as share capital of the 1st Defendant a sum of USD. 5,000,000 to enable it kick start the mining business. This money was to meet the licensing requirements. The Plaintiff claims that the 3rd Defendant could only reimburse to the extent of 65% share value and so surrendered to her a further 15 shares which raised her share holding to 35%; **ExhP17**.

After the incorporation the 1st Defendant applied for and was granted Exploration License No. 1178 which would enable her to prospect and explore for base metals, phosphates, rare earth and uranium in Sukulu Hills and valleys.

On 12th December 2013 the 2nd Defendant was registered in Uganda and the following day on 13th December 2013 the Exploration License No. 1178 was transferred from the 1st Defendant to her. Armed with the Exploration License, the 2nd Defendant applied for and was granted a mining lease No. 1393.

On the 22nd December 2014 the 2nd Defendant and 6th Defendant entered into a Mineral Development agreement with the Government of Uganda which paved the path for the exploration and development of extraction. The 2nd Defendant thereafter transferred the Exploration License and Mining Lease to the 6th Defendant. The Plaintiff contended that the transfer of license from the 1st Defendant to the 2nd Defendant without her consent deprived the 1st Defendant of her property. That the act also occasioned loss to her as a minority share holder.

She further contended that the 4th and 5th Defendants who participated in those transfers did so without capacity in as much they did not subscribe to any shares.

She further contended that the acts of the 3rd, 4th and 5th Defendants in transferring the exploration license to the 2nd Defendant and subsequently to the 6th Defendant was froth with fraud. That the "board resolution" passed by the two was a nullity *abi nitio.* That the situation was aggravated by passing the license to the 2nd Defendant without any consideration to the 1st Defendant.

In reply the Defendants denied liability. They contended that the 4th and 5th Defendants were members of the 1st Defendant since they were subscribers to the Memorandum and Articles of Association and being Directors of the 1st Defendant. They contended that they had five shares each.

The Defendants contended that right from the start, they had agreed with the Plaintiff that they would hold shares in the following manner;

1. L.V Weidong 70
2. Fang Min 20
3. Mao Jie 5
4. Yang Junjia 5

That it was the Plaintiff's responsibility to handle the incorporation formalities of the Nominal Defendant and she asked for equivalent of USD 1,200,000 to be banked on her account in China which was done on 20th and 28th January 2013.

That the parties agreed that after the incorporation the 3rd Defendant would transfer 65 shares to the 2nd Defendant. The Defendants also contended that the Plaintiff contributed USD 5,000,000 spent on the Nominal Defendant and they contributed USD 20,000,000 which was spent on the feasibility study, Fourth End Engineering Design (FEED) and Resettlement Action Plan (RAP) for those who would be affected by the project.

That when the Plaintiff got to know the complexities associated with the project, and the need to guarantee the cost overruns, she requested to be refunded her USD 5,000,000 so as to opt out. She also asked for an appreciation fee of USD 4,700,000. That the 2nd Defendant agreed to

refund her contribution and also give her the appreciation provided she provided accountability of how she had used the USD 5,000,000 and USD 3,000,000 which the 2nd Defendant had remitted to the Nominal Defendant's account.

That after the refund, the 2nd Defendant took over. That the Plaintiff then isolated herself from the participation and management of the Nominal Defendant. As a result the 2nd Defendant applied to Government of China to freeze the Plaintiff's accounts in China.

On Notices of meetings, the Defendants contended that the Plaintiff was notified of all the meetings but she decided to stay away so the resolutions were passed in her absence. The 2nd, 3rd, 4th and 5th Defendants therefore denied committing any fraud. That in any case the Plaintiff's representative action was bad in law and an abuse of court process. More so that the Plaintiff's attempt to allot herself an extra 15 shares in the Nominal Defendant was illegal in as much as she forged the resolution.

By way of Counterclaim the 2nd Defendant seeks to recover USD 8,000,000, money unaccounted for by the Plaintiff.

The Counterclaimant contended that between 1st January 2013 and 7th November 2013 she remitted USD 10,894,419 on the Counter Defendant's account at the Industrial Bank Company Limited Shanghai, China. That the Counter Defendant used USD 2,027,419 for incorporation of the Nominal Defendant, USD 5,000,000 was refund to the Counter Defendant as money injected in the Nominal Defendant and USD 3,867,000 was Appreciation fee to the Counter Defendant.

On 12th August 2013 the 2nd Defendant remitted USD 3,000,000 to the Nominal Defendant's account at Diamond Trust Bank for the Nominal Defendant's operations in Uganda. That the Counter Defendant failed to provide any accountability. That in the premises she must refund the money USD 8,000,000. The Counterclaimant seeks general damages and interest plus costs.

The issues as agree by the parties for trial were;

1. Whether the transfer of Exploration License No. 1178 from the 1st Defendant to the 2nd Defendant and the subsequent transfer of the Exploration License together with Mining Lease No. 1393 to the 6th Defendant amounted to fraudulent deprivation of the Nominal Defendant of its assets?

2. Whether the Plaintiff's personal action against the Defendants is tenable?
3. Whether the actions of the 3rd, 4th and 5th Defendants in purporting to transfer Exploration License No. 1178 from the 1st Defendant and the subsequent transfer to the 6th Defendant amounted to fraud on the minority?
4. Whether an order lifting the corporate veil of the 2nd and 6th Defendants respectively can be issued to allow for remedies against their shareholders and directors, having used the entities to perpetuate fraud on the 1st Defendant?
5. Whether the Plaintiff is under a duty to account for money as stated in the counterclaim?
6. Whether the Plaintiff is entitled to a set off as stated in the reply to the Counterclaim?
7. What remedies are available to the parties?

On whether the transfer of the Exploration License No.1178 from the 1st Defendant to the 2nd Defendant and the subsequent transfer of the Exploration License together with the Mining Lease No.1393 to the 6th Defendant amounted to fraudulent deprivation of the Nominal Defendant of its assets **ExhP3** shows that while there were four people who had subscribed to the Memorandum and Articles of Association of Uganda Hui Neng only two of them had shares. These were L .V Weidong the 3rd Defendant and Fang Min the Plaintiff in this matter. The space provided for Mao Jie and Yang Junjia the 4th and 5th Defendants was empty.

It is also clear from the evidence of DW1/ the 3rd Defendant that the 4th and 5th Defendants did not have shares. In his evidence he stated;

> *"At the beginning I said Mao Jie and Yang Junjia should be directors and according to the Uganda law they should have shares. Ms Fang Min did not give shares when she was drafting the documents."*

Another piece of evidence showing that they had no shares came from DW1 when he said that out of the 100 shares available he had 80 shares while the Plaintiff had 20. In December 2013 alarmed by the situation the Defendants' advocates wrote to the Registrar General of the Uganda Registration Services Bureau seeking clarity on allotment of shares of the Nominal Defendant.

The Registrar General wrote **ExhD12** in answer explaining the status in the 1st Defendant. He wrote;

> *" Yours of Ref. No. DK/126/ UHM/11/13, dated 3rd day of December, 2013 refers.*
>
> *We have since conducted a search of our records and are pleased to advise you that the company was incorporated on the 15th February 2013 with the following subscribers:*
>
> *1. L.V WEI DONG 80 shares*
> *2. FANG MIN 20 shares*
> *3. MAO JIE , and*
> *4. YANG JUNJIA*
>
> *The above individuals are and appear on Company Form No. 7 filed on the 11th April, 2013 as the Directors with FANG MIN doubling as Company secretary.*
>
> *We however, regret to inform you that the original files were not seen in its physical location.*
>
> *Documents seen on the available temporary file reveal the following:*
> *1. The last two subscribers have no shares attributed to them. But despite there being no such indication of the number of shares subscribed to by the said subscribers, the law presumes that subscription should be one or more shares.*
>
> *2. There is indication of transactions on file especially the Resolution filed on the 19th July, 2013 allotting shares to Guangzhou Dong Song Energy and Fang Min to the tune of 65 and 35 shares respectively.*

3. There is no evidence on file to indicate that the other subscribers neither forfeited their shares nor were they called up to subscribe and they failed.

In the circumstances, we request the parties to furnish us with adequate details on the company shareholding to enable us streamline the file."

Mao Jie and Yang Junjia have been referred to as Directors and that as Directors they could therefore sit and participate in deliberations and pass resolutions. It is important at this stage to find out who could be a Director with powers to pass resolutions.

The answer in my view lies in **ExhP3** which is the Memorandum and Articles of Association of Uganda Huineng Mining Limited. Articles 34 and 35 found on page 15 of **ExhP3** provide for Directors in the following manner;

"*34a] Unless and until determined by the company in a general meeting, the number of directors shall not be less than two or more than ten.*

b] So long as the number of directors does not exceed two the quorum necessary for the transaction of the business of the directors shall be two.

c] The number and the names of the first directors shall be all the subscribers to the Memorandum of Association."

Article 35(a) provides further qualifications required by the Directors. It reads;

" 35. a) the share holding qualification for directors shall be the holding in his own right of at least five fully paid up shares."

What I see from these provisions are that the lowest number of Directors to constitute a quorum necessary for the transaction of their business was two. What the provisions governing the Directors also indicate was that you could only be a Director if you had subscribed to the Memorandum of Association. And lastly that for you to be a Director with a functional basis

you had to have or you were expected to hold in your own right a minimum of five fully paid up shares.

The 3rd Defendant testified that the 4th and 5th Defendants were directors because at the time of incorporation it was agreed that he would get 70 shares, Fang Min would get 20, Mao Jie 5 and Yang Junjia 5. That since that was the agreed position the 4th and 5th Defendants acted rightly as Directors and correctly passed resolutions for the transfer since it was clear that they owned 5 shares each.

I do not believe the 3rd Defendant when he states that the 4th and 5th Defendants were supposed to get 5 shares each. It is recalled that on failing to pay for all the 80 shares, he transferred 15 shares to the Plaintiff as **ExhP17** shows. This in essence would have left him with 55 shares if he indeed had given the 4th and 5th Defendants 10 of his shares.

The fact that he continued to claim 70 shares proves that the 4th and 5th Defendants got none.

I further do not agree with the 3rd Defendant's evidence because he knew all along that he had 80 shares. Asked what he had signed for he replied "*80 shares*." Although he claims that the 4th and 5th Defendants also got 5 shares the document which he endorsed and which was brought into evidence uncontested indicated that he had got 80 out of the 100 exiting shares. It seems to me along the way he realised that for the resolutions that had been made to stand, the 4th and 5th Defendants who had participated in their making had to have a minimum of 5 shares each.

He knew all along that Fang Min had 20 shares. He also knew that he had 80 shares. He could now not turn round and say that they had intended that the 4th and 5th Defendants were entitled to 5 shares each. This in my view was something they could have rectified immediately at the time of signing of the Memorandum of Association. The Memorandum and Articles of Association clearly showed that the 4th and 5th Defendants had no shares. They could therefore not be signatories to a resolution. For anything concerning the 1st Defendant less still be signatories of a resolution purporting to give themselves shares.

Under these circumstances who qualified to be a Director in the Nominal Defendant? The Plaintiff Fang Min was a subscriber to the Memorandum of Association and had 20 shares which was more than the minimum shares required so she qualified and was rightly appointed as a Director.

The 3rd Defendant LV Weidong was a subscriber to the Memorandum of Association and held 80 shares. So he qualified to be a Director. Mao Jie the 4th Defendant and the 5th Defendant Yang Junjia were both subscribers to the Memorandum of Association but did not have any shares. The absence of shares put them out of the bracket of those who could participate and make resolutions in a Directors' meeting. It therefore meant that the Plaintiff and the 3rd Defendant were the only Directors capable of passing resolutions. And going by Article 34(b) there could be no resolution without the participation of both the Plaintiff and the 3rd Defendant.

This Article 34(b) is clear on this position in these words;

> *" b] So long as the number of directors does not exceed two the quorum necessary for the transaction of the business of the directors shall be two.*

In the circumstances any Directors' meeting without the Plaintiff and the 3rd Defendant would be void of capacity to pass resolutions.

Meetings.

Questions have also been paused as to whether the meetings in which the resolutions were passed were properly convened.

The several resolutions made could only emerge from meetings. There was a meeting which resolved the transfer of the Exploration license to the 2nd Defendant held on 12th December 2013. There was also a meeting held to rectify their shareholding held in China.

Statutory meetings are provided for under section 138(2) of the Companies Act. This must have been the section under which the 3rd Defendant called the meetings that led to the resolutions court is going to consider here. The other type of meeting is the extraordinary general meeting which is held on requisition of members not less than one tenth of the paid up capital of the company. The requisition must state the objects of the meeting and must be signed by the requisitionist.

A meeting which is convened as an extraordinary meeting shall be in the same manner as nearly as possible as that in which meetings are to be convened by the Directors; ***section 139(4) of the Companies Act.*** Section 139(6) makes it mandatory for notice to be given and in a meeting at

which a resolution is to be proposed as a special resolution it will be declared not to have taken place if the time spans provided for under section 149 are not adhered to. Section 149 provides for special notices in cases of meetings which will end in resolutions. It provides as follows;

> "*149.* ***Resolution requiring special notice***.
>
> *(1) Where by any provision of this Act special notice is required of a resolution, the resolution shall not be effective unless notice of the intention to move it has been given to the company not less than twenty eight days before the meeting at which it is moved."*

And this notice will be given at the same time and in the same manner as it does of the meeting and where it cannot do so it shall give notice through an advertisement in a newspaper with wide circulation or any other mode allowed by the company Articles not less than 21 days. Needless to say that the resolutions that emerge shall be delivered to the registrar for registration within 30 days from the date of the resolution; ***section 150 of the Companies Act***.

I would like to add that minutes of proceedings of these meetings of a company and the Directors shall be taken down and entered in books that are specifically for that purpose; ***section 153 Companies Act***.

Section 140 however controls the length of notice for calling meetings and prescribes the minimum length of notice in these words;

> *" 140.* ***Length of notice for calling meetings***.
>
> *(1) Any provision of a company's articles shall be void in so far as it provides for the calling of a meeting of the company other than an adjourned meeting by a shorter notice than twenty one days."*

And this notice shall be in writing and if not an adjourned meeting by 21 days. The length can however be shortened if all the members entitled to attend and vote at that meeting are agreed to a shorter notice or by a majority who together hold not less than 95% of the shares. It is a requirement that the notices should be served on members of the company as provided for in Table A of the Companies Act, section 141 or as the Articles of the company provides. The

Articles of Association of the 1st Defendant in this case provided for service under Article 52 as follows;

> "*A notice may be served by the Company upon any member either personally or by sending it by post in a prepaid letter, envelope or wrapper addressed to each member at his registered place of address."*

Article 55 provides for service through post and states that any notice sent by post shall be deemed to have been serviced two days after the date on which the letter, envelope or wrapper containing the name is posted and in providing such service it shall be sufficient to prove that the letter, envelope or wrapper containing the notice was properly addressed and put into the post office.

Still Article 57 of the Memorandum and Articles of Association of the 1st Defendant required that notice of every general meeting would be given to every member of the company.

It is clear from these proceedings that one of the contentions of the Plaintiff is that the meetings that passed the resolution that led to the transfer of the Exploration license was done without notifying her. As we have seen in this judgment, there were only two people qualified to call meetings, meet and pass resolutions. These were the Plaintiff and the 3rd Defendant. It follows that any meetings that would be conducted without notice to either party would be void rendering the resolutions a nullity.

There are two meetings to be considered here. One is in respect of the transfer of the Exploration license from the Nominal Defendant to the 2nd Defendant. The second is the meeting held in China to rectify their shareholding in the Nominal Defendant.

For any of these meetings to take place the Directors had to be given ample notification of the meetings to take place. Under Regulation 50(2) of Tab A the time and venue of the meeting were to be specified in the notice in Regulation 50 provides;

> *"(1) Every meeting shall be called by at least 21 days notice in writing.*

(2) The notice shall be exclusive of the day on which it is served or taken to be served and of the day for which it is given, and shall specify the place, the day and hour of meeting and, in case of special business, the general nature of that business, and shall be given, in a manner described in sub regulation(3) or in such manner, if any be prescribed by the company in general meeting, to such persons as are, under the regulations of the company, entitled to receive such notices from the company."

The Plaintiff contended that she was never served. The 3rd Defendant in return stated that he called her and informed her that there would be a meeting. There was no proof of this telephone call either by way of production of a print out or other independent evidence. What remains therefore is to consider the strength of the service based on **ExhD17** upon which the Defendant relies as proof of notice. I find it necessary to reproduce the notice at this stage;

"December 9

Ms Fang Min

Fang Fang Hotel

Sezzibwa Road No.9

Hello! I asked Ms Guo Yaqiong to forward this letter to you.

We should meet to discuss the transfer of the Sukulu project from Uganda Hui Neng Mining Company to Guangzhou Energy Group Co. Ltd.

Currently I stay in Serena Hotel in Kampala and the meeting will be held at the hotel on December 12, 2013 at 2pm.

We will also hear from you about the expenses incurred from the establishment of the company up to now

I look forward to seeing you

Lu Weidong

Director Uganda Energy Corporation."

A critical look at this document reveals a lot of defects and breaches. It was first of all not sent through post. It was given to one Ms Guo. There is nothing to show that this Ms Guo delivered this letter. The courier in this case was not called to testify that this letter arrived its destination.

Looking at this letter one would conclude that it came from Uganda Energy Corporation. The letter also shows that the notice for the meeting was for only two days having been written on December 9th 2013 setting the meeting for December 12th 2013 considering that the day it was written and the day of the meeting were excluded.

The minimum days required as notice is provided in the regulations and the Companies Act mentioned above is 21 days notice. These could only be abridged under section 140 of the Act by consent of all parties and since the two persons who could have attended this meeting were the 3rd Defendant and the Plaintiff, the Plaintiff's consent to such reduction of length of notice of calling meetings was necessary.

There is no proof whatsoever on the record to show that her consent was sought and that it was given. In the absence of proof of service of notice, the only conclusion one can come up with is that the Plaintiff was not notified of this meeting.

The other meeting which we shall also deal with involves the passing of a resolution to rectify the shareholding in the Nominal Defendant.

In convening this meeting the 3rd Defendant stated that he had written to the Plaintiff on the 20th of August 2014 **ExhD14** calling her to attend a meeting to rectify mistakes in the register of the company. The letter to the Plaintiff read;

"*Madam Fang Min*

Fang Fang Hotel

Plot 9 Sezzibwa Road

I trust that you are well. I am giving this letter to Hu to deliver to you. We shall have a meeting to discuss the mistake in the member book/register and the company documents. Why did lawyers state

that Mao and Yang will have zero in the shares! They are supposed to have 5 shares for each.

Since I am currently in China, the meeting will take place in China at the offices of Dong Song on 26 September 2014 at 3pm Guangzhou time, which is 10am of Kampala.

If you cannot come, inform us to organize to call you to attend by telephone.

Lv Weidong , a director of Uganda Hui Neng"

The 3rd Defendant stated that although the Plaintiff was notified she did not attend the meeting. The difficulty with this meeting in China is that it was a long distance into a country where the allegations of drug dealing and human trafficking had been leveled on the Plaintiff by the 3rd Defendant. Still the meeting could have been held in the absence of the Plaintiff under Article 28 of **ExhP3** which provides for meetings outside East Africa in these words;

"*If at any time there are not within East Africa sufficient Directors capable of acting to form a quorum and one Director or any two members of the Company may convene an extraordinary meeting."*

The key words here are "sufficient directors capable of acting to form a quorum." I have already pointed out the qualifications of a Director as that person who had a minimum of 5 shares in the Nominal Defendant. There was nobody in China save for the 3rd Defendant.

The Plaintiff denied ever receiving this notification. Again there is no evidence on record to prove that she was served with this notice. The copy that was filed in court does not show that she received it. In absence of proof of receipt, the Defendant should have called Hu who allegedly delivered the letter to testify in that regard.

This meeting is said to have taken place and resolutions were arrived at. The most important resolution was that of re-allotment of shares where on the face of **ExhP7** the 3rd Defendant's shares were reduced from 80 to 70, those of the Plaintiff remained at 20 and Mao Jie and Yang Junjia were given 5 shares each.

The meeting was attended by the 4th and 5th Defendants and they together with the 3rd Defendant signed the resolutions. It has earlier been found in this judgment that the 4th and 5th Defendants having no shares could not sit as directors because they did not have five fully paid up shares each. Resolutions passed by people devoid of authority to do so and meetings held without notifying the relevant members are null and void. Since those meetings are null and void they render the outcome worthless.

In this I rely ***on Seremba Mark vs Isanga Emmanuel & 3 Others (In the Matter of Greenvine College Ltd Companies Cause 27 of 2004)*** wherein the Court found that the Applicant had not been notified of the company meeting and that a quorum had not been realised but he company went ahead to allot shares and appoint other Directors, the Learned Judge found in these words;

> "*In conclusion I find that the meeting of the 15th August 2002 was improperly convened and therefore was illegal. All resolutions passed at the meeting therefore are null and void. It therefore follows that Mr. William Muwaya (the 2nd Respondent) and Steven Isabirye (the 3rd Respondent) did not become members, shareholders and or officer bearers of the company as result of that meeting."*

On the strength of that authority and findings herein above, it is my finding that the resolution to transfer the Exploration License No. 1178 from the 1st Defendant to the 2nd Defendant which was done based on a resolution that was a result of a meeting without quorum and where the only other director was not notified is null and void.

Counsel for the Defendant submitted that the subsequent transfer of the Exploration License and Mining Lease from the 2nd Defendant to the 6th Defendant could not affect the 6th Defendant because it was not aware of the dealings between the Nominal Defendant and the 2nd Defendant.

I do not believe in this assertion because the 3rd Defendant was in full control of the 2nd Defendant which 2nd Defendant had 999,999 share holding out of 1,000,000 thus giving the 3rd Defendant absolute control over the 6th Defendant. The 3rd Defendant was directly involved in the transfer of the Exploration License from the Nominal Defendant to the 2nd Defendant so one

cannot say that the 6th Defendant was not aware of the earlier transactions concerning the Exploration License and the subsequent Mining Lease.

It is also my finding that the purported rectification of the shareholding provided in **ExhP7** also based on a resolution resulting from a meeting that has no quorum and which lacked proper notification to the only other director who could sanction changes is null and void.

Turning to whether the Plaintiff's personal action against the Defendants is tenable, the Plaintiff filed this claim as a minority shareholder and as a derivative action contending that the actions of the Defendants amounted to fraud on the minority and deprivation of property from the Nominal Defendant.

It is a settled position of the law that the proper Plaintiff in an action against a wrong done to the company, is the company itself who alone decides to sue and that decision is made by the majority; **Foss vs Harbottle (1843) Hare 461.** In order to address the injustices that would otherwise arise when the majority shareholders refused to sue, the exception to the general rule allows a derivative action to be brought by a shareholder of the company where the wrongdoers are in control and prevent the company itself from suing.

In ***Salim Jamal & 2 others vs Uganda Oxygen Ltd & Anor SCCA No. 64 of 1995*** the Learned Justice citing Lord Denning observed that;

> "*The company itself is the one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs- by directors who hold majority of the shares- who then can sue for damages? Those directors themselves are the wrongdoers. If a board meeting is held they will not authorise proceedings to be taken by the company against themselves."*

It will be noted that the shareholder will sue in a representative capacity on behalf of himself and all the other members other than the real Defendants. Commenting on this situation ***Modern Gower's Principles of Company Law, 3rd Edition*** summarizes it in these words;

> *"On the face of it this seems anomalous. As already pointed out the plaintiff is not really suing on behalf of the shareholders but on behalf of the company, but the requirement fulfills a useful purpose, for it ensures that all the other shareholders are also bound by the result of the action. If ,therefore, judgment is given for the defendants a second derivative action cannot be brought by another member, for the matter will be res judicata as regard all of them. "*

This explains why a shareholder who has been injured together with the Nominal Defendant must also bring up his or her action together with the derivative action. The real fear is that the minority and even the company itself might face a lot of harassment, loss of assets and be driven backwards by the majority shareholders leaving the company itself with no recourse to the courts because the majority shareholder as directors of the board w would be in the control of passing resolutions that would empower the company to sue.

In a situation where the complaint is against the majority shareholders the solution must be found elsewhere. In the instant case there were two shareholders one of the shareholders originally holding 80 shares as against 20 shares of the other and subsequently allegedly 65 shares as against 35 shares of the minority shareholder.

The majority shareholder continued to remain so in the 2nd Defendant where he claimed in evidence he had 100% although evidence indicated 90. This shows his full control of the 2nd Defendant which 2nd Defendant was firmly in control of the 6th Defendant. The 2nd Defendant held 999,999 shares out of 1,000,000. The single remaining share was allotted to the 3rd Defendant who in any case had all the shares in the 2nd Defendant which had full control of the 6th Defendant.

One could argue that the 2nd Defendant and the 6th Defendant were different persons and fell within the protection of ***Salomon vs Salomon (1897) AC 22*** and that therefore they were independent of each other and could not act as agents, trustees or nominees of one and the other. This type of relationship in companies normally acts very well as a corporate personality that acts as a cloak for fraud or improper conduct.

Dealing with a similar situation Justice Odoki former Chief Justice as one of the Panel Justices in Salim Jamal cited ***Gower Modern Company Law 2nd Edn at page 208*** he wrote;

> "*I think that this is the right situation in which an exception to* ***Salomon v. Salomon (1897) AC 22*** *would be applied. It is clear from the evidence that the 1st Plaintiff in this case was 98% in the 2nd Plaintiff and about that percentage in NEC Bakery and Confectional Ltd. However although the courts are in general precluded by the Salomon case from treating a company as "alias agent, trustee or nominees" of its members, they will nevertheless do so if corporate personality is being blatantly used as a cloak for fraud or improper conduct. There is a dictum which has been so influential in the United States, for instance that when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association of persons. Courts will also do so where agency can be established in fact, either in respect of particular transactions or even as regards the whole of company's business. They are more ready to hold that agency is established whether the controlling shareholder is another company; indeed there is evidence of a general tendency to ignore the separate legal entities of various companies within a group and to look instead at the economic entity of the whole group.*"

In this case therefore looking at the control that the 2nd, 3rd and 6th Defendants had over all the business of the mineral extraction which is in dispute it is necessary to ignore the separate legal entities of the various companies within this group and to look at the economic entity of the whole setup.

To conclude this preposition I would like to cite the ***Ontario Court of Appeal in Monley Inc. et al vs. Fallis (1977)*** which fully agrees with what I have stated above. It reads;

"*This is a case where the Court is not precluded from lifting the corporate veil, and in effect, regarding the closely related respondent Companies as essentially one trading enterprise in the interests of the affiliated companies in circumstances where the refusal to do so would allow the appellant to escape the consequences of his breach of a fiduciary trust. Cases where this derogation of Salomon's case (**Salomon v. Salomon and Co. (1897) AC 22**), is permitted are collected in Professor **Gower's Modern Company Law, 2nd Ed. 1957** particularly in C.10 entitled lifting the veil*."

In this case the Nominal Defendant was incorporated by the Plaintiff and 3rd Defendant to carry on extraction and mineral development as indicated in objective 3 of **ExhP3**. The Nominal Defendant got some of the money to fund it from the 2nd and 3rd Defendants. The 2nd Defendant to whom the exploration license was transferred from the Nominal Defendant was virtually owned by the 3rd Defendant who owned 90% of the shares although during examination he said he owned 100%.

The 3rd Defendant therefore overwhelmingly controlled the 2nd Defendant. It is also clear from **Exh P14** that the 2nd Defendant in which the 3rd Defendant has 90% held 999,999 out of 1,000,000 shares of the 6th Defendant. It is therefore clear that the 2nd Defendant and 3rd Defendant are essentially in complete control of the 6th Defendant.

As I have stated above there is no way the 3rd Defendant who is alleged to be the person behind the fraud could bring the action to remedy the wrong complained of by the Plaintiff.

In my view therefore the only way the Plaintiff could get redress is to allow her to duck the concept of separate personality; ***Salim Jamal & 2 Others v. Uganda Oxygen Ltd & Anor. SCCA No. 64 of 1995***.

Counsel for the Defendants submitted that for such action to be sustained there must be loss to the company and there must be reflective loss to the shareholder. Counsel added that it was in fact "the reflective loss of the shareholder" is what gives the shareholder a right to start a derivative claim. He added;

> "*If the shareholder does not have a right to participate he/she cannot even start to complain about fraud of the minority.*"

Counsel for the Defendants further submitted that neither the 1st Defendant nor the Plaintiff were entitled to participate in this project. That PW1 the Plaintiff was entitled to be a shareholder in the company and participate in other projects but not the suit project.

I have gone through the evidence and agree with the submission of Counsel in all save on the issue of non participation of the Plaintiff and the 1st Defendant.

Beginning with their participation it is clear that the reason why the 1st Defendant was set up was mineral exploration, extraction and development. When the Plaintiff and 3rd Defendant came together the development of mineral exploration in Sukulu Hills was the uniting factor. The Plaintiff's participation is clearly seen in her appointment as Director, Manager and to deal "with all financial businesses" of the project, **ExhP28**.

Further her participation is seen in her registration and incorporation of the company. The idea to appreciate her services coined by the 3rd Defendant is because of her participation. There is therefore no doubt that she as one of the founders of the 1st Defendant had a right to participate in the project. Moreover she was the only Director in Uganda at the time of inception.

As for the Court action, the basis to institute a derivative action existed. The 1st Defendant had lost the exploration license which was a key property of the company. This loss obviously resulted into reflective loss on the part of the Plaintiff.

It is my finding that the reflective loss of the Plaintiff who was a shareholder, gave her the right to start this derivative action.

It would seem that from the majority of the authorities the Plaintiff could be availed the opportunity to sue and such derivative action where fraud seems to have been committed.

Two such authorities are the learned author of Gower's Principles of Modern Company Law, 3rd Edition and the holding of the Learned Justices in ***Salim Jamal & 2 others vs. Uganda Oxygen Limited & Anor. SCCA No. 64 of 1995***.

Both these authorities state that for a derivative action to be relevant normally the wrong complained of must be such as to involve fraud on the minority which could not be validly waived by the company in a general meeting.

Such conduct would include;

a) Expropriation of the property of the company or, in some circumstances that of the minority;
b) breach of the director's duties of subjective good faith
c) voting of company resolutions not bonafide in the interests of the company.

(ii) it must be shown that the alleged wrong doers control the company.

(iii) the company must be a Defendant in the action; in effect, a nominal Defendant. As already pointed out the company is the true Plaintiff, and if a money judgment is recovered against the true Defendants, the wrong doing directors or other controllers, this will be in favour of the company and not in favour of the individual shareholder who is a nominal Plaintiff. So long as the company is a party, judgment can be given in its favour and any decision in the case becomes res judicata so far as the company is concerned.

(iv) the shareholder must sue in a representative capacity on behalf of himself and all the other members other than the real Defendants.

The first element that was referred to here was expropriation of the property of the company or in certain circumstances that of the minority.

I have already in this judgment stated how a resolution to transfer the exploration license No.1178 **ExhP4** was illegally arrived at. It was my finding that for a resolution to be passed two of the directors both holding not less than 5 shares each would meet in a properly and lawfully convened meeting before such a resolution was passed. In this case the 3rd Defendant convened a meeting with the 4th and 5th Defendants in attendance and in the absence of the Plaintiff purported to pass a resolution transferring the exploration license from the Nominal Defendant to the 2nd Defendant.

The act was unlawful and amounted to expropriation without a quorum and endorsed by the 4th and 5th Defendants who were not clothed with authority to do so.

One of the duties of the Directors as provided for under Section 198 (c) of the Companies Act is to act in good faith in the interests of the company as a whole. Acting in good faith includes the following;

1) Treating all shareholders equally
2) avoiding conflicts of interests

3) declaring any conflicts of interests
4) not making personal profits at the company's expense and
5) not accepting benefits that would comprise him or her.

Treating all shareholders equally meant giving the plaintiff a chance to participate in deliberations that led to the resolution. This was not done. Avoiding conflicts of interest required the 3rd Defendant to inform the meeting that came up with the resolution of the benefits he was bound to get as a majority shareholder if the exploration license was transferred to the 2nd Defendant wherein he had full control.

To do so required declaration of conflict of interest. Transferring the Exploration license from the Nominal Defendant meant to enable the 2nd Defendant to acquire the Mining License with all the profit which profits would be in the control of the 3rd Defendant being the controller of that company. This profit going to the 3rd Defendant would be at the expense of the Nominal Defendant and the minority shareholder and at the advantage of the 2nd and 3rd Defendants.

It goes without saying that these benefits would compromise him and lead him to make decisions like the one he made when he again transferred the exploration license and extraction licenses to the 6th Defendant.

It is clear from the foregoing that the 3rd Defendant breached his duties as a director more specifically section 198 (c) of the Companies Act in as much as he did not act in good faith in the interests of the Nominal Defendant as a whole.

Needless to say the 3rd Defendant was also in breach of S.198 (d) when he failed to ensure compliance with this Act.

As for voting for company resolutions in a manner which was not bonafide in the interest of the company I have already earlier stated that the voting he organized which resulted into the transfer of the exploration license and the one he conducted in China in respect of rectification of shareholding of the parties was all done in bad faith in as much as he sat with the 4th and 5th Defendants who were not qualification and or authorized to pass resolutions.

It is seen above that this was not in the interest of the Nominal Defendant.

Turning to the control of the company the 3rd Defendant told this court that he held 80 shares although later he submitted that they were 70 of the Nominal Defendant. There were only 100 shares. It meant he had control of the company. This control of the various companies namely the 2nd Defendant where he claimed he had 100% control and the 6th Defendant in which the 2nd Defendant had 999,999 shares is evidence in the proceedings as seen in the Articles of Association of Guangzhou Dongsong Energy Group Company Ltd and Memorandum and Articles of Guangzhou Dongsong Energy Group (U) Ltd.

There is therefore no doubt that the 3rd Defendant exercised tremendous control over the Nominal Defendant.

Lastly, it is this Nominal Defendant that exists in the suit and the Plaintiff is a shareholder who has sued also in her own capacity.

Instances of fraud have been mentioned in the course of discussing the elements that would open the gate ways of a derivative action. I still feel they could be expounded.

One of the glaring instances of fraud arose at the time when the 3rd, 4th and 5th Defendants wanted to validate their activities by giving shares to the latter two so as to position them in a manner that would enable them to pass resolutions.

Following an inquiry by the Defendants account ABMAK Associates the Registrar General wrote a letter clarifying the position of shareholding between all the parties.

The Registrar General wrote to them **ExhD12** clearly detailing the impossibility of them being Directors because they did not have any shares; *"The last two subscribers have no shares attributed to them*." The Registrar General wrote. They knew of the provisions under Article 34 and 35 of **ExhP3** that not being holders of shares they could not be Directors in the Nominal Defendant.

Notwithstanding that knowledge, they went ahead on 12th December 2013 and purportedly came up with a Board resolution in a bid to transfer Exploration License No. 1178 which was in the names of the Nominal Defendant to Guangzhou Dong Song Energy Group Co. Limited and proceeded to notify the Commissioner Department of Geological Survey and Mines.

The 3rd Defendant knew that his two colleagues Mao Jie and Yang Junjia who had no shares could not pass their resolution, something that was prohibited by Article 34 and 35 of **ExhP3**.

Mao Jie and Yang Junjia knew very well that they were not shareholders but allowed themselves to be led into an activity which was obviously fraudulent. The issue of fraud is further under lined by the activities of still these three in subsequent activities. One example is where having discovered that they were not Directors they now participated in a scheme to procure for themselves shares by again coming up with a Resolution still holding out as Directors.

This inappropriate conduct is clearly seen in **ExhP7** headed "Members Resolution". This impugned resolution was a result of a members meeting. Its preamble reads;

> *"At the meeting of the members of the Company held on the 26th September 2014 in the Peoples Republic of China, whereat the quorum was present, a letter dated 11th December 2013 from the Registrar of Companies at the Uganda Registration Services Bureau (**copy attached**) was tabled and considered together with the Memorandum and Articles of Association of the Company, and it was noted:*
>
> *A. That, pursuant to Article 34(c) of the company's Articles of Association, each subscriber to the Memorandum of Association was appointed as one of the first directors of the Company.*
>
> *B. That, it was the intention of the subscribers to the Memorandum of Association to indicate, on the subscription page, at least five (5) shares for each subscriber, being the minimum number of shares required to be held by each subscriber under Article 35(a) of the Company Articles of Association.*
>
> *C. That, the draftsperson omitted to indicate five (5) shares against the names of Mr. Mao Jie and Mr Yang Junjia, on the subscription page of the Company's Memorandum of Association.*
>
> *D. That, a register of members was made on the basis of the contents, of the subscription page, of the Memorandum of Association which erroneously indicated the share subscription*

as : Mr L V Weidong- 80 shares, Ms Fang Min- 20 shares and zero shares for Mr Mao Jie and Mr Yang Junjia."

Then the parties resolved that the 3rd Defendant would get 70, Fang Min would get 20, Mao Jie 5 and Yang Junjia 5. It is interesting to note that the 3rd Defendant who knew all along that he had 80 shares reduced them to 70 to accommodate the 4th and 5th Defendants.

He knew all along that Fang Min had 20 shares. He also knew that he had 80 shares. He could now therefore not turn around to say that they had intended that the 4th and 5th Defendants be given five shares each. This in my view is something they could have rectified immediately at the time of signing of the Memorandum of Association. Nonetheless this resolution was done pursuant to Article 34 (c) as the first paragraph of the resolution states. Article 35 (a) clearly spelt that for a person to be a Director he had to own at least five fully paid up shares.

The Memorandum and Articles of Association clearly showed that the 4th and 5th Defendants had no shares. They could therefore not be signatories to a resolution. The only people who could have sat to pass the resolution were the Plaintiff and the 3rd Defendant.

It is clear from **ExhP7** that the Plaintiff did not attend the meeting whose proceedings were in China and where she could not go because of reasons we shall give later on in this judgment.

Resolution **ExhP7** was therefore of no value in as much as it was reached without quorum. This attempt of non directors sitting and passing resolutions that gave themselves shares, well knowing that they did not have the authority to do so can only be classified as fraud.

The definition of fraud was laid down in the case of ***Fredrick Zaabwe vs. Orient bank & 5 Others SCCA No.4 of 2006*** as an intentional perversion of truth for the purpose of inducing another with lies upon it to part with some valuable thing belonging to him or her or to surrender a legal right. And fraud means acting willfully with specific intent to deceive or cheat, ordinarily for purposes of either causing some financial loss to another or bringing about some financial gain to oneself.

In my view holding meetings with people who were not qualified and acting willfully with intent to deceive that the resolutions that came out of those meetings were lawful knowing very well it

would cause financial loss to the Nominal Defendant and bringing gain to the 3rd, 4th and 5th Defendants amounted to fraudulent conduct.

No wonder the behavior of the Defendant around the time expropriation of the property took place is corroborative of their intentions.

On 20th March 2014 the 3rd Defendant wrote **Exh P25** alleging that she was a dealer in drugs and human beings.

This letter written to the Minister of Internal Affairs in part reads;

> "*In effort to curb down crime it is thus necessary that we inform you and pray that your office carries out the above cause due to some issues that we have concerning matters of trafficking and drug dealing whereby Madam Fang Min coordinates with her daughter who is based in Hong Kong China to connect Chinese under aged girls who are brought to Uganda at Fang Fang Restaurant and are used up and left helpless after the mission is done. In fact one of the victims is ready to testify in this matter. We therefore pray that your immediate action to this cause will be highly appreciated.*
>
> *Yours Faithfully,*
>
> *LV Weidong*."

The 3rd Defendant conceded having written this allegation. During cross examination the 3rd Defendant admitted having written to the Internal Affairs and said he had received information in China because he believed in the allegation. He was summoned to police to go and help in the investigations but he did not go.

On the 15th of April 2015 Uganda Police summoned him to go and furnish them with information concerning the allegation he had made in his letter. The police wrote in **Exh P16**;

> "*We request that you cooperate to enable first and appropriate investigations into the matter. Failure to do so will attract*

subsequent action against you within a period of 14 working days on receipt of this letter."

He did not go. The police did their investigations and came up with a finding on 6th May 2017 **Exh P27** addressed to the 3rd Defendant. They wrote;

"*Whereas you gave us information about the criminal activities of Madam Fang Min our records who that you were required to give more information including presenting the victim in this matter which you have either failed or refused to do. As a result of this we carried out our investigations and found that your claims are false, which to the laws of this country amounts to a criminal offence and thus you are required to come and defend your claims as in failure to respond will lead to subsequent arrest*."

The Plaintiff was therefore cleared by the police which categorized the 3rd Defendant's allegations as false and amounted to a criminal offence. Raising such serious allegations without evidence can only be construed to have intended to demobilize the Plaintiff so as to remove any obstacles to the smooth flow of the Defendants' acquisition of the Nominal Defendant's property.

The foregoing in addition to passing of resolutions that had no foundation in law supported by the 4th and 5th Defendants was in my view fraudulent in nature and taking into account that the 3rd Defendant had almost 100% control of the 2nd Defendant which 2nd Defendant had 999,999 shares of the 6th Defendant through which the 3rd Defendant had full control and according to the authority in ***Salim Jamal***' s case herein earlier cited warranted a derivative action and lifting of the veil to enable the Nominal Defendant to peep and see the source of her troubles and for court to properly adjudicate the matter.

One of the issues that most probably led to break down in the relationship between the parties was the issue of accountability. DW.1 in his evidence stated that the Plaintiff had paid her own money totaling USD 5,000,000 which the 2nd Defendant agreed to refund but required the Plaintiff to provide accountability.

He stated that the Plaintiff also asked to be paid an appreciation fee of USD 4,700,000 for the role she had so far played to promote the 2nd Defendant's capacity to develop the Sukulu Project. He stated that on 3rd April 2013 the 2nd Defendant paid USD 5,167,000 as part of the appreciation fee which money was deposited on the personal account of the Plaintiff at the Industrial Bank Company Limited in Shanghai. He relied on **ExhD6**, in addition to that they paid another Yuan 19,200,000 equivalent to USD 3,200,000 totaling USD 8,367,000. That on 12th August 2013 the 2nd Defendant remitted a sum of USD 3,000,000 in the Nominal Defendant's Account for its operations. Indeed **Exh D7** shows that money was transferred from the Agricultural Bank of China.

On the 7th November 2013 the 2nd Defendant again deposited Yuan 3,000,000 equivalent to USD 500,000 towards payment of the Plaintiff's appreciation fee which brought the total payment of appreciation fee to USD 3,867,000. According to the 3rd Defendant this left a balance of USD 833,000 in respect of appreciation. That although the 2nd Defendant had refunded the USD 5,000,000 to the Plaintiff she did not account for it and that on checking the account, USD 3,000,000 was missing.

For those reasons he informed the Plaintiff that the money they had deposited on her account forming part of her account would not be released to her until she provided satisfactory accountability.

The Plaintiff throwing light on the issue of accountability stated that she had been asked to account for the USD 5,000,000 which she had injected into the company as nominal capital and preliminary expenses. She claimed she was entitled to a refund thereof. That she had been asked to personally account for the USD 3,000,000 that had been sent to the joint venture company that remained under the control of the 3rd Defendant who was the majority shareholder and retained control and custody of its books of accounts.

She further stated that the 3rd Defendant had appointed Mao Jie the 4th Defendant and Hao an Accountant to manage the day-to-day affairs of the company. It is mandatory for a company to keep books of accounts and to have these books of accounts subjected to audit. Section 154(1) of the Companies Act provides as follows;

> "(1) *Every company shall cause to be kept in the English language proper books of account with respect to-*
>
> *(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;*
> *(b) all sales and purchases of goods by the company ; and*
> *(c) the assets and liabilities of the company…"*

These books of account must reflect a true and fair view of the company's affairs and clear enough to explain its transactions. Section 154(3) provides that these books must be kept at the registered office of the company or at such other place in Uganda as the directors think fit and shall at all times be open to inspection by the directors.

Since there is no evidence on record to show that these books of account of the Nominal Defendant were kept in such other place, it is safe to conclude that they are at the registered office of the Nominal Defendant. The 3rd Defendant as well as the Plaintiff were directors and as accounting officers had access to these books. When the Plaintiff ceased to have anything to do with the financial business of the company and more so access to the registered office of the Nominal Defendant, the person responsible to have these books of accounts audited so as to show the picture of the company was the 3rd Defendant. He has access to the office and has access to the books of account.

It is his responsibility to have company auditors by calling annual general meetings in which they are appointed under section 167 of the Companies Act. It is these auditors then who would make a report under section 170 of the Companies Act that would show the financial status of the company.

The Plaintiff acknowledged that at one time she was a signatory but for only a limited time because she was removed as signatory. She does not deny that she was for sometime a signatory. **ExhP28** shows that from April 12th 2013 she was given a one year's appointment. In the letter of authorization **ExhP28**,to act as the representative of the Nominal Defendant in Uganda signing legal documents and dealing with all financial businesses including opening an account in the bank.

This authorization was however terminated by **ExhP29** on 12th November 2013. By this termination she could not sign any financial document nor open any bank account. She also ceased being the representative of the Nominal Defendant in Uganda. As I shall state later because of the animosity that developed between her and the 3rd Defendant she ceased having access to the Nominal Defendant's office where the books of accounts were kept. She therefore had no access to the books of accounts after her services were terminated. It was important for her to have access to the books of accounts to be able to show how much money was withdrawn, how it was spent, who did the spending and for what purpose. Indeed she had signed cheques and in some instances money was drawn but she claimed she had used it to pay company debts, to register the company and production of documents for feasibility studies which eventually played a very big role because they enabled the company to justify financial support.

On the 20th of March 2014 the 3rd Defendant wrote to the police **Exh P25** alleging that she was a trafficker in human beings and drugs. That she specialized in underage girls whom she brought to her Restaurant in Uganda, used and left helpless. This must have resulted into animosity and fear.

Counsel for the Defendants submitted that she was free to go to the office and work on her accountability.

In my considered opinion after being labeled a dealer of drugs and human trafficking it becomes very difficult to go to that office, pull out books of accounts and work out a report. A person who reports you to the police alleging crimes like the 3rd Defendant did in my view has only one wish for you "incarceration." It would become very difficult for the Plaintiff to go to that office and demand for books of accounts.

That notwithstanding the Defendants were in full control of the office and accounts department. They had an Accountant and they also had an Administrator. None of these was called to testify in court as to the status of their accounts and in what manner the Plaintiff had left them.

It is the obligation to keep books of accounts under section 154 of the Companies Act and it is their obligation to have these books audited under section 170 of the companies Act. Since the books were in their possession they had to lead evidence and tender books of audited accounts indicating the status as left by the Plaintiff. Having made it difficult for her to return to the

office aggravating it with irreconcilable resolutions, wrenching the Exploration license from the Nominal Defendant more so without her participation, it was difficult for her to return to the company office, ask for the books and work out her accountability.

For those reasons it is my finding that although in normal circumstances she would have accounted in this case she was prevented by the conduct of the Defendants themselves.

The freezing of her accounts therefore based on the ground that she has not accounted was without foundation and illegal.

It also follows that the issue of set off cannot be sustained as she is now entitled to the appreciation and whatever refund in respect of expenses incurred by her from her personal money. This appreciation and refund were conceded to by the 3rd Defendant in his evidence in chief and during cross examination.

At this stage I find it necessary to deal with the counterclaim. The 2nd Defendant sought to recover USD 8,000,000 being money for which the Counter Defendant failed to provide a satisfactory account and for those reasons general damages, interest and costs.

Since the issue of accountability has been dealt with, the claim under the counterclaim remains with no foundation and is hereby dismissed with costs.

Turning to the Issue of Remedies I shall begin with the issue of shares.

Before remedies are considered, it is important to settle the issue of shares.

During the hearing of the suit, the Plaintiff contended that she had 35 share of the Nominal Defendant.

The 3rd Defendant contended that her shares had never changed from 20. He however conceded that there was an intention to make them 35. His contention was that the Plaintiff had not accounted for money expended in the creation, registration, incorporation and day to day running of the Nominal Defendant. I have in another part of this judgment found that failure of the Plaintiff to render accounts cannot be used to deny the Plaintiff of her rights because she has been prevented to do so.

Furthermore the Defendants have not shown that the sums of money were not put to rightful use.

On the 15 shares, the Plaintiff relied on **Exh P17** which witnessed the Transfer of share stock. It shows that:

"I LV Weidong in consideration of USD 750,000 (United States Dollars of Seven hundred and fifty thousand only) paid by Fang Min herein called the said Transferee,

Do hereby bargain, sell, assign, and transfer to the said Transferee 15 ordinary shares of an in the undertaking called Uganda Hui Neng Mining Limited."

This document **Exh P17** clearly indicates that the Plaintiff paid for the 15 shares. It shows that the 3rd Defendant acknowledged the payment and indeed endorsed that acknowledgement.

So even if there were other debts to settle this transfer of stock which had been executed and registered was conclusive that the Plaintiff obtained extra 15 shares.

Since she already had 20 shares, the extra 15 shares made it 35.

For the reasons above it is my finding that the Plaintiff holds 35 shares in the Nominal Defendant.

In determining the fair market value of the Sukulu Deposit, PW.2 Munyaradzi Chirisa the expert witness stated that he used the discounted cash flow method which is an income approach. This aided them to estimate the fair market value of Sukulu Deposit.

To be specific he said, they used the comparable company method and comparable transaction method under the market approach to estimate the value.

In this way they used the Secondary (market approach) to test the reasonableness of valuation conclusions arrived at under the primary approach (income approach).

In his submission, counsel for the Plaintiff submitted that PW.2 came up with two positions. One of them was based on his findings of the Plaintiff's interest in the company based on a share holding of 20% and the other 35%.

He submitted further that the rates to be taken are those of 2018 since the matter has continued todate.

He further submitted that the expert's report remained unchallenged since the Defendants did not call any expert to rebut it. That PW.2 was extensively cross examined but he demonstrated his expertise.

He further sought punitive damages because in all his activities, the Defendant intended to make a profit for himself exceeding the compensation to be paid to the Plaintiff.

He further justified punitive damages that the Defendant who had entered into a joint venture with the Plaintiff used her money to set up the company, used her energy to get the exploration license, used her connections to advance himself, pretended to pay her, accused her of the most unimaginable crimes, stopped her money, took the company, the licenses and took everything from her. That the Defendant did all this to profit himself.

In reply the counsel for the Defendants submitted that if there was to be any compensation, it would stop as at 31st December 2013 when the licence was transferred. He submitted that this was the case because the Company was non-producing at that time.

Counsel further submitted that the expert report could not be relief upon because he ignored critical documents in respect of the value of the mineral asset for example the Mineral Agreement where it refers to restrictions of the 2nd Defendant on exporting concentrates that the Agreement required the 2nd Defendant to first process the extracted raw material and go to the market and fight for a share against big companies like Roofings, Tembo Steel etc. that with competition, the company was unsure of selling.

Furthermore that there was no certainty that the licence would be renewed when it expired.

That the assumption that the company would still be in existence and maintaining a cash flow by 2080 was misplaced.

Furthermore that the report took into account the whole exploration area yet the mining lease is for just a portion.

For those reasons and since the PW.2 could not produce the balance sheet he relied upon, counsel submitted that the report be discarded. He relied on ***3000 Counties Fresh Foods Ltd v. RWM Purchases Ltd & Others***

Lastly counsel submitted that in derivative action, the purpose is to seek a remedy on behalf of a company. That one cannot seek a direct remedy for him or herself. That one cannot recover loss that he has incurred because an asset of a company has been taken away.

To begin with the expert evidence I attentively listened to his answers. He said they used the DCF and market approach.

> "*What we did is to put a value on the Mineral Project as it stands, based on the information that has been received. So irrespective of the risk appetite of any hypothetical Buyer, what we did was to put a value. There is also a difference between a value and a price; I can come up with the value of this much but what the seller and the buyer ultimately negotiate on and agree upon may be something entirely different. So we looked at the technical merits of the asset based on the information that we were provided and we came up with the value*."

PW.2 explained the risk of speculation in this way;

> "*Yes they are but we took the risk into account when we calculated the discount rate. You will find that the discount rate that we have is really high and that is to take into account risks such as the one that you have just stated*."

PW.2 then gave the standards used.

He testified on the freedom the valuer has to choose a method he is comfortable with.

I found the witness very firm and answered all the questions clearly. He in my view presented an expert's testimony which counsel for the Defendants did not dislodge. In my view the Defendant seems to have given in to the expert's report because they did not call an expert to rebut it. The end result is that I believed the report as a document presenting acceptable values.

The first values were based on a 20% value. I have however earlier in the judgment found that the Plaintiff had 35 shares out of the 100. It is therefore based on those values that I base the award.

In paragraph 34 of the report PW.2 found that as at 31st December 2013 her interest in the Mineral deposit would be in the range of $14.9 to $ 22.7 million with a midpoint of $18.7

million. He also found that as at April 30th 2018 it was within the range of $20.9 million to $29.5 million with a midpoint of $25.0.

Although counsel for Defendant submitted that it would be wrong to consider anything beyond 2013, I find that the property has appreciated and continues to appreciate with time. It is therefore fair that court takes the 2018 values as the correct ones.

Counsel for the Defendant submitted that the value was based on the whole of Sukulu yet only a small area is developed. I have considered the fact that the valuator took those risks into account when he calculated the discount rate.

After considering all the circumstances of this case I find the Plaintiff's 35 shares worth $25 million being the midpoint of the fair market value of the Mineral deposit.

This should however go to the Nominal Defendant for the benefit of the shareholder.

In conclusion therefore, judgment is entered in favour of the Plaintiff in the following manner:-

1. That the purported transfer of the Exploration License No.1178 from the 1st Defendant to the 2nd Defendant and its subsequent transfer together with the resulting Mining Lease No.1393 to the 6th Defendant was done based on a resolution fraudulently obtained and therefore null and void.
2. That the Nominal Defendant is entitled to the benefits derived from the Exploration License.
3. The Plaintiff is entitled to the US$ 8,000,000 frozen conceded to by the 3rd Defendant.
4. The alleged rectification of shareholding which was done in China was illegally conducted and cannot stand.
5. That while the Plaintiff could bring a derivative action the fruits of such action would be towards the benefit of the Nominal Defendant through which it would trickle down to the Shareholder.
6. That the transfers referred to in (1) above amounted to a fraud on the minority.
7. That the corporate veil of the 2nd and 6th Defendants be lifted to allow for remedies against the Shareholders and Directors.
8. That the books of accounts of the Nominal Defendant be subjected to an audit so as to arrive at the financial status of the company.

9. That the sum in (3) above shall attract interest of 8% per annum from date of filing till payment in full.
10. That the counter claim by the Defendant is hereby dismissed.
11. The costs are to be borne by the Defendants.

Dated at Kampala this 19th day September 2019.

…….

HON. JUSTICE DAVID WANGUTUSI

JUDGE