THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

COMMERICAL DIVISION

COMPANY CAUSE NO. 0007 OF 2022

1. **SARAH IRUMBA MUHUMUZA**
2. **OBURU GRACE ACHIENG :: APPLICANTS**

VERSUS

1. **UGANDA ELECTRICITY TRANSMISSION COMPANY LTD**
2. **MINISTER OF FINANCE, PLANNING AND ECONOMIC DEVELOPMENT (MATIA KASAIJA) as of 15th March 2022**
3. **MINISTER OF STATE FOR FINANCE (EVELYNE ANITE) as of 15th March 2022**
4. **THE ATTORNEY GENERAL OF UGANDA :::::::::::::::::::: RESPONDENTS**

Before Hon. Lady Justice Harriet Grace Magala

JUDGMENT

Background

On the 29th day of October 2020, at an Annual General Meeting of the First Respondent, the Applicants were appointed as Board Members of the 1st Respondent for a period of three (3) years from 30th December 2020 to 30th

November 2023. Thereafter, between 2021 to early 2022 the press scrutinized and questioned the management of the 1st Respondent. This led to numerous articles in newspapers with wide circulation and media outlets over mismanagement of the 1st Respondent. These included allegations of fraud, corruption among many others.

Subsequently, the 2nd respondent tasked the Board of the 1st Respondent to explain the allegations and a status report was presented to the 2nd Respondent, who is a shareholder in the 1st Respondent. Thereafter, the Board members of the 1st Respondent were invited for a meeting to discuss matters relating to the disagreements within the Board on the 15th day of March 2022; which the applicants duly attended but state that only the former chairperson of the Board of the 1st Respondent, a one Mr. Peter Ucanda was granted the opportunity to be heard.

The 2nd Respondent vide a communication dated 7th April 2022 changed the Board of Directors of the 1st Respondent and communicated the decision of the 1st Respondent's shareholders to appoint a new Board of Directors. This in effect terminated the tenure of the applicants as board members of the 1st Respondent with immediate effect. It is as a result of this decision that the applicants petitioned this honorable court to nullify the said decision on the basis that the dismissal was unlawful. The Applicants also seek compensation for the remaining months of their tenure and costs.

Representation and Hearing

Mr. Ibrahim Kaggwa Kyembe on brief for Mr. Mohammed Mbabazi represented the Applicants while Mr. Anyuru Simon represented the 1st Respondent, Ms.

Nakannaba Barbara represented the 2nd and 3rd respondents and Mr. Moses Mugisha represented the 4th Respondent.

The Parties filed their written submissions following Court's directions and they have been duly considered.

Observation

In their pleadings and submissions, the Respondents raised preliminary points of law that had a likelihood of disposing this matter. However, counsel for the Respondents argued the points as issues. The parties framed the issues for determination differently but what is certain, is that issues number one and number two of the Applicants are substantially similar to issues number three and number four of the Respondents.

Issues

1. Whether the matter is properly before court?
2. Whether the applicants have a cause of action against the 2nd, 3rd, and 4th Respondents?
3. Whether the tenure of the applicants was lawfully terminated?
4. What remedies are available to the parties?

Resolution

1. Whether the matter is properly before court?

It was submitted for the Respondents that the Applicants were directors of the 1st Respondent and not shareholders and as such the application before is not provided for under **Order 38 Rule 5 (d) of the Civil Procedure Rules**. Counsel for the Respondents relied on the case of **DFCU *Bank Ltd Versus Mukibi***

Yudaya HCCS No. 195 of 2012 where it was held that the nature of company matters under **Order 38 of the Civil Procedure Rules** can be discerned from **Order 38 Rule 6**. They do not include an action against a company for breach of contract or tortious acts such as negligence. An action by a third party against a company for breach of contract or for a tort is not a company matter or cause.

It was further submitted for the Respondents that this matter does not fall under the scope of **Order 38 of the Civil Procedure rules** since it is not in consonance with the Act when it seeks to follow the procedure not provided for by the Act. Learned Counsel cited and relied on the case of ***Muljubhai Madhvani & Co. Ltd Versus Francis Mugarura & Others SCCA No. 013 of 2006*** where it was observed that the *ejusdem generis* rule demands that construction should be restricted to things of that class or category unless it is reasonably unclear from the context or general scope and purview of the Act of Parliament intended that they should be given broader significance.

The Respondents' counsel further observed that the remedies sought by the Applicants were for personal interests and thus termed as breach of contract, which is not envisaged under **Order 38 of the Civil Procedure rules** and therefore this court should find that this application is improper before it.

The Applicants submitted that a director is governed by the provisions of the Companies Act. That a director is an employee of the company as held in ***PG Group (Pty) Ltd Versus Mmambo NO and others (2004) 25 ILJ 2366 (LC).***

For the Respondents it was argued that the matter before this honorable court was not a company matter which is covered under **Order 38 of the Civil Procedure Rules S. 71-1 as amended**, herein **"CPR"** and the Order is headed, "Company Matters".

Whereas the CPR does not define what a company matter is, **Order 38 rules 3,4,5 and 6** to a very great extent give guidance on what company matters are and the manner in which they should be filed in court. That is either by way of a petition, motion or summons. In the case of ***DFCU Bank (u) ltd versus Mukiibi Yudaya and others HCCS No. 195 of 2012***, **Justice Madrama J (as then was)** noted that **Order 38 of the CPR** applies to applications made under the Companies Act.

The Applicants seek to rely on **Order 38 rule 5(d)** which states that:

> "*the following applications shall be made by motion…and applications not otherwise provided for in this Order".(emphasis is mine)*

The Applicants' claim against the Respondents is for a declaration that their termination and/or dismissal as directors of the 1st Respondent was unlawful, unfair and /or contrary to the terms and conditions of their appointment and the Companies Act, 2012. The Applicants further seek compensation payable to the directors for the remaining tenure of their term and costs. In law, the claim against the Respondents is for committing a tortious act. A tort is a wrongful act or an infringement of a right (other than under a contract) leading to legal liability. According to **Winfield, Province of the Law of Tort (1931), p.32,** a tortious liability arises from the breach of a duty primarily fixed by the law; such duty is towards persons generally and its breach is redressible by an action for unliquidated damages. The Applicants' case is that the Respondents acted contrary to section 195(3) and (9) of the Companies Act, 2012; and the rules of natural justice. In the case of **DFCU Bank Ltd – vs – Mukibi Yudaya HCCS 195 of 2012,** also cited and relied upon by the Respondents, Court held that:

> *"The nature of company matters under Order 38 of the Civil Procedure Rules can be discerned from Order 38 rules 3 and 6. They do not include an action against a company for breach of a contract or tortious acts such as negligence. An action by a third party against a company for breach of contract or for a tort is not a company matter or cause".*
>
> *(emphasis is mine).*

My reading and understanding of Order 38 of the CPR vis-à-vis the Applicants' claim, is that the claim should not have been filed in court by way of a notice of motion but by way of an ordinary plaint as provided for under Order 7 of the Civil Procedure Rules as amended.

Lastly, whereas Order 38 rule 5(d) is a general provision of the Law, the *ejusdem generis* rule on statutory interpretation if applied to Order 38 of the CPR vis-a –vis the Applicants' claim, it would still not fall within the scope of the Order. I shall rely on the case of **Muljubhai Madhvani & Co. Ltd – vs – Francis Mugarura & Ors. SCCA 13 of 2006** also cited by the Respondents where the Court held that:

> *"where general rules are found, following an enumeration of persons or things all susceptible of being regarded as specimens of a single genus or category, but not exhaustive thereof, their construction should be restricted to things of that class or category, unless it is reasonably clear from the context or general scope and purview of the Act that parliament intended that they should be given broader significance".*

The Applicants' claim against the Respondents does not fall within the class or category of company matters within the scope of Order 38 rules 3, 4, 5 and 6 of the Civil Procedure Rules as amended.

In conclusion, I find that this application is not properly before this Court. The Applicants were removed from the Board of the 1st Respondent in April 2022. It is about two years since they were removed. The Limitation Act, Cap 80 Laws of Uganda, **section 3(1)(a)** states that:

> *"(1)The following actions shall not be brought after the expiration of six years from the date on which the cause of action arose—*
>
> *(a)actions founded on contract or on tort; …*
>
> *except that in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under an enactment or independently of any such contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years".*

According to the above provision of the Limitation Act, the Applicants are still within time to properly bring their claim in court against the Respondents.

2. Whether the Applicants have a cause of action against the 2nd, 3rd, and 4th Respondents?

The Respondents' counsel submitted that the 2nd and 3rd Respondents are shareholders and cannot be sued personally without an order to lift the corporate veil under **Section 20 of the Companies Act 2012**. That the reasons for suing the 4th Respondent were not clearly spelt out in the application. For

that reason, therefore, the Applicants do not have a cause of action against the Respondents.

Counsel relied on the case of ***Tororo Cement Co. Ltd versus Frokina International Ltd SCCA No. 02 of 2001*** where it was emphasized that a cause of action is disclosed where the plaintiff enjoyed a right, that right has been violated and the defendant is liable. It was further submitted that a company is a legal person with its own identity, separate and distinct from the directors or shareholders as held in ***Salomon Versus Salomon & Co (1897) AC 22***. Therefore, the 2nd and 3rd Respondents cannot be held liable or sued independently without lifting the company corporate veil. The Applicants made no reply to this issue neither in their pleadings by way of an affidavit in rejoinder nor their submissions.

Order 7 rule 11(a) of the Civil Procedure Rules, as amended states that a plaint shall be rejected where it does not disclose a cause of action. In the case of ***Kapeka Coffee Works Ltd V NPART CACA No. 3 of 2000*** the **Court of Appeal** held that in determining whether a plaint discloses a cause of action, the court must look only at the plaint and its annexures if any and nowhere else. Therefore, in order to prove that there is a cause of action, the plaintiff, through the plaint must show that *he/she enjoyed a right, that the right has been violated*, *and that the defendant is liable*. If the three elements are present, then a cause of action is disclosed and any defect or omission can be put right by amendment. The trial judge has the discretion to allow such an amendment. Where no cause of action is disclosed, no amendment can be allowed because the plaint is a nullity **(see *Tororo Cement Co Ltd V Frokina International Ltd (supra).***

I have perused the Notice of Notion and the affidavits attached in its support. The Applicants did not disclose any cause of action against the 4th Respondent. In respect of the 2nd and 3rd Respondents, they were sued in their capacities as ministers. The 1st Respondent is a company fully owned by the Government of Uganda and its two shareholders are the Minister of Finance, Planning and Economic Development and the Minister of State for Finance in charge of privatization. In law, a company is a separate entity from its shareholders. In the *locus classicus* case of ***Salomon Versus Salomon (1897) A.C 22 at page 51,*** it was held that:

> *"The company is at law a different person altogether from the subscribers… and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not an agent of the subscribers or trustee…"*

In the case of ***Prest Versus Petrodel Resources Ltd [UKSC] (2013) 2 AC 415 at par. 66***, **Lord Neuberger** described the *Salomon* decision as to have stood unimpeached for over a century. He referred to the statement of **Lord Halsbury LC** who noted that a *"legally incorporated" company "must be treated like any other independent person with its rights and liabilities appropriate to itself ..., whatever may have been the ideas or schemes of those who brought it into existence"*.

As rightly submitted by the Respondents, the 2nd and 3rd Respondents cannot be sued for the actions of the company. It was further submitted for the 2nd and 3rd Respondents that they could not be sued without lifting the corporate veil of the 1st Respondent which was never prayed for by the Applicants. I wish to state that the doctrine of veil piercing requires some dishonesty on the part of the

company member. The dishonesty must involve company law being used as a sham or façade to disguise the true ownership of property or evasion of liability by the company.

In the circumstances, I find that the Applicants did not disclose any cause of action against the 2nd, 3rd and 4th Respondents.

The Court's finding on the 1st preliminary objection/issue disposes of this cause but does not resolve the Applicants' claim against the 1st Respondent because this court has not pronounced itself on the 3rd and 4th issues. For that reason, the Application is dismissed with no order as to costs. Each party shall bear their own costs.

Signed and dated at Kampala this 9th day of May 2024.

Harriet Grace MAGALA

Judge

Delivered online (ECCMIS) this 13th day of May 2024.