

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
HCT-00-CV-CI-0012-2008

1. MOHAMMED ZZIWA KIZITO

2. MUBARAK MUGERWA

3. IBRAHIM KAYOGA

4. SPIDIQA FOUNDATION

:::::::::::::::::::::::::APPLICANTS

VERSUS

SPIDIQA UMMA FOUNDATION::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING

This company cause was brought under O.38 rr. 4 – 7, O.52 rr.(4) and (3) of the Civil Procedure Rules, Section 118 of the Companies Act and Section 98 of the Civil Procedure Act. It is for a host of orders, including that the name SPIDIQA FOUNDATION which has been wrongfully struck off the Register be restored by the Registrar of Companies to the Register of Companies; that a declaration be made that all resolutions and dealings by the respondent, its officers and servants and all documents lodged with the Registrar by the respondent since the 17th of June, 2002 in so far as they relate to property, membership and management of the Company be declared null and void and of no legal effect; that a declaration be made that the company known as SPIDIQA UMMA FOUNDATION is unlawfully constituted and entered in the Registry of Companies; and that the register of SPIDIQA FOUNDATION be rectified or restored to that before 17/06/2002 to reflect the lawful membership of the Company and striking out any illegally entitled members.

The matter came up for conferencing on 10/11/2008. As the record shows, parties have not been economical with words. The pleadings, especially those of the applicants, are

too prolific. We did not complete the conferencing on that date. The case was adjourned to 8/12/2008 but on that date court did not sit. In the course of time, both counsel decided to file written submissions on their own volition. I declined to decide the matter at that stage without any formal issues being framed. When hearing resumed on 2/07/2009, Mr. Madrama informed court that both parties had had a meeting and agreed on issues for determination. On the basis of those issues, the case was listed for a ruling on condition that the parties file written submissions in line with the framed issues. Both counsel chose to rely on written submissions which they filed in February and March 2009.

Issues

1. Whether the names of SPIDIQA FOUNDATION were lawfully changed to SPIDIQA UMMA FOUNDATION.
2. Whether the meeting mentioned in the Notice of Motion of March 1998 and all subsequent actions and meetings allegedly held on behalf of the company in question are lawful and binding on SPIDIQA FOUNDATION.
3. Whether Spidiqa Foundation and Spidiqa Umma Foundation are the same company.
4. Who are the members of the company and whether the register of members of the company should be rectified.
5. Remedies, if any.

Counsel:

Mr. Christopher Madrama for the applicants

Mr. Serwadda Musisi for the respondents.

THE EVIDENCE

From the pleadings, the first three applicants Mohammed Zziwa Kizito, Mubarak Mugerwa and Ibrahim Kayoga, were founder members of a company known as SPIDIQA FOUNDATION, the 4th applicant herein. The company was registered with 20 members, namely:

1. *Sheikh M.Kizito Ziwa* 2. *Sheikh Mubarak Mugerwa* 3. *Sheikh Abdu Kasule* 4. *Sheikh Musa Tamusange* 5. *Sheikh Zaid Kaddu* 6. *Sheikh Isa Mutumba* 7. *Sheikh Y. Semakula* 8. *Eng. Juma Kisaliita* 9. *Mr. Ibrahim Kayoga* 10. *Mr. Moses Musisi* 11. *Haji Abdu Katumba* 12. *Mr. Bilal Muwanga* 13. *Mr. Amir Mubiru* 14. *Mr. M. Balyejjusa* 15. *Muhammad Sekonge* 16. *Sulaiman Lwamakuba* 17. *Mr. Abdu Karim Abuya* 18. *Mr. Muhammed Kabonga* 19. *Mr. Muhammed Musisi* 20. *Mr. Shaban Sentamu.*

The main aim of their organization was to teach and propagate Islam. The organization was under the leadership of the 1st applicant, deputized by the 2nd applicant. In the course of time, the parties developed some disagreements and 9 members out of the twenty founder members resigned. Consequent to this resignation, only 11 members remained as subscribers in the company. It is the case of the respondent that in 1998 an Annual General Meeting was convened during which it was resolved that an interim Executive be elected and was indeed elected. That thereafter a new name was adopted and new members were enlisted.

It is these events subsequent to the conflicts in the company which form the substance of the applicants' case against the respondent.

I should state in passing, since the point is not canvassed in the 5 issues, that the appropriate agency to start an action on behalf of a company is ordinarily the board of directors, to whom the power is delegated as an incident of managing the company. In the instant case, such power vested in the Executive Committee. However, the company has had a turbulent existence since inception. It is well established that in certain circumstances, an individual shareholder or group of them can institute proceedings as

plaintiffs. This point was considered in *Burland & others vs Earle & others [1902] A.C. 83* where the court observed:

“It is an elementary principle that a court has no jurisdiction to interfere with the internal management of companies acting within their powers. The company must sue to redress a wrong done to it, but if a majority of its shares are controlled by those against whom relief is sought, the complaining shareholders may sue in their own names, but must show that the acts complained of are either fraudulent or ultravires.”

We wait to see whether this action meets the criteria stated in the above case.

I will in the same vein comment on the objections raised to the affidavits of Musa Tamusange and Yunus Kamya, and the 1st applicant’s alleged loss of citizenship.

As regards Yunus Kamya’s affidavit dated 24/10/2008, it does not disclose the source of information with regard to the General Meeting of 1998. All other parts of it are based on knowledge and belief. In *Dr. Besigye Kizza vs Museveni Yoweri Kaguta & Anor Election Petition No. 1 of 2001* (Supreme court), it was held that part of an affidavit can be struck off if it does not disclose the source of information but at the same time rely on the other averments as evidence if based on knowledge and belief. I would do that in the instant case.

And as regards Sheikh Tamusange’s affidavit in rebuttal, I note that though filed without leave of court, it does not raise any new matter. Given that our constitution mandates courts to administer justice without undue regard to technicalities, I am inclined to overlook the omissions and lapses in the said affidavit also in the greater interests of justice in accordance with Article 126 (2) (e) of the Constitution and Section 98 of the Civil Procedure Act.

And as regards the first applicant's alleged loss of citizenship, he has produced extracts from his passport indicating that he got a new passport on 07/05/08 and it will expire in 2018. I have not seen evidence to support his alleged loss of citizenship. I do not think that it matters much either.

These three objections are in my view clear demonstration of how undue regard to technicalities can obscure real issues, to the prejudice of substantive justice. I have therefore disregarded them.

I now turn to the issues framed for court's determination.

1. **Whether the names of Spidiqa Foundation were lawfully changed to Spidiqa Umma Foundation.**

From the pleadings, Spidiqa Foundation owned land, Plot 925 Kibuga Block 12 at Mengo Kisenyi. The said land was developed for and on behalf of the company by the members. In the course of time, conflicts arose within the Foundation. The conflicts led to formation of cliques within the company and ultimately to the formation of a breakaway faction of members. As a result nine (9) members, including 4 on the Executive Committee, resigned their membership in the Foundation and declared no further interest in the Foundation affairs. Those who resigned were:

- | | |
|-------------------------|-----------------|
| 1. Juma Kisaliita | 5. Abdul Kasule |
| 2. Ameri M. Musikalaale | 6. I. Mutumba |
| 3. Moses Musisi | 7. M. Sekonge |
| 4. Abdul Karim Abuya | 8. Abdu Katumba |
| | 9. Abubakar |

From the pleadings also the breakaway faction formed its own organization, Umma Foundation, which they did not register. Then on 15/03/1998, some 97 people of the Islamic faith came together and constituted themselves into a General Meeting. They included those who had broken away from Spidiqa Foundation. The meeting came up

with far reaching resolutions, including the dropping of the company's constitution in favour of using the Quran and the traditions of the Prophet as their constitution in every aspect of problem or dispute. They also resolved to rename the Foundation SPIDIQA UMMA FOUNDATION. All this resulted in a company Resolution dated 6th February, 2000 on the basis of which the impugned changes were effected. I will now turn to the efficacy of these changes.

Although it is generally agreed that the affairs of the company are run by the board of directors and Management, in this case the Executive Committee, it is trite that the ultimate control lies with the Annual General Meetings or Extra-ordinary meetings, as the case may be. At these meetings the members normally express their wishes as to how the affairs of the company should be run by holding meetings and voting for or against resolutions. The decision of the majority will normally prevail, termed as the rule in **Foss vs Harbottle (1843) 2 Hare 461**. There is an exception to the said rule. Section 135 of the Companies Act comes to aid where there is a stalemate in the running of a Company, the likes of what happened in Spidiqa Foundation before the impugned resolutions herein.

The section empowers court to call meeting of a company in any manner if it is satisfied that it is impracticable to call for a meeting in the manner envisaged under the Articles of Association. It can do so on own motion or on application of a director or member of the Company who is entitled to vote at such meeting. It is one of the most effective ways of diffusing tension in corporate bodies.

In the instant case, the breakaway faction did not seek any lawful means of dealing with the impasse in the management of the company. They purported to overthrow fellow members in the company, abrogate and suspend their own constitution and rename the company SPIDIQA UMMA FOUNDATION. Upon doing so, they purported to change the number of Directors in the Company from 20 to 60 and changed the proprietorship of the company land from Spidiqa Foundation to Spidiqa Umma Foundation.

The procedure adopted by the breakaway faction was irregular and, to say the least, unlawful. I say so because section 21 (1) of the Companies Act provides that the memorandum and articles shall, when registered, ***“bind the company and the members of the company to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions in the memorandum and the articles.”***

The effect of this section is to create a statutory contract between the members themselves and between the members and the company. The contractual relationship can only be terminated in accordance with the terms of that contract or else it will be ***ultravires*** (beyond the power). An act in excess of the authority conferred by law is ***ultravires*** and therefore invalid.

Turning now to the impugned acts of the breakaway faction in relation to the law which I have outlined above, the whole question is whether the said changes were validly effected on 15/03/1998 and thereafter.

With regard to the name of the company, that is, a change from Spidiqa Foundation to Spidiqa Umma Foundation, the law under Section 19 of the Companies Act is that ***“A company may by special resolution and with the approval of the registrar signified in writing change its name.”***

In the instant case, whereas the membership of the company stood at 20 on inception and dropped to 11 in the course of time after the resignation of 9 members, a group of 97 people came together on 15/03/98, purported to constitute themselves into a General Meeting, suspended the Companies Constitution and purported to make resolutions one of which was to change the name of the company from Spidiqa Foundation to Spidiqa Umma Foundation. The group included members who had resigned and had therefore ceased to be members of the company. They purported to transact business on behalf of the company and yet they were not members. Those who were still members and participated in the meeting did so as individuals, not as members mandated to act as such

by the articles of association. I do not hesitate to say that whatever they did was outside the constitutional framework of the company and was therefore ***ultravires***.

It is trite that a company comes into existence for the objects stated in its memorandum and articles of association. This was after all the condition for its incorporation and existence. To the extent that the acts of the breakaway faction were not in accordance with the company's constitution, they were null and void.

I am mindful of the decision in ***Nanjibhai Prabhudas & Co. Ltd vs Standard Bank Ltd [1968] E. A. 670*** that:

“The court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature.”

In the instant case, what the 97 people did on 15/03/1998 with regard to the activities of the company were not merely matters of procedure. They were matters of a fundamental nature, going to the very root of the contract between the members of the association and the Company itself. Those who were not members but took part in the deliberations did so illegally. The articles of association do not constitute a contract between the company and non-members. Their acts were therefore null and void.

The effect of a nullity could not have been better stated than Lord Denning did in ***Macfoy vs United Africa Co. Ltd [1961] 3 ALL ER. 1169*** at 1172 when he said:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court to declare it to be so. So every proceeding which is founded on it is also bad and incurably

***bad. You cannot put something on nothing and expect it to stay there.
It will collapse.”***

Applying the same principle to the facts herein, it is very clear to me that the name Spidiqa Foundation was not lawfully changed to Spidiqa Umma Foundation. Those who did it had no company mandate to do so. In the same vein, the meeting mentioned in the Notice of Motion of 15/03/98 and all subsequent actions and meetings purportedly held on behalf of the company in question were not lawful and binding on Spidiqa Foundation. I would answer issues (1) and (2) in the negative and I do so.

As to whether Spidiqa Foundation and Spidiqa Umma Foundation are the same company, on the facts and the law outlined above, the two are different entities, one merely riding on the shoulder of the other. They cannot share the same certificate of incorporation. In theory the 97 people disbanded Spidiqa Foundation Constitution and by so doing thought that it had then ceased to exist. A company only exists through its memorandum and articles of association. The Constitution of Spidiqa Foundation, as learned counsel for the applicants has correctly submitted, could not be lawfully substituted with the Quran, Prophets and Traditions of the Prophet. Accordingly, Spidiqa Foundation has never ceased to exist and Spidiqa Umma Foundation is not even its alias. I so hold.

The third issue is also answered in the negative.

4. ***Who are the members of the Company and whether the register of members should be rectified.***

In law a person may become a member by subscribing to the memorandum and articles of association. Thus under S.27 of the Companies Act, upon registration of Spidiqa Foundation, the 20 subscribers became members. I have already set out the names of those 20 people. In the alternative, membership is achieved through agreement to be a member. This includes those to whom shares are transferred or transmitted. From the evidence, there has never been any valid general meeting of the company to increase

membership. I have already indicated that the meeting of 15/03/98 was of no legal effect. The resolution to increase the membership to 60 therefore lacked efficacy.

It is evident that in the course of time nine of the original 20 members resigned and therefore ceased to be members. I have also already set out the names of those members. By necessary implication the eleven (11) members who did not resign have never ceased to be members. With the exception of those who have died, if any, they now constitute the core of Spidiqa Foundation. It is immaterial that some of them took part in the sham meeting of 15/03/98 as long as they have never formally tendered any resignation.

As regards rectification of the members register, Section 118 of the Companies Act gives court power to order rectification of the company register if **“the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company”** [S.118 (1) (a)].

The remedy under this section is available to any aggrieved person, any member of the company or the company itself. Given that some names may have been entered on the register following the illegal acts of the breakaway faction, and in view of the possibility that some of the stayees in the company may have passed away in the course of time, it is necessary that the register be rectified in accordance with S.118 of the Companies Act.

I so order.

This also disposes of issue No. 4.

5. ***Remedies***

The applicants have prayed for a number of orders in the matter.

The first is a declaration that all the resolutions and dealings by the respondent, its officers and servants and all documents lodged with the Registrar by the respondent since May 1998 in so far as they relate to property, memberships and management of Spidiqa

Foundation whose names were changed to Spidiqa Umma Foundation are null and void and of no legal effect. I have already indicated that the applicants are entitled to this remedy. The same is granted to them.

The second is a declaration that the company known as Spidiqa Umma Foundation is unlawfully constituted and entered in the Register of Companies to succeed Spidiqa Foundation.

The applicants have also made out a case for the grant of this remedy. It is granted.

The third is a declaration that the company known as Spidiqa Umma Foundation is materially a different company from Spidiqa Foundation.

I have already made a finding that this is so. It is therefore so declared.

The fourth is a declaration that Spidiqa Foundation is entitled to its certificate of incorporation and Spidiqa Umma Foundation is not.

From my analysis of the evidence above, Spidiqa Foundation is entitled to its certificate of incorporation. The same shall be restored to them. As for Spidiqa Umma Foundation, however, its registration as a separate company by the breakaway faction from Spidiqa Foundation shall be at the discretion of the Registrar in accordance with Section 18 of the Companies Act.

The fifth is a declaration that Umma Foundation cannot use the name Spidiqa in its names. This remedy shall abide the outcome of the fourth prayer above.

The sixth is for an order directing the Registrar of Companies to restore the name of Spidiqa Foundation which had been wrongfully struck off the Register on the Company Register.

Again from my analysis of the evidence above, the applicants are entitled to this remedy. It is granted to them. Accordingly, the register of Spidiqa Foundation shall be rectified and/or restored to that before 15th March 1998 to reflect the proper membership of the Foundation.

For the avoidance of doubt, the company's register of members shall be rectified within **three** (3) months from the date of this order in the absence of any valid reason to the contrary. Notice of the rectification of the register shall be given to the Registrar of Companies.

As an incidental relief to the above, I would also make an order for a meeting of Spidiqa Foundation under S.135 of the Companies Act also to be convened and held within three months from the date of this order after notification of the remaining eleven or so subscribers to the memorandum and articles of association to discuss the affairs of the company, admit new members, appoint a new executive committee, among other business.

The seventh prayer is for a permanent injunction restraining Spidiqa Umma Foundation, its members, servants, officials or agents from occupying or in anyway dealing with the property of Spidiqa Foundation in a manner inconsistent with the objects of its incorporation, as it was by 1998, in the suit property.

For the same reasons given above, the applicants have made out a case for grant of this remedy. It is granted.

The applicants have also prayed for any other and further relief as the court may deem fit.

Under Section 177 of the Registration of Titles Act, Cap. 230, where court finds, as in this case, that the title of the registered proprietor cannot be protected or upheld under the Act, it is empowered to order cancellation of such certificate of title and the entry in the Register Book.

See: Florence Kateeba vs Geoffrey Mayinja Civil Appeal (High Court) No. 129 of 1995 (unreported). I would think that such an order would be fitting in these circumstances to avoid multiplicity of proceedings. The Registrar shall cancel Spidiqa Umma Foundation's certificate of title [under Instrument No. 396666 of 23/05/2008] as well as entry in the register with respect to the suit property and give effect to the 6th prayer above.

For the avoidance of doubt, Spidiqa Foundation's interest in the suit property shall remain unencumbered pending re-registration as owner of the suit property.

As regards costs, the usual result is that the loser pays the winner's costs. This practice is subject to the court's discretion, so that a winning party may not necessarily be awarded his costs.

In the instant case, I would note that a shareholder is only required to institute proceedings on behalf of the company if all means have been used to put the company's general meeting in motion and have failed. One such means in the instant case would have been invocation of Section 135 of the Companies Act before the matter went too far. I have not seen evidence of any such step being taken by applicants 1 – 3 before they joined issue with the 4th applicant to file this case. In these circumstances, I would allow the claims in the terms already stated above with costs to the applicants but certified for the 4th applicant alone. I would so order and I do so.

Orders accordingly.

Yorokamu Bamwine

JUDGE

06/08/2009