

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. APPL. NO.190 OF 2008
(Arising from Divorce Cause No.15 of 2005)

SOON PRODUCTION LTD ::::::::::::::::::::::::::::::: APPLICANT

VERSUS

- 1. SOON YEON HONG }
2. KIM DONG YUN } ::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE REMMY K. KASULE

RULING

The applicant, a company registered with limited liability under the Companies Act, Cap.110, Laws of Uganda, filed Miscellaneous Application Number 190 of 2008 seeking a review and setting aside the orders as regards properties in the names of the applicant, made by this Court, in a Judgment in Divorce Cause Number 15 of 2008.

The two respondents to this application were wife, SOON YEON HONG KIM, and husband: KIM DONG YUN, and in Divorce Cause No.15 of 2005, the wife sought against the husband, the dissolution of the marriage on grounds of adultery and cruelty, amongst others.

Judgment in the Divorce Cause No.15 of 2005 was given on 12.05.08. A Decree Nisi dissolving the marriage was issued and properties acquired by the parties during the sustenance of the marriage were distributed, the distribution having been agreed upon by the parties to the petition, with the advice of their respective Counsel.

The applicant company was incorporated in Uganda in about April, 1992. It has as its directors and Shareholders: SOON YEON HONG KIM, wife, and KIM DONG YUN,

husband. Each one owns ten (10) shares in the Company. There is no other director or shareholder in the Company.

The activities of the company included the catching and trapping of fish and export of same outside Uganda. Both directors as shareholders worked in the company.

Overtime, the applicant company, under the control and management of its two directors/shareholders, came to own a number of landed properties as well as motor-vehicles. These properties were part of the distribution agreed upon and consented to by the two directors/shareholders who in the said Divorce petition were wife and husband.

Judgment in the Divorce petition was given on 12.05.08. On 18.08.08 the applicant filed the Miscellaneous Application Number 190 of 2008.

Learned Counsel T. Kanyerezi Masembe, for the first respondent to the application has raised two preliminary objections to the application.

The first objection, is that, the application is barred in law as Messrs Simon Tendo Kabenge, Advocates, for the applicant, do not have any or any valid instructions of either the board of directors or the general meeting of Soon Productions Ltd to bring this action. The second objection, is that, the Judgment in Divorce Cause No.15 of 2005 dated 12.05.08 between the two (2) respondents and the signed agreement, between the same respondents dated the 30.04.08, that preceded the Judgment, being a judgment and an agreement between the two (2) sole shareholders and directors of the company, constitute a valid and enforceable agreement, as to distribution of the property in question, binding on the Respondents and on the Company; and to that effect, this claim is Res Judicata.

As to the first objection, it was submitted, for the first respondent, that, since the applicant company has only two (2) shareholders/directors, and since the first respondent never participated in any resolution to instruct applicant's Counsel to lodge this

application, therefore the review application is not authorized by any of the relevant organs of the Company; and as such the same is a nullity and should be struck out.

For the applicant, it was submitted, in reply to the submissions of Counsel for the first respondent, that one of the directors/shareholders in the company, who was a managing director in the company; and therefore with powers to manage the business of the applicant company, gave the instructions to lodge the Review Application, on behalf of the board of directors. This director/shareholder is KIM DONG YUN, who also is the second respondent to the application. KIM DONG YUN, had also sworn an affidavit in support of the Review application.

The position of the law is that, in a dispute within the company, the company is the proper plaintiff: See: **The Principles of Modern Company Law by LCB Gower, 2nd Edition pp.527 and 528.**

The Rule, known as the “**Foss Vs Harbottle**” Rule, pronounced in the case of **Foss Vs Harbottle [1843] 2 HARE 461**: is that a suit for a wrong done to a company can only be brought in the names of the company; and only with the authorization of the company’s relevant organs.

The exception to the “**Foss Vs Harbottle**” Rule is the institution of a derivative action in the name of an individual Shareholder for a wrong done to the Company. In such a case, the company is usually joined as a defendant to the action. See: **Cheshire on company law: pp.309 and 310.** A derivative action is resorted to whenever the circumstances are such that, notwithstanding the Rule in **Foss Vs. Harbottle**, when what the individual shareholder complains of could not be validly effected or ratified by an ordinary resolution.

It is now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf

of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company: See **UNITED ASSURANCE CO. LTD VS. ATTORNEY GENERAL: SCCA NO.1 of 1998**, and **M/S TATU NAIGA & CO. EMPORIUM VS. VERJEE BROTHERS LTD.: SCCA No.8 of 2002**.

The above two decisions overruled the earlier decision of **BUGERERE COFFEE GROWERS LTD VS. SEBADUKA & ANOTHER [1970] EA 147**, which was to the effect that, a resolution of the board of directors or that of the meeting of the company, was necessary as proof that the company was authorized to commence action. Wambuzi C.J., as he then was, stated the law thus in the **UNITED ASSURANCE** case:

“Every case must be decided on its own facts. Looking at the authorities and the law I would say that one way of proving a decision of a board of directors is by a resolution of Board in that behalf. But I would not go so far as to say that this is the only means of proof as is suggested in the Bugerere Coffee Growers Ltd. Vs. Sebadduka, unless of course, the law specifically requires a resolution as appears to be the case in instances specifically provided for in the Companies Act, and authority to bring an action in the name of the Company is not one of those instances where a resolution is required.”

In this particular application, the pleadings of the application on the face of it show that KIM DONG YUN, as Director/Shareholder/Managing Director instructed Counsel for applicant for the applicant to commence this Review Application. It is not denied by the first respondent that KIM DONG YUN was director/Shareholder and Managing Director of the applicant Company, at the material time, and therefore could instruct and communicate instructions to applicant’s Counsel to commence the Review Application. Counsel for applicant therefore filed the application and is prosecuting the same pursuant to those instructions.

Court, at this stage of preliminary objection, declines to consider what effect, KIM DONG YUN, having agreed to the distribution of properties in Divorce Cause No.15 of 2005, such agreement can have on the instructions being pursued by the applicant. Court will only deal with such a matter when considering the overall merits and demerits of the application to Review.

The first objection is overruled.

The second objection has in a way been resolved upon, while dealing with the first objection. The objection can only be exhaustively dealt with when dealing with the overall merits and demerits of the main Application to Review. It is only at that stage when court can consider whether or not the applicant remained a separate corporate identity, independent of what happened in the Divorce Proceedings, or whether, its corporate status notwithstanding, the applicant is bound by the Judgment in the divorce proceedings. This objection is also rejected.

Court also observes that the application for Review involves fundamental issues regarding the three parties to it: the Company, the applicant, and then its two Shareholders/directors who at the same time happen to be husband and wife whose marriage is being dissolved under the Divorce Petition. The issues involved in the application are thus fundamental to the individual lives of those concerned. It is thus appropriate, in the considered view of Court, that all the issues for resolution, be fully argued out and Court resolves each and every one of them on its own merits. This is not an appropriate case for shutting out the parties by way of preliminary objections.

It is thus ordered that the application for Review proceeds on a full hearing, the same to be determined on its own merits.

The costs of this objection are to follow the main event in the substantive Application for Review.

Remmy K. Kasule

Judge

8th August, 2009