THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

HCT-00-CV-CI-0008-2005

BALWINDER KAUR SANDHU ::::::::::::::::::::::::::::::::APPLICANT

VERSUS

NOBLE BUILDERS (UGANDA) LTD :::::::::::::::::::: RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING

The respondent, M/s Noble Builders (U) Ltd, was incorporated as a Limited liability Company in Uganda on 5th January, 1984. Shareholding was as follows:

1). Raghbir Singh Sandhu ……. 255 shares.

2). Jaspal Singh Sandhu ……. 245 shares.

The share capital of the Company was stated to be Shs.500,000/= divided into 500 ordinary shares of Shs.1,000/= each. The first directors of the company were the two shareholders mentioned above.

From the pleadings, in April 1984, the two directors of the Company executed form No. 8. The execution thereof signaled the resignation of Mr. Jaspal Singh Sandhu as director/member of the Company effective 12th January, 1984 and the appointment of his wife Mrs. Balwinder Kaur as a director/member of the company. The document was duly registered at the company registry. Sometime in the year 2000 Mr. Jaspal Singh Sandhu commenced by way of a petition an action to wind up the respondent company. The petition was heard and determined by my brother R. O. Okumu – Wengi, J. who allowed the winding up petition with costs. The matter went on appeal to the Court of Appeal which allowed the appeal on the ground that on the execution of Company Form 8 by Jaspal Sandhu and on the unambiguous words which were used in the said Form, the said Mr. Jaspal Sandhu had transferred his 245 shares in the Company to his wife Balwinder

Kaur and ceased to be a member and therefore could not petition for winding up of the company. On further appeal to the Supreme Court the Justices upheld the findings of the Court of Appeal and therefore dismissed the appeal. Consequently, Balwinder Kaur sought to have her name entered on the register of the Company. This was resisted by the other shareholder and director, Raghbir Singh Sandhu. Hence this application under S. 118 of the Companies Act.

When the matter came up for hearing on 30/03/09, Counsel invited me to allow them to file written arguments on the matter. I obliged. However, each side came up with its own set of issues for determination. Consequently, both parties were re-summoned for conferencing and the following issues emerged:

1. Whether the applicant's application is time barred.

2. Whether the application is competent.

3. Whether there was a valid transfer of 245 shares to the applicant.

4. Whether the applicant is entitled to the reliefs sought.

5. Remedies.

1. *Whether the applicant's application is time barred.*

The respondent's objection to the application on this point is that on the basis of the evidence adduced, the applicant's claim to be registered as a member of the respondent company is based on a document entitled: Notification of Change of Directors or Secretaries or their particulars' executed in 1984. That the application for rectification of the register of members was filed in this court on 16th September, 2005, 21 years after the alleged cause of action arose. Hence the argument that the application is time barred.

Learned Counsel's objection is based on Section 21 (1) of the Companies Act. It states:

"Subject to this Act, 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 the provisions of the memorandum and of the articles."

He has submitted that according to Gower's Principles of Modern Company Law, 4th Edition at p. 314, the effect of the above section is to create a Statutory contract between the members themselves and between the members and the Company; that the applicant's claim is thus based on contract, since by applying to have her name entered as shareholder on the register of the respondent's company she is trying to enforce an alleged contractual right which according to the evidence on record arose way back in 1984. He has cited to me S. 3 (1) (a) of the Limitation Act which provides that no action founded on contract or tort shall be brought after the expiration of six years.

Learned Counsel for the applicant does not agree. He has submitted that an action under S. 118 of the Companies Act is a creature of Statute and is not time constrained. That the provisions of the Limitation Act would not be applicable because the cause of action does not stem from a specific act or omission but from statute.

Section 118 of the Companies Act under which the application is based gives the power of the court to rectify the register. It provides:

"(1) If –

(a) ***the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or***

(b) ***default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,"***

the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register.

It is trite that a cause of action means the facts that entitle a person to sue.

The period of limitation begins to run when the cause of action accrues. A cause of action accrues when there is in existence a person who can sue and another who can be sued, and when there are present all the facts which are material to be proved to entitle the plaintiff to succeed. Thus in an action for breach of contract, the cause of action is the breach. Such an action must be brought within the time stipulated in law. The instant case is certainly not an action for breach of contract. It is an action for the rectification of the respondent's register.

A person may become a member by subscribing to the memorandum of association. Thus under Section 27 of the Companies Act, upon registration of the Company the subscribers to the memorandum become members. The applicant herein was not among the subscribers. In the alternative, membership is achieved through agreement to be a member. This includes those to whom shares are transferred or transmitted. So the remedy under S.118 of the Companies Act is available to persons whose names are, without sufficient cause, entered or omitted from the register of members of a company. It is available to the person aggrieved, any member of the Company, or the company itself. I have already set out in sufficient detail the substance of the case for the applicant. Shares amounting to 245 were transferred to her by her husband way back in 1984 in a transaction sanctioned and blessed by the husband's Co-director in the Company, Raghbir Singh Sandhu. To-date her name does not appear on the Company register. In ***Lutaya vs Gandesha [1986] HCB 46*** it was held that holding a share certificate and appearance of one's name on the Company's annual return may be evidence of membership. In the instant case, none of these applies to the applicant.

Learned Counsel for the respondent has argued that the relationship between shareholders on the one hand and shareholders and the company on the other is a statutory contract; that an application under S. 118 of the Companies Act is one which seeks to enforce the Statutory Contract and that therefore it ought to be filed within 6 years from the time

when the cause of action arose. Other than invoking the general law of contract, he has not cited to me any authority to back up his argument. I have not come across any time limit, be it under Statute law or case law, set by law for rectification of a company's register under Section 118 of the Companies Act, to raise inference that the applicant's claim herein is time barred. The presumption is that there is none. In my view therefore for as long as entry of her name on the register continued to be unreasonably delayed by those duty bound to act, she continued to be an aggrieved party, whose cause of action was continuous. She could of course have moved court for a remedy earlier than she did. However, the delay on her part, in the absence of a specific law barring action under S. 118, would not ipso facto be a ground to deny her a statutory remedy. I would therefore disallow the objection and I do so.

2. *Whether the application is competent*

Under this head the respondent has attacked the application for alleged incompetence because: the applicant has no locus to claim for the award of damages arising from the respondent's business activities; the application seeks to affect the interest of other shareholders who should have been made parties in their individual capacities; the application for reduction of share capital cannot be entertained under the application brought under the provisions of Section 118 of the Companies Act; and the application is supported by inadmissible affidavits.

I will address the last point herein and reserve the other points for determination in issue No. 4.

The thrust of Counsel's submission on this point is that the application is supported by the affidavits of Mr. William Edwards, sworn on 16/09/05 and 06/04/06 respectively; that Mr. Edwards is a complete stranger to the respondent company who has never been a member, employee or officer at any time and cannot therefore testify to affairs of the respondent to which he has not been personally privy; that his evidence is therefore hearsay and inadmissible in terms of section 59 of the Evidence Act.

I have once again addressed my mind to Counsel's concerns.

I may be wrong in my assessment of counsel's objections but they appear to me to be a clear demonstration of how undue regard to technicalities can obscure real issues, to the prejudice of substantive justice.

Mr. Edwards may indeed be a stranger to the respondent company. However, he is not a stranger to the applicant. He has exhibited a duly executed power of attorney, a formal instrument by which one person legally empowers another to act on his behalf, either generally or in specific circumstances. On the basis of that power of attorney, he has sworn the impugned affidavits. His capacity as holder of a duly executed power of attorney has not been challenged by the respondent. Our law recognizes that he who does something through another does it himself. The facts stated in the affidavits are verifiable.

Learned Counsel has lamented that both the applicant and Mr. Jaspal Sandhu have not been produced so as to have them cross-examined. The respondent did not make any such request to court. Written submissions have instead been filed on its behalf, implying that this matter could be disposed of on the basis of the available records. I am of the view that the material before court is sufficient for court to make a proper determination of this matter, without the need to have the deponents of any of the affidavits appearing for cross-examination. After all both Counsel so elected.

The position at law is that if a party desires to have any point of law disposed of before the trial, he should raise it in his pleading by an objection in point of law, especially where it will substantially dispose of the whole action. However, at the trial he may argue it whether raised on the pleadings or not. An objection in point of law must always be taken clearly and explicitly if it requires serious argument but not an allegation wearing a doubtful aspect: ***Tarlol Singh Saggu vs Roadmaster Cycles (U) Ltd Civil Appeal No. 46 of 2000*** (Judgment of Mpagi-Bahigeine, JA at p. 6). In the instant case, as

Mr. Musoke – Kibuuka has correctly pointed out, the objections were raised generally and in a cursory manner. The substance has been raised in the submissions, after the pleadings had been closed, when the applicant had no opportunity to rebut them with the aid of affidavits. The respondent has to this extent been unfair to the applicant. Be that as it is, the Supreme Court did emphasize in ***Christine Namatovu Tebajjukira [1992 – 93] HCB 85*** that the administration of justice should normally require that the substance of the disputes should be investigated and decided on their merits and that errors and lapses should not be necessarily debar a litigant from the pursuit of his rights.

I am in full agreement with that legal position coming as it were from the highest court. I am also of the view that alleged short comings in those affidavits can conveniently be overlooked in the spirit of Article 126 (2) (e) of the Constitution, as errors and or lapses which should not necessarily debar the applicant from the pursuit of her rights. I therefore hold that the application is competent.

3. ***Whether there was a valid transfer of 245 shares to the applicant***

The applicant avers that Jaspal Singh Sandhu transferred 245 shares to her. She also relies on the decision of the Supreme Court in ***Jaspal Singh Sandhu vs Noble Builders Civil Appeal No. 13 of 2002*** as giving her as basis upon which court can exercise its powers under S. 118 to rectify the register.

I have studied the decision of the Court of Appeal in ***Noble Builders (U) Ltd & Anor vs Jaspal Sandhu Civil Appeal No. 41 of 2001*** per C. M. Kato, J.A.

The learned Justice held in that case:

"……..It is my considered opinion that as from 12/01/84 the respondent ceased to be a member of the first appellant and all his rights in that company were vested in his wife. It is remarkable that the wife has not chosen to pursue her rights" (p. 10 thereof, middle paragraph).

On the basis of the above, court held that Jaspal Sandhu had no locus standi in the affairs of Noble Builders (U) Ltd and as such he could not petition for its winding up nor could he call upon Raghbir Singh Sandhu to account to him how he had been managing the business of the company.

Jaspal Sandhu was not satisfied with the decision of that court. He appealed to the Supreme Court vide ***Jaspal Singh Sandhu vs Noble Builders (U) Ltd & Anor SCCA No. 13/2002***.

With specific reference to the above quotation from the Judgment of C. M. Kato, J. A, Kanyeihamba, JSC stated:

"In my opinion, the learned Justices of Appeal cannot be faulted. In support of their decision, I find further evidence that the wife of the appellant acquired the shares of her husband who was the original subscriber at the initial stage of the Company's incorporation. The record shows that her husband who is the appellant in this appeal owned 49% of the shares and the first (sic) respondent owned the remaining 51% of the shares. Thereafter the appellant transferred both his directorship and membership of the Company to his wife, Mrs. Balwinder Kaur Sandhu." (p. 12 thereof, emphasis mine).

True Balwinder Kaur Sandhu, the applicant herein, was not a party to that case. However, the records of the Court of Appeal and the Supreme Court are very clear that Jaspal Singh Sandhu, husband to the applicant herein, lost his arguments upto the highest court in the land when that court upheld the finding of the Court of Appeal that he, Jaspal Singh Sandhu, had transferred both his directorship and membership of the company after he transferred his shares to his wife, the applicant herein. In view of the above clear and unambiguous observations of the two courts, I am a little puzzled by Mr. Raghbir Singh Sandhu's continued resistance to the applicant's move to have her name entered on the register of the respondent in the Registry of Companies. Estoppel by record applies in such a case. The doctrine prevents a person from re-opening questions that are res

judicata (i.e. that have been adjudicated upon by a court of competent/jurisdiction). The subsequent litigation would then be barred on account of ***issue estoppel***, that is, estoppel arising in relation to an issue that has previously been litigated and determined between the same parties or their predecessors in title. The issue must be an essential element of the claim or defence in both sets of proceedings.

See: a Dictionary of Law, Sixth Edition (Edited by E. A. Martin and J. Law – Oxford University Press) at pages 200 and 291.

In these circumstances, on the basis of the applicant's evidence as per her affidavit and that of her donee of the power of Attorney, Mr. Edwards, and the two decisions of the Court of Appeal and the Supreme Court, I am satisfied that there was a valid transfer of 245 shares to the applicant.

I so hold.

4. Whether the applicant is entitled to the reliefs sought.

To my understanding, this issue relates to the respondent's argument that the application is incompetent because (1) the applicant has no locus to claim for the award of damages arising from the respondent's business activities; (2) the applicant seeks to affect the interest of other shareholders who should have been made parties in their individual capacities; (3) the application for reduction of share capital cannot be entertained under the application brought under the provisions of S. 118 of the Companies Act.

I have addressed my mind to the able arguments of both counsel. It is not necessary to reproduce those arguments here. One of them is the applicant's alleged ineligibility because she is now a Canadian citizen. Article 4 of the Articles of Association provides that "*The Company is made purely for Africans/Ugandans and the right to transfer shares is hereby restricted*."

Learned counsel for the applicant has submitted that this does not mean that the right to transfer shares to non-Ugandans or non-Africans is prohibited.

I agree. The clause is clear that the right is restricted, not prohibited. In any case by the time the shares were transferred to her in 1984 she had not assumed the Canadian Citizenship. Restrictions imposed under the clause can always be taken care of by the Management of the Company and also rights of third parties who have acquired interest in the company. It would appear to me that it would be unconstitutional to order their deletion from the register on the basis of this application where they have not been afforded an opportunity to be heard.

It is undisputed that the company commenced business under the shareholding and membership of Raghbir Singh Sandhu and Jaspal Singh Sandhu. The latter has since ceded his interest in the Company to the applicant. The applicant has never been formally registered as shareholder and Director, to effectively replace her husband.

In these circumstances, I would agree with the submission of learned counsel for the respondent that even if a member had any right to claim a share in the earnings of the Company, the applicant whose membership is yet to be formalized would not be eligible to espouse such claims at this stage. Any interest that she could claim would arise after and not before the act of entering her name on the register of members. Besides, where a wrong has been done to the company and action is required to restrain its continuance, or to recover the company's property or damages or compensation due to it, the company is the true plaintiff. The appropriate agency to start an action an behalf of the company is the board of directors, to whom the power is delegated as an incident of managing the company.

> **See: Makerere Properties Ltd vs Mansukhlal Ranji Karia HCCS No. 32 of 1994** (reproduced in ***[1995] III KALR 25*** at p. 28).

I notice that most of the issues raised by the applicant relate to alleged wrongs done to the company.

For the reasons elaborated above, I would allow the application in part. I would order that the Company's register of members be rectified within ***three*** (3) months from the date of this order by registering the applicant as transferee of Jaspal Singh Sandhu's shareholding and directorship in the company.

I would also make an order for a meeting under S. 135 of the Companies Act to be convened and held at least within six (6) months from the date of this order after notification of Raghbir Singh Sandhu to discuss the affairs of the Company raised herein, inter alia.

In the event of the said Raghbir Singh Sandhu's failure or refusal to attend the meeting, the applicant would form a quorum. Notice of the rectification of the register shall be given to the Registrar of Companies.

The company shall meet the applicant's costs arising out of this application.

Orders accordingly.

Yorokamu Bamwine
JUDGE
05/08/2009