THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

IN THE MATTER OF MORINGA LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT, CAP 110

COMPANIES CAUSE NO. 21 OF 2009

IRENE KULABAKO ::PETITIONER

VERSUS

1. MORINGA LIMITED
2. DAVID CASE **::::::::::::::::::::::::::RESPONDENTS**
3. CHARLES CASE

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

This action was brought by way of a petition under Section 211 of the Companies Act (Cap.110) and Rule 2 (1) of the Companies (Winding up) Rules S.1 10 – 2. It is for orders that this Honourable court be pleased to order the respondents to purchase her shares at the current market value; that this court be pleased to make such other orders as it may deem fit; that the respondents pay costs of this petition.

From the pleadings, Moringa Limited, the 1st respondent herein, was incorporated on 29/07/2003 as a private limited liability company, with a share capital of Shs.5,000,000/= divided into 100 shares of Shs.50,000/= each; the majority shareholders being David Case and Charles Case, holding 50 and 40 shares each respectively. The remaining 10 shares went to the petitioner, Irene Kulabako.

From the pleadings also, differences have arisen in the manner in which the affairs of the company are being conducted. It is the petitioner's case that the affairs of the company are being conducted in a manner oppressive to her as a minority shareholder. Hence this petition.

At the conferencing the parties agreed that:

1. The petitioner is a shareholder in the company.
2. The 2nd and 3rd respondents are Shareholders and Directors in the company.
3. The petitioner was removed as director of the company.
4. Land comprised in LRV 2693 Folio 13 Plot 41 Luthuli Avenue was registered in the names of Moringa Limited on 6/05/04 under Instrument No. 342897.

The following issues have been framed for court's determination:

1. Whether the petitioner has been oppressed by majority shareholders and the affairs of the company are being operated in a manner oppressive to the Petitioner.
2. If so, whether the petitioner is entitled to the reliefs claimed.

Representations:

M/s Omunyokol & Co. Advocates for the petitioner.

M/s Sebalu & Lule Advocates for the respondents.

Issue No. 1: ***Whether the petitioner has been oppressed by the majority shareholders of the company and the affairs of the company are being conducted in a manner oppressive to the petitioner.***

I have already indicated that the petition is founded upon Section 211 of the Companies Act. This section provides an alternative remedy for winding up in cases of oppression. It provides:

> ***"211 (1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself or herself) or, in a case ……..may make an application to the court by petition for an order under this section."***

If in any such petition the court is of the opinion that the complaint is genuine, it may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the companies affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company itself.

From a historical perspective, Section 211 of the Companies Act, as replicated from Section 210 Companies Act, 1948 (U.K), arose out of the need to redress the imbalance between majority shareholder control and minority shareholders rights within the corporate structure. This development was especially significant, according to Company Law in Uganda by D. J. Bakibinga, 2001 Edition at p. 224, given the Courts' reluctance to interfere into the affairs of the company.

The difficulty that arises is that there cannot be any universal definition as to what amounts to 'oppressiveness' in the context of Section 211. Each case must therefore be determined on the basis of its own unique facts and circumstances.

In ***Re Nakivubo Chemists (U) Ltd [1977] HCB 312*** the court observed that for the petitioner to succeed under Section 211 of the Companies Act, he must show not only that there has been oppression of the minority shareholders of a company but also that it has been the affairs of the company which have been conducted in an oppressive manner. The oppression must be to a person in his capacity as a shareholder and not his any other capacity. Lord Keith in ***Elder vs Elder & Watson Ltd (1952) S. C. 49*** thought that oppressive conduct involved "an element of lack of probity and fair dealings," while Lord

Cooper in the same case suggested that it was conduct which amounted to a "visible departure from the standards of fair dealing and violation of the conditions of fair play."

From the above discourse, there cannot be an all embracing definition of what in law amounts to 'oppression.' It (oppression) manifests itself in various ways. One therefore needs to look at the conduct complained of vis-à-vis the genuine exercise of a power, say by the majority in a business organization.

I have considered the various complaints raised by the petitioner as the basis for this action. I have also considered the respondents' reply thereto. What it adds up to is not any different from a relationship of a couple in a rocky marriage, where the couple can hardly share a bed, in this case, a board room table.

1. ***Transferring the property of the company to another company owned by the majority shareholders.***

It is an admitted fact that land comprised in LRV 2693 Folio 13 Plot 41 Luthuli Avenue in Bugolobi was registered in the names of Moringa Limited on 6/05/2004. The company was incorporated in July 2003, implying that at the time of its acquisition the company was already in existence. From the records also, by the time this petition was filed on April 17, 2009, the suit property was registered in the name of Moringa Limited. A copy of the Certificate of title for the property together with the Statement of Search from the Commissioner Land Registration, both confirm that as at 31/08/2009, the registered owner was Moringa Limited.

As fate would have it, during the pendency of this suit, the respondents transferred the company property to another company wholly owned by the 2nd and 3rd respondents known as Muwafu Holdings Limited. This was done despite the existence of the petitioner's caveat on the property. The presumption here is that the respondents manipulated the corrupt land registration system to their advantage to the prejudice of the petitioner.

Turning now to the ownership of the suit property, there is evidence that in April 2004 the directors of Moringa Limited resolved that the company applies for a loan of US

$125,000. Those directors included the petitioner. The bank gave a written offer to the company which offer the company accepted. There is therefore irrefutable documentary evidence that it is the company which purchased the suit property using the said loan facility. The contention of the respondents is that the 2nd and 3rd respondents were the beneficial owners of the property having used their private funds to repay the loan. The explanation offered for this is that the company's books of account do not show any monies coming from the company to repay the loan. I think this argument is frail. An incorporated company is an entity distinct from its members. As long as there is evidence that the borrower was Moringa Limited and that the purpose of the loan was for the purchase of the suit property, the resultant purchase was for the company and not any of the individual members. It is trite that evidence cannot be admitted (or if admitted it cannot be used) to add to, vary or contradict a written instrument. In relation to contracts, it means that where a contract has been reduced to writing, as in the instant case, neither party can rely on evidence of terms alleged to have been agreed, which is extrinsic document, that is, not contained in it. Relating this principle to the instant case, it is in my view immaterial that the 2nd and 3rd respondents advanced money to the company in the process of paying off the debt. From the pleadings and available evidence the property belonged to the company - Period.

It is submitted by learned counsel for the petitioner that by stripping the company of its priced asset, namely, the suit property, by transferring it to Muwafu Holdings Limited, a company whole owned by the majority shareholders herein, the majority shareholders acted in a manner that was oppressive to the petitioner, a minority shareholder.

On the strength of evidence before me, I'm unable to come to a contrary opinion. I therefore accept learned counsel's submission on this point.

2. ***Paying out colossal sums of money as rent for the company whereas the company was occupying its own premises (the suit property).***

From the records, the company has paid out huge sums of money as rent for the company in respect of the suit property. During the pendency of the suit, evidence emerged that in September 2007, without the knowledge of the petitioner, the company entered into a

tenancy agreement with Muwafu Holdings Limited in which the company (Moringa Limited) rented the suit property from the said Muwafu Holdings Limited. This was so despite the fact that even by August 2009 the property was still registered in the names of Moringa Limited. In other words, a company (Muwafu Holdings Limited) wholly owned by the majority shareholders herein, the 2nd and 3rd respondents, started siphoning money from Moringa Limited under pretext of paying rent. The respondents' justification for this bizarre conduct is that after all the two respondents (2nd and 3rd) were the beneficial owners of the property. This argument is to say the least absurd. It demonstrates how the majority shareholders can oppress the minority shareholders using their numerical strength. In the instant case they (the majority shareholders) acted in a manner oppressive to the petitioner.

I so find.

3. ***Forcing the petitioner to sell her shares at a paltry sum of Shs.10,000,000/=.***

There is evidence to the effect that when the differences between the petitioner and her co-shareholders became irreconcilable, the latter put the former under immense pressure to surrender her interest in the company for a consideration of Shs.10m or else be forcefully ejected from the company. In the course of time she lost her directorship. She rejected the Shs.10m offer mainly because:

1. the value of the suit property was excluded; and

2. the respondents rejected the component of Goodwill in the computation.

I have already resolved the issue of ownership of the suit property. For the avoidance of the doubts, the property belonged to Moringa Limited, and not the so called beneficial owners, 2nd and 3rd respondents in their individual capacities.

From the pleadings, the petitioner with the knowledge of the respondents engaged the services of auditors, M/S Spring Associates, a firm of Certified Public Accountants to ascertain the value of her shares in the company. They came up with a value of Shs.134,839,795/=. The figure takes into account the value attached to the suit property

of Shs.650,000,000/=. Another Firm of Public Accountants, M/s Raitz & Co. Certified Public Accountants, have returned a value of Shs.2,137,865/= in favour of the petitioner or Shs.13,483,980/= in the event that the petitioner's auditors calculation of net assets of Shs.1,348,397,952/= is accepted without any adjustment. His proposal is based on the current registered shares of Shs.1000 (that is, 10/1000 x 1,348,397,952).

I have looked at both Valuation Reports.

Commenting on the basis of valuation, Mr. Siragi Atwine, a partner in Raitz & Co. observed:

> ***"I find the method of Valuation (Net Asset Basis) that was used by M/s Irene Kulabako's appointed auditors reasonable and indeed more appropriate."***

In view of that concession, I'm unable to fault M/s Katuramu & Co's valuation as regards the value of Plot 41 Luthuli Avenue.

As regards Goodwill, I have already indicated that the auditors, M/s Spring Associates, valued the Petitioner's interest in Moringa Limited based on the disclosed properties/assets at Shs.134,839,795/=.

The figure contains an element of Goodwill assessed on the Net Assets.

The basis for rejecting the element of Goodwill in the petitioner's valuation, according to M/s Raitz & Co., is that in the accounting standard for Intangible Assets, IAS 38, internally generated goodwill is not recognized as an asset because it is not an identifiable resource controlled by the entity that can be measured reliably at cost. It is the view of these valuers that Goodwill, which is an intangible asset, should not have been included in the valuation of the petitioner's shares in the company since it is very subjective and its value, if any, cannot be easily ascertained in the absence of an acquisition of the firm. Further, that the computation of goodwill is based on the assumption that the company will continue to have its current clients, which is equally speculative.

This is no doubt an interesting subject. What makes it even more interesting is the second valuer's attempt to discredit the valuation report of the first one in a bid to express an opinion that favours the respondents on a matter fairly common to both valuers.

I will do the best I can in the unique circumstances of this case.

The leading authority on the meaning of 'goodwill' is to be found in the ***Commissioner of In land Revenue vs Muller & Co.'s Margarine, Limited [1901] A C 217*** where in answer to the question 'What is goodwill?' Lord Macnaghten said:

> ***"It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start."***

I agree and would only add that 'goodwill' is an intangible asset representing the value of, for example, the company's client base, its reputation and potential future earnings.

Intangible as it is, goodwill is an asset to a company. Like other assets, it can be included in the valuation of a shareholder's interest in a company. My take on this is that if the business is unprofitable and has to be valued on a break-up basis, the goodwill has no value. If, however, the exit of a minority shareholder is on account of the majority shareholders' oppression to him/her, the shareholder is in my view entitled to goodwill compensation since his/her departure from the company is viewed as a blessing to the company.

Applying the above principle to the instant case, it is evident that M/s Spring Associates calculated the company's maintainable profits over a past period of four years and nine months for which accounts were available. It all shows that the petitioner is leaving a profitable company. On the basis of their calculation, the value on the goodwill, taken on the assumption that the company will continue to maintain earnings at the same level for the next 4 years comes to Shs.652,908,000/=.

The International Financial Reporting Standards (IFRS) of 2009, a document which learned counsel for the respondents have availed to me, does not show that goodwill is excluded from consideration in all valuations of this nature.

What is excluded is internally generated goodwill, a distinct form of goodwill where, in a company, expenditure is incurred to generate future economic benefits. Such expenditure does not result in the creation of an intangible asset that meets the recognition criteria in IFRS.

I have studied the valuation report compiled by M/s Spring Associates. It does not include any element of internally generated goodwill which, in the above context, is not recognized as an asset because it is not an identifiable resource (that is, it is not separable nor does it arise from contractual or other legal rights) controlled by the company that can be measured reliably at cost. In all these circumstances, I am of the opinion that the submission of learned counsel for the respondents on this point cannot succeed. It is in my view immaterial that goodwill is premised on the assumption that the company will continue to have its current clients, arguably speculative, as long as it is internationally recognized as an asset for purposes of shares and assets valuation.

From the pleadings, the amount she was offered as representing her interest in the company was grossly unrealistic. It did not take into account the value of Plot 41 Luthuli Avenue and/or any element of the company goodwill to which she had contributed as director and shareholder. The attempt to eject her from the company before resolution of these two issues was in my view unfair and oppressive.

I would add that matters of managing the company are better resolved in the company board room. In meetings, members normally express their wishes as to how the affairs of the company ought to be run. This is done through voting for or against resolutions. The decision of the majority will normally prevail, a practice known as the rule in ***Foss vs Harbottle (1843) Hare 461***. Where there are irreconcilable disagreements, Section 135 of the Companies Act may be invoked. This is a more civilized way of running the affairs of a company than resorting to intimidatory threats.

I would agree with the submission of counsel for the petitioner that stampeding her into accepting a payment of Shs.10m when her interest in the company had not been valued and before the issue of ownership of Plot 41 Luthuli Avenue was resolved; coupled with the issuance of threats to throw her out of the company for being stubborn, were all oppressive.

As regards reduction of her share holding interest in the company, I have already indicated that she started off with 10%. In the course of time, she was removed from her directorship. The decision to remove her was taken in her absence, despite indication to them that she was not available. Later, the same majority share holders went ahead to increase the share capital on selfish grounds to convert loans allegedly advanced to the company to share capital. Hence the increase of the share capital to Shs.50m, up from Shs.5m. In the process loans amounting to Shs.44m were converted into shares all to the advantage of the majority shareholders. And this in effect reduced her shareholding to a meager 1% or even less. I am of the considered view that all these maneuvers were to give the 2nd and 3rd respondents full control of the company and to frustrate the petitioner, a minority shareholder. If there has ever been a case of the majority systematically undermining and oppressing the minority in a company, this was it.

For the reasons stated above, I would answer the first issue in the affirmative and I do so.

Issue No. 2: ***Whether the petitioner is entitled to the reliefs claimed.***

It is submitted on behalf of the petitioner that although there are grounds that qualify the company to be wound up, that is, oppression of a minority shareholder, if the company is wound up, it will unfairly prejudice the interests of the petitioner as the value of the shares would greatly decrease. There is merit in this submission and I hold so.

The petitioner's main prayer is for this court to order the respondents to purchase her shares at the current market value. M/s Spring Associates valued the petitioner's shares in the company. There is evidence that in the course of this exercise the said valuers encountered challenges, including hiding of useful information from them. Taking into account the value of Plot 41 Luthuli Avenue and the element of goodwill in the company,

they arrived at a figure of Shs.134,839,795/=. I have already indicated with reasons that the valuation by Raitz & Co. is unreliable and therefore unacceptable to the court. In view of this rejection, I'm inclined to the view that the petitioner's interest in Moringa Limited is indeed in the region of Shs.134,839,795/= and not Shs.13,483,980/= as proposed by the respondents. Taking into account all imponderables, including the possibility that as a human being prone to weaknesses the petitioner

+may have contributed to the bad blood between herself and her colleagues in the company, directly or indirectly, I would discount the figure of Shs.134,839,795/= by a factor of 20% and assess the value of her interest in the company at Shs.107,871,836/= (i.e. 134,839,795 x $\frac{20}{100}$ = 26,967,959 less Shs.134,839,705/=).

I do so and order the respondents to pay it to her, i.e. Shs.107,871,836/=, as she lets go the affairs of the company.

The award shall attract interest of 20% per annum from the date of judgment till payment in full.

The petitioner shall also have the taxed costs of the petition.

Orders accordingly.

Yorokamu Bamwine

JUDGE

01/04/2010

Order:

This judgment shall in my absence be delivered on my behalf by the Deputy Registrar.

Yorokamu Bamwine

JUDGE

01/04/2010