THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

HCT-11- CIVIL APPEAL No. 41/2012

(ARISING FROM THE CHIEF MAGISTRATE'S COURT OF KABALE IN CIVIL SUIT NO. 181/2010)

M/S KIGEZI TWIMUKYE CO. LTD :::::::::::::::::::::::::::: APPELLANT

VERSUS

ENG. E.S. BALABA :::::::::::::::::::::::: RESPONDENT

BEFORE HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

This is an appeal against the judgment and orders of the Chief Magistrate's Court Kabale dated the 24th of September, 2012.

The background to this Appeal will be drawn from the pleadings of the parties and their submissions in the lower Court. No evidence was led with the parties opting, as stated above, to rely on their pleadings for the facts.

The defendant/Appellant in the lower Court, Kigezi Twimukye Company Limited, was incorporated as a Company in 1967. The Plaintiff/Respondent, Engineer E.S Balaba, subscribed and became a member of the defendant in 1970. He built up

his shareholding to 28% of the Company by 1989. The share capital of the defendant company was 50,000,000/= (Fifty million shillings). The Plaintiff held 14,000 shares valued at 1000/= each.

At a general meeting held on 11th of February 2003, the Appellant company raised its share capital to 80,000,000/= from 50,000,000/= to finance company operations. The meeting placed a ceiling of 14,000 shares as the maximum number of shares a member could hold.

The respondent's shareholding was effectively reduced from 28% to 17% of the Company. The rest of the members who had different shareholding, but all below 17%, were then given the opportunity to raise their own shareholding.

It is alleged the Plaintiff raised complaints about this allotment stating unfair treatment to him. On 4th April, 2007, at a meeting of the directors, which the Plaintiff attended, it was resolved that the status quo would be maintained and the matter was considered closed never to be brought up again. Engineer Balaba was aggrieved and sued the Kigezi Twimukye Company Limited praying for:

a) An order to restore his original shares of 28% of the share capital.
b) General damages
c) Nullification of allocation of shares at the time of increment of share capital from 50,000,000/= (Fifty million shillings) to 80,000,000/= (Eighty million shillings).
d) A permanent injunction against the defendant from farther oppression of the Plaintiff.

e) Costs of the suit.

The Defendants denied all the Plaintiffs claims and prayed that the suit be dismissed.

The learned trial Magistrate found for the Plaintiff and ordered that:

i) The resolution which reduced the Plaintiffs shares to 17% of the company's share capital was declared null and void.
ii) A rectification of the public records to reflect the 28 % share capital held by the Plaintiff in accordance with the chief Magistrate's order.
iii) General damages of 5,000,000/=.
iv) Costs to the Plaintiff.

The Defendant being dissatisfied with the finding of the trial Magistrate appealed his Judgment.

Three grounds of Appeal have been filed namely:

i) The learned trial Magistrate erred in law and in fact when he failed to properly evaluate the evidence on record and thereby came to a wrong decision.
ii) The learned trial Magistrate in deciding the case against the weight of evidence when he held that the respondent was entitled to a rectification of shares without taking into account the evidence of the process undertaken in allotment of the shares in the appellant company.
iii) The learned trial Magistrate misdirected himself on the law regarding the application of the directive of laches and came to a wrong decision when he held that the respondent's suit was not statute barred.

The appellant prays:

a) The Appeal be allowed.
b) The judgment and orders of the learned trial Magistrate be set aside.
c) Costs here and below.

The parties filed written submissions which are on record and shall not be reproduced here. The appellant was represented by Mr. Timothy Twikirize while the Reverend Ezra Bikangiso appeared for the Respondent.

Ground 1 and 2

It was argued for the appellant in ground 1 and 2 that the trial Magistrate misapplied sections 75 and 77 of **the Companies Act, Cap 110,** as the resolution of the Company of 11th February, 2003 did not fall within the ambit of these two provisions. That the resolution was not a transfer of shares but an allotment and thus Section 54 of T**he Companies Act** was applicable.

Section 54 provides,

> *(1) Whenever a company limited by shares or a company limited by guarantee and having a share capital makes any allotment of its shares, the company shall within sixty days thereafter deliver to the registrar for registration—*
> *(a) a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and descriptions of the allottees and the amount, if any, paid or due and payable on each share; and*
> *(3) If default is made in complying with this section, every officer of the company who is in default is liable to a fine not exceeding one hundred shillings for every day during which the default continues.*

Counsel conceded that the appellant had not complied with the provisions of the quoted section when it made the allotment of shares but this omission did not amount to nullifying the allotment. It only attracted a default fine under S. 54 (3) **The Companies Act**.

It is the submission of Counsel for the Respondent the allotment in this matter offended the provisions of Section 54 of The Act. He argues that as the impugned resolution was registered in 2010, when the general meetings' decision it is based on was taken in 2003, then that belated registration rendered the resolution a nullity.

I will dispose of this question first. Section 54 provides for allotment of shares. Allotment in this case refers to dealing with previously unissued shares. (See **The Oxford Dictionary of Law**) S. 49 through to S. 54 are sections of the Companies Act which make provision on how to handle allotment of shares.

With respect to both Counsel, it is my view that Section 54 did not apply in the instant case.

From the minutes of the general meeting of the shareholders of the appellant held on 11th October, 2003, Minute 32/03 thereof, it is clear that what they intended was to increase the share capital of the appellant by 30,000,000/= from 50,000,000/= to 80,000,000/=.

Therefore Section 63 (i) (a) which provides for the increase of share capital and Section 65 (3) which provides for a default fine, where notice of such increase has not been given within the stipulated time, are the relevant provisions here. Late registration, as happened in this case, does not nullify the resolution passed. It was merely an irregularity cured by the late filing of the resolution of the meeting on 11th October, 2010. For that reason it is my view that Section 54 was not applicable here.

Again as part of arguments on grounds 1 and 2 of the Appeal, the appellant submits that the act of reducing the respondents shareholding from 28% to 17 % was not minority oppressive. It is submitted farther that there was no evidence to show that the respondent was the only victim of the action of placing a limit on the how many shares a member could hold.

It is also the contention of Counsel for the appellant that the respondent should have raised his grievances through the company decision making organs, namely, the general meeting and the board of directors meeting. He cited **Irene Kulabako Vs Moringa Limited H.C.C.S 21/2009** where it was held that matters of managing a Company are best handled in the Company boardroom.

Counsel went on to add that the Board of Directors did not act in breach of their fiduciary duty to the respondent because the decision was taken in a general meeting where the Respondent was in attendance.

Furthermore, the Respondent is a member of the board of directors and attended the board meeting which dealt finally with the share limit imposed by the general meeting. He concluded that the Respondent therefore attended and voted in all the meetings where the decisions on shares were taken.

The last argument on this ground is that the respondent had the option to petition court through the Attorney General as is provided under Section 211 of **the Companies Act** which course he did not explore.

For the Respondent, the Reverend Ezra Bkangiso submitted that his (the respondent's) shareholding in the Company was reduced from 28% to 17%, which in effect transferred the respondents' portion of the shareholding to other shareholders without compensation. He prayed that this loss must be made good to the respondent.

It is also Counsel's contention that the decision of the general meeting to limit shareholding was not registered in time and thus the question arises, when did that resolution take effect?

The Last part of the respondents reply was that Eng Balaba did not sue on behalf of other shareholders but for himself as an aggrieved individual shareholder. It is in that capacity that he seeks the remedies prayed for.

In dealing with this part of Ground 1 and 2, I shall start by establishing whether the Respondent could maintain an action if he felt the other shareholders had taken a decision which was minority oppressive.

As seen in **Kulabako** (supra) ordinarily company disputes should be resolved in the board room and not the Court which is itself not an astute business entity. The boardroom is governed by majority vote. [See Section 141 (i) Companies Act Cap 110].

The Respondent here finds himself in a position where he has been out voted both at the general meeting and a directors meeting. He is aggrieved by the decisions made at these company meetings.

As an exception to the rule in **Foss Vs Harbottle,** an action by the minority, can be maintained, where it is shown that the alleged wrong doers control the Company. (See **Jamal & others Vs Oxygen Ltd SCCA No. 64/1995)**.

In the instant case a decision of the majority shareholders in a general meeting held on 11th February, 2003 introduced an item to raise the share capital of the appellant to 80,000,000/- and set a cap at 14,000,000/- for each individual shareholder. Under this new arrangement, only those below the cap could subscribe for the new shares.

At the directors meeting of 4th April, 2007 where the Respondent, as a director, opened a discussion on the matter of the limit on individual shareholding at 14,000,000/=, it was decided to uphold the decision of the general meeting of 11th October, 2003 and resolved that there shall never be discussion on the matter again. That was meant to shut down any farther debate on the issue.

Clearly therefore the Respondent was a minority here and was closed out by the majority. As an aggrieved party, as held in the **Uganda Oxygen** (Supra) case, he could maintain an action.

The Companies Act does not define what oppressive conduct is. I shall therefore rely on case law. In **Elder Vs. Elder and Watson (1952) SC 49** it was held that oppression is a departure from the standards of fair dealing, violation from the conditions of fair play on which every shareholder is entitled to rely. **In Re Jermyn St. Turkish Baths Ltd (1971) 1 WLR 1042** it was stated that there is no exhaustive definition of oppression but it amounts to being forced to submit to something unfair. By the definition in these holdings, and the facts in the instant case, one can see that the respondent who was forced to submit to the unfair position of the share cap faced oppressive conduct from the company.

It is argued by the appellant that is no evidence that the Respondent was the only victim of the majority shareholders decision perhaps to show that he was a minority.

I have looked at a list of all the shareholders as at 31st December, 2007 which is annexed as "B" to the appellants submissions in rejoinder. That list shows that the Respondent, listed as No. 29, was the highest shareholder by far. He was the only one who at the time held 14,000 shares valued in total at 14,000,000. It is therefore evident that when a cap of 14,000,000/= was put on the individual shareholding of the Company, he was the only one not allowed to raise his percentage share of the company.

In Addition, the minutes of the general meeting in Min. 32/03 state and I quote,

> *'ReportNo 6(e) members suggested ways of raising money for construction debts. Members were informed that out of the share capital, there was a balance of 5 million shillings.* ***Members decided to increase but the one who had reached a limit of 14M shs should not add.*** *It was discussed for a long time, some members saying shares are never equal.* ***But on seeing that if there is a need to vote by shares the one with more shares shall make a decision alone.*** *It was resolved that members who have less shares should be the ones to be given chance to buy those shares remaining and the limit remained at 14,000,000/=."*

A decision was therefore taken by the meeting to use the majority to target the highest shareholder and defeat a future situation where the highest shareholder would have a controlling vote where voting was by shares.

It was held in the case of **Howard Smith Ltd Vs Ampol Petroleum Ltd & others (1974) All E.R. 1126** at Page 1135 that "*an issue of shares purely for the purpose*

of creating voting power has repeatedly been condemned ... the issue would be invalid."

This was a case from Australia where shares were issued ostensibly to raise share capital to finance Company (M) operations. The real reason however was to use the issued shares to allow for the raising of the shareholding, of a company (H), favoured by the directors of M to become majority shareholders. H was in competition with (A and B) for the shares of the company (M) and had put in a rival bid for the purchase of the shares on offer. At the time, (A and B) were majority shareholders in M. If Company H became the majority shareholder, then the shareholding of (A and B) would be diluted into a minority.

It was held inter alia

> "... it was unconstitutional for directors to use their fiduciary power over the shares in the Company purely for the purpose of destroying a majority'.

In the instant case, in the meeting of the appellant's directors of 4th April, 2007, Minute 9/09 which the Respondent attended, states,

> "*Opening of the limit of 14,000,000/= shares, the Council discussed about it and decided to leave it the way the general meeting decided. It was closed and never to be discussed upon again."*

In my view this was the directors of the appellant destroying a majority shareholding by use of their fiduciary power. They ratified an oppressive and

illegal decision of the majority shareholders taken earlier on 11th February, 2003 to dilute the respondent's shareholding in the appellant. In such circumstances the Respondent would not expect to obtain justice in the board room.

As to whether the Respondent should have opted to proceed under Section 211 of **The Companies Act**, I find that the procedure adopted is neither irregular nor illegal. It was well within the rights of the Respondent to choose which mechanism he would use to enforce his rights.

For the above reasons grounds 1 and 2 of appeal fail.

Ground 3

The Appellant in this ground attacks the finding of the Trial Magistrate regarding his application of the Law of Laches.

It is the submission of Counsel for the appellant, on this ground, that the Appellants action is statute barred, by reason of **Section 3 (i) (a) of The Limitation Act Cap 80**. The provision prohibits entertaining an action based on contract, after 6 years since the cause of action arose, have elapsed. It is his contention that the relationship between a shareholder and a Company is a contractual one based on the covenants governing their relationship in the Articles of Association. This was therefore a claim based on contract.

It is the submission of Counsel that even though limitation was not pleaded at trial it was brought to the attention of the lower Court in their submissions.

Secondly a submission was made based on the doctrine of laches stating that it is an equitable discretionary remedy. That in the case the appellant acted equitably through the Company organs to raise capital and place a limit on the respondent's shareholding. The Respondent had a statutory remedy through Section 211 of The Companies Act but chose not to pursue it. He therefore cannot be hard to complain.

Counsel concludes that though both defences were not pleaded in the lower Court, a Court may base its decision on an un-pleaded issue if it has been shown to be left to Court to decide as when evidence is led and an address to Court is made on it. (See **Odd Jobs Vs Mubiru [1970] E.A 476).**

The Respondent argues that limitation was not pleaded at the trial. He submitted that the actions of the shareholders were illegal and fraudulent. Therefore limitation does not arise as illegality once brought to the attention of Court overrides all questions of pleadings including admissions thereon (See **Makula International Vs Cardinal Nsubuga (1982) HCB 11)**.

With regard to Laches, Counsel argues it applies where there has been unreasonable delay which had not been determined in this case. The time taken by the Respondent to file his claim was not unreasonable, he submits.

Lastly, that the doctrine of Laches is equitable in nature and equity would apply. Counsel contends that the Appellant does not come with clean hands as he was fraudulent and as such cannot make an equitable chain.

I shall start with limitation.

The 3rd ground of appeal, as framed, is limited and specific to a complaint on the finding of the Lower Court regarding the law of Laches. The Appellant has not filed any ground of Appeal regarding the Law of Limitation. A party should be bound by its pleadings which indicate to Court the facts and points of law in contention.

However under Order 43 Rule 2 of **the Civil Procedure Rules Cap 71-3**, the Appellant has a window through which matters not canvassed in the ground of appeal may be heard and determined, but only where the Respondent has properly contested the un-pleaded ground. That is the case here. The respondent's reply makes a rebuttal on limitation. For this reason I shall deal with limitation.

The question of limitation has been raised for the first time during this appeal. The trial Court dealt exclusively with laches.

As limitation was not raised, investigated or determined at the trial stage, I am of the view it is too late for the appellant to rely on it at appeal. An appellate Court shall not consider matters not raised and investigated at trial (See **Riddock Vs Coast Region Co-operation [1971] E.A 438)**.

Secondly under Order 6 Rule 6 of the Civil Procedure Rules, the defendant/appellant was under obligation to plead limitation as a defence to his action. This he did not do and has taken the Respondent by surprise on appeal.

Be that as it may, this matter has not barred by limitation. The minutes of the impugned meeting of 11th October, 2003 were confirmed by the General Meeting of 4th December, 2004. This means that they took effect from the date of confirmation on 4th of December 2004. The suit in the lower Court was filed on the 6th July, 2010 - less than six years later and within the limitation period set by Section 3 (i) (a) of **The Limitation Act** for matters based on contract.

Next with regard to Laches, Court acts on three factors when considering the equitable remedy of laches. Firstly was there delay by the Plaintiff; second acquiescence by the Plaintiff in the delay; and lastly a change in position by the defendant (See: **'Equity and Trusts'** by D Bakibinga [Law Africa] Page 33).

The Court should also consider in its evaluation whether the Respondent is guilty of unreasonable delay in the pursuit of his claim in a way which has prejudiced the appellant (Blacks Law dictionary 8th Edition).

From the record, the appellant raised the matter in the Directors meeting held in 2007 before he filed his suit. There is therefore evidence that the Company was aware that the Respondent was aggrieved, disgruntled and dissatisfied with his

predicament. It is why in the meeting of 4th April 2007 they resolved that the matter is closed for discussion and should be raised again.

Secondly the resolution of the Company putting the share limit was registered on 11th October, 2010, after the filing of the suit in the Lower Court. The Appellant had never taken action to register the same as required by law since 2003.

I find the Respondent was not guilty of unreasonable delay as he was seeking remedy through the company structures, such as the Board of Directors meeting, and when that failed, he sued. There is no evidence to show prejudice to the appellant by the Respondents claim.

The doctrine of Laches was therefore inapplicable here.

The third ground of appeal accordingly fails.

This appeal stands dismissed.

Judgment and Orders of the Trial Court are confirmed. Costs here and the Court below to the Respondent.

Dated at Kabale this ..**23rd**..day of September 2015

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MICHAEL ELUBU

JUDGE