

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
COMPANY CAUSE NO. 01 OF 2015
IN THE MATTER OF COMPANIES ACT 01 OF 2012

OLIVE KIGONGO ::: PETITIONER

VERSUS

MOSA COURTS APARTMENT LTD ::: RESPONDENT

BEFORE: HON. JUSTICE STEPHEN MUSOTA

JUDGMENT

This is a company cause brought by petition under **Sections 247, 248 and 249 of the Companies Act No. 1 of 2012, Rules 2, 4, 21 and 22 of the Company (Winding Up) Rules S I 110-2** and all enabling laws seeking for orders that;

- a) The respondent company be wound up by this court.
- b) A liquidator be appointed to wind up the company.
- c) An additional order this court may deem just and equitable.
- d) The costs of this application be paid by the company.

The petition is supported by the affidavit of the petitioner, Ms. Olive Kigongo dated 15th January 2015 and a rejoinder affidavit dated 15th October 2015.

The respondent Mosa Court Apartment Limited opposed the petition and filed an affidavit in opposition dated 22nd January 2015 and it was sworn by Hajji Moses Kigongo.

Briefly the background to this petition is that this was an in-house company incorporated by 'husband and wife'. The company was incorporated on 4th November 1997 with a nominal share capital of UGX100,000,000/- divided into a 100 ordinary shares of 1,000,000/- each. The company has only two shareholders namely, Hajji Moses Kigongo who holds 85% of the shares and the petitioner Olive Kigongo, who holds 15% of the shares. The two as I have said are husband and wife and they are the only directors to the company. They were both involved in the day today running of the company but sometime in 2011 Hajji Kigongo the majority shareholder unilaterally removed the petitioner from the management of the company by taking away from the petitioner all the cheque books, books of accounts and records of the company and employed staff who exclusively reported to him. The petitioner has since been removed from all the affairs of the company including denying her access to the properties of the company like vehicles and telephones. Since her removal from the management of the company, the petitioner has not been invited to any board or general meeting of the company and the said Hajji Kigongo has held board and general meetings wherein he appointed a company secretary, opened dollar accounts and ordered payments to be made to the company account where he is the sole signatory. The petitioner has also since incorporation not been given any dividends or other payments by the company.

It is because of the events as I have outlined above that the petitioner has brought this petition.

At the hearing of this petition, the petitioner was represented by Kwesigabo Bamwine & Walubiri Advocates. The respondent company was represented by M/S Muwema & Co. Advocates & Solicitors.

The issues agreed upon by the parties are:

1. Whether the petitioner is a member of the company with locus standi to file the petition.
2. Whether the affairs of the company are being conducted in a manner oppressive and prejudicial to the petitioner.
3. What are the available remedies to the parties under the circumstances?

In their written submissions, the respondent added the following issues as number four.

4. Whether the petitioner's affidavit in rejoinder is admissible.

The parties were allowed to file written submissions in support of their respective cases.

I have considered the pleadings, the submissions and affidavit evidence filed by both parties. I will go ahead and resolve the issues framed starting with the 4th issue.

4. Whether the petitioner's affidavit in rejoinder is admissible.

What comes out of this issue is a question of whether the Civil Procedure Rules apply to this petition on the issues of time or whether the company winding up rules should apply.

In the submission by learned counsel for the respondent, he states that the Civil Procedure Rules are applicable and therefore the affidavit in rejoinder should be struck out because it was filed out of time without seeking leave of court.

Learned counsel relied on Order 12 Rule 3 of the Civil Procedure Rules and the case of **Stop and See Uganda Limited Vs Tropical Bank, Misc. Application No. 333 of 2010** for this submission.

In reply to the submission by the respondent, learned counsel for the applicant submitted that the Civil Procedure Rules do not apply to petitions of this nature and the case of **Stop and See** quoted above is distinguishable from the current petition because in that case, the judge was dealing with an ordinary suit to which the Civil Procedure Rules was applicable. That what applies to this case are the Company (Winding Up) Rules and that under those rules the affidavit in rejoinder would be within time and therefore admissible. Learned counsel for the petition didn't cite any authority to support his position.

It should be noted that the Companies Act Cap 110 was repealed by the Companies Act 1 of 2012 under Section 298(1) thereof. When the Companies Act 2012 was enacted, Section 296 only saved certain rules which had been made under the repealed Act. This section states as follows;

“296 Savings for certain rules,

(1) Notwithstanding the provisions of this Act, the Companies (High Court) fees Rules made under the repealed companies Act shall remain in force after the commencement of this Act until revoked in the manner prescribed in subsection 3.

(2) The rules referred to in subsection 1 shall be read with and considered part of this Act except in so far as they may be inconsistent with the Act.

(3) The minister may make rules revoking the rules referred to in this section.”

The above quoted section is the only provision I could find in the Companies Act 2012 saving rules that had been made under the repealed Companies Act Chapter 110. The new Act does not mention expressly that other existing rules under Cap 110 had been saved. This therefore leaves

only one option to consider and that is Section 12 of the Interpretation Act which provides for the effect of repeal on Statutory Instruments made under a repealed law.

Section 12 of the Interpretation Act states:

“Where an Act or part of an Act is repealed and re-enacted with or without modification, Statutory Instruments made under it shall unless a contrary intention appears remain in force so far as are not in consistent with the repealing Act until they have been revoked or repealed by Statutory Instruments made under the repealing Act and until that revocation or repeal shall be deemed to have been made under the repealed Act.

The Supreme Court has discussed Section 12 of the Interpretation in the case of **Ismail Dabule & 2 Others Vs Attorney General & Another, Constitutional Appeal No. 3 of 2007.**

Tumwesigye JSC in his lead judgment stated that his understanding of Section 12 above is that a Statutory Instrument will be saved even if the Act under which it was made is repealed if;

1. The repealed Act or part of it is re-enacted and;
2. The statutory instrument is not inconsistent with the repealing Act.

Having been saved, the Statutory Instrument remains in force until according to Section 12, it is revoked by another Statutory Instrument made under the repealing Act. Statutory Instruments are based on some provision in the Act. If the Act is repealed and the same Act or any of its provisions is not re-enacted in some way in a repealed Act and there is no indication in the Act that the Statutory Instruments have been saved, then the Statutory Instruments made under it will be deprived of their statutory base and cease to have force of law.

I therefore find that in the instant case, the **Companies Act 2012** having repealed the **Companies Act Cap 110** and having expressly saved the rules it sought to save of which the Winding Up Rules is not among, the old winding up rules were deprived of the statutory base and ceased to have the force of law when the Companies Act 2012 came into force. The only provision relating to winding up under the new **Company Act 2012 is part IX of the Act** which provides that the Insolvency Act will be applicable to the procedure in winding up of companies. Therefore even though the company Act was re-enacted the **Companies (Winding Up) Rules** are inconsistent with the new Act in as far as provisions relating to the procedure for winding were not re-enacted.

In the circumstances therefore it is my considered view and am in agreement with learned counsel for the respondent that Civil Procedure Rules SI 71-1 is applicable to this petition to fill that vacuum. It follows therefore that the affidavit in rejoinder was filed out of time without leave of court and deserves to be struck out. However, since this court reserves the authority to extend time if asked to do so for sufficient cause and given the fact that we are still dealing with a transition from the old company Act to the new one and it is in the interest of justice and the just conclusion of this petition I will allow this affidavit in rejoinder to form part of the record. Learned counsel for the petitioner was under mistaken belief that the Companies (winding up rules) are still applicable.

ISSUE 1: Whether the petitioner is a member of the Company with locus standi to file the petition.

Membership of a company in Uganda is provided for under **S. 47 of the Companies Act 2012** wherein it is enacted as follows:

“47 definition of a member:

- (1) *The subscribers to the memorandum of a company shall be taken to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.***
- (2) *A person who agrees to become a member of the company and whose name is entered on its register of members shall be a member of the company”.***

My interpretation of the above provisions is that there are two ways of becoming a member of a company and these are:

- (i) By being a subscriber to the Memorandum of Association of a company at the time of incorporation of that company as in **Section 47(1) of the Companies Act;**
or
- (ii) By acquiring shares in the company after incorporation that’s **section 47(2) of the Companies Act.**

The requirements for the options however, differ.

1. To become a member as subscriber to the memorandum of association of a company one needs only to sign the memorandum as a subscriber and automatically will become a member of the company and holder of shares for which she or he has signed even if the company omits to fulfill its duty to put him on the register of members or to allot the shares to him or her. This was the position enunciated in **Evans Case [1867] L.R.2 Ch App 424;** and **Bytrust Holding Limited Vs I.R.C [1971] 1 W.L.R 1333.**

The rationale of this position is that an agreement between the company and the subscriber is that the subscriber shall become a member and the memorandum of association is a public document which makes publicity of the fact that the subscriber is a member of the company. **See; Lugan’s case [1902] 1 Ch 707.** In this option therefore entry on the register of members is not a

condition precedent to being a member. All members are shareholders in the company but not all shareholders are members.

2. The second option is to become a member by acquiring shares in the company after incorporation. In this case what is required are two things. First is an agreement between the company and the buyer of the shares. Secondly, an entry on the register of members which is in this case mandatory. Otherwise the buyer of the shares shall not be taken to be a member. See; **Mawogola Farmers and Growers Ltd Vs Kayanja & others (No.1) [1971] 1 EA 108 (CA Uganda).**

In the case under consideration it was submitted by learned counsel for the petitioner that the petitioner was a subscriber to the memorandum of association for 15% of the shares of the company. This is further proved by the petition and affidavit in support wherein is attached a copy of the memorandum of association as annexure 'A'. On that basis, I am inclined to find that the petitioner is a member of the company. On whether the petitioner has the locus standi to bring the petition, under S. 248 of the Companies Act 2012 only a member of a company may petition court for orders under that section of the Act.

Since I have held that the petitioner is a member of the respondent company I will find that she has the locus standi to bring this petition.

There was an issue relating to whether the petitioner paid for her shares. I find that issue is not relevant under the circumstances because neither the petitioner nor the majority shareholder presented any proof that they paid for their shares. It appears from the pleadings that the company never obtained its working capital from shareholders but rather from debt financing through a loan which both the petitioner and majority shareholder authorized as directors.

ISSUE 2: Whether the affairs of the company are being conducted in a manner oppressive and prejudicial to the petitioner.

This issue has to be approached as a question of fact and therefore court has to examine the circumstances of this case. Under Section 248 of Companies Act 2012 there is an option of petitioning court for remedies on ground that the Companies affairs are being conducted in a manner which is unfairly prejudicial to the interest of its members generally or some part of its member including at least the petitioner himself or herself or that any actual or proposed act or omission of the company including an act or omission on its behalf is or would be so prejudicial. Section 247 of the Companies Act 2012 is not a section under which this court can make orders except if the Registrar of Companies has referred the petition to court under Section 293 of the Companies Act.

It should be noted that matters relating to oppression are supposed to be dealt with by the Registrar of Companies under Section 247 of the Companies Act. I will therefore restrict myself to matters that fall under Section 248 relating to unfair prejudice which affects interests of members.

My reading of Section 248 of the Companies Act seems to suggest that in passing that Section, Parliament did not intend to give a right of action to all shareholders who considered that some act or omission by the company resulted in unfair prejudice to him/herself. The said section is confined to “unfair prejudice” to a petitioner qua member, or put it in another way, the word “interests” in Section 248 is confined to the “interests of the petitioner as a member”.

I will now have to consider whether or not the matter over which the petitioner complains in the petition and the evidence in support thereof can amount to a conduct of the affairs of the company “in a manner which is unfairly prejudicial to her as a shareholder”. To constitute unfair prejudice the value or the quality of the shareholder’s interest, that is his/her shares in the company limited by shares must be adversely affected. I don’t think that Section 248 was enacted so as to enable any disgruntled minority shareholder to require the company to wind up.

To invoke the principle of 'unfair prejudice' two elements must be present for one to succeed in a petition under Section 248.

- (a) The conduct must be prejudicial in the sense of causing prejudice or to the relevant interest of members or some part of the members of the company i.e shareholders; and
- (b) It must also be unfair.

The objective test of unfairness is what amounts to unfair prejudice. It is not necessary for the petitioning shareholder to show that anybody acted in bad faith or with intention to cause prejudice. The courts will regard the prejudice as unfair if a hypothetical reasonable standard would regard it to be unfair. Fairness is judged in the context of a commercial relationship, the contractual terms which are paramount and as are set out in the Articles of association and in any binding shareholders agreement. This court believes that the protection for a shareholder is found in the Articles themselves. Therefore is the conduct of which the shareholder complains in accordance with the Articles and the powers which the shareholder have entrusted the board? If the conduct is in accordance with the articles to which the shareholder has agreed it will be difficult to succeed in a cause based on unfair prejudice. This does not mean that anything done outside the articles amount to unfair prejudice. Far from it. Even if the conduct is not in accordance with the articles, it does not necessarily render the conduct unfair since trivial and technical infringements of the articles may not give rise to a remedy under Section 248 of the Companies Act.

Therefore unfair prejudice is a flexible concept incapable of exhaustive definition. This means that the categories of conduct which may amount to unfair prejudicial conduct are not closed. Examples that may constitute unfairly prejudicial conduct are:

1. Exclusion from management in circumstances where there is (legitimate) expectations of participation.
2. The diversion of business to another company in which the majority shareholder holds interest.
3. The awarding of the majority shareholder to himself of excessive financial benefits.

4. Abuses of power and breaches of Articles of Association for example the passing of a special resolution to alter the Company's Articles maybe unfairly prejudicial conduct if such alterations would affect the petitioner's legitimate expectation that he would participate in the management of the company.
5. Repeated failures to hold Annual General Meetings.
6. Delaying accounts and depriving the members of their right to know the state of the Companies affairs.

In the instant case, the petitioner complains that the majority shareholder unilaterally removed her from management of the company by taking away from her cheque books of accounts and records of the company and employed staff who exclusively reported to him. The petitioner has since been removed from all the affairs of the company including denying her access to the properties of the company like vehicles and telephones. The petitioner claims that since her removal from management of the company she has not been invited for any board or general meeting of the company and that Hajji Kigongo the majority shareholder has held singularly board and general meetings during which he has appointed a company secretary, opened dollar accounts and ordered payments to be made to a company account where he is the sole signatory. That since incorporation, the petitioner has not been given dividends or any other payments by the company. Under Article 84 of the Articles of Association in annexure "A"2 it is provided that the petitioner and the other shareholder were expected to participate in the management of the company business. It shows that both Olive Kigongo and Moses Kigongo were supposed to be directors of the company right from its inception. Then under Article 70 of the Articles of Association it is provided that failure to give notice of a meeting to a member does not invalidate proceedings at the meeting. Going by this article, this court cannot invalidate proceedings at the meetings or question the matters that were conducted in the meeting where the petitioner was not in attendance.

From the pleadings and evidence in this petition, I have noted that the complaints leveled against the company have not been in any way denied by the company especially in the affidavit of

Moses Kigongo. Instead the company attempts to justify the actions of the majority shareholder/director. The only allegation denied is the fact that the petitioner was kicked out of management of the company. The respondent claims that the petitioner was mismanaging the finances of the company and therefore it was justified for the majority shareholder to take on personal management of the company. Further that when the petitioner was summoned to answer for her mismanagement of the company, she refused to attend the meetings. However, no notices served on the petitioner were attached as evidence. There is therefore no cogent evidence adduced by the respondent to support all these claims.

The petitioner's shareholding in the company came with the legitimate expectation of participation in the management of the company which she has been effectively and unfairly denied. I therefore find that the affairs of the respondent company have been conducted in a manner unfairly prejudicial to the interests of the petitioner as a member.

ISSUE 3: What remedies are available to the parties in the circumstances?

The petitioner prayed for orders that:

- a) The respondent company be wound up by this court.
- b) A liquidator be appointed to wind up the company.
- c) Any additional orders this court may deem just and equitable.
- d) The costs of the petition be paid by the company.

Regarding the option of winding up a company on the ground that it is just and equitable was a result of a statutory provision in the repealed Companies Act Cap110 under Section 222(f) thereof. However, there is no similar provision under the new Companies Act 2012. I therefore find that a winding up order and an order appointing a liquidator would not be appropriate in this case. This is because it is an undisputed fact from the pleadings of both petitioner and respondent

that the company is still solvent and profitable. The petitioner also holds only 15% of the shares of the company. Section 250 of the Companies Act 2012 lists particular types of orders which may be made by this court if it decides that there has been unfair prejudice. However under Section 250(1) thereof, the court still retains a general discretion to make any order as it thinks fit.

The powers listed under Section 250(2) provide that the court can:

- 1. regulate the conduct of the Companies affairs in the future.**
- 2. require the company to refrain from doing or continuing to do an act complained of or to do an act which the petitioner has complained of that it has omitted to do;**
- 3. authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct.**
- 4 provide for the purchase of the shares of any member of the company by the other members or by the company itself and in the case of purchase by the company itself the reduction of the Company's capital accordingly.**

In deciding which orders to make the conduct of the respondent is relevant since the conduct complained of maybe prejudicial but not 'unfair'. The petitioner's conduct may also affect the reliefs granted by court.

In the instant case this court finds that since the petitioner wished the company to be wound up, it means she no longer wants to continue investing and participating in the company affairs. Therefore under Section 250(2)(d) of the Companies Act 2012 I will order that the petitioner's 15 shares be purchased by the company itself at the value of 1,000,000/= (one million only) per share as at the time when the prejudice to the petitioner began. The capital of the company shall be reduced accordingly. Further in exercise of the discretionary powers of this court to grant any orders that it thinks fit, I order that the respondent company in addition pays the petitioner 15% of the profits made from 1st January 2011 to the date of this judgment. A report of the

implementation of these orders shall be communicated to this court within two months from today.

To the extent I have discussed above, this petition will be allowed with costs to be paid to the petitioner by the respondent company.

I so order.

Stephen Musota

J U D G E

09.02.2016