THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

IN THE MATTER OF THE DONATE COMPANY LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT, 2012

HCT-00-CV-CI-0005-2016

1. **EDWARD SSENTEZA**
2. **BANGA MICHEAL SSEMUGABI ::::::::::::::::::PETITIONERS**

- VERSUS –

1. **DONNIE COMPANY LIMITED**
2. **EQUITY BANK UGANDA LIMITED :::::::::::::: RESPONDENTS**

BEFORE: HON. JUSTICE STEPHEN MUSOTA

RULING

This ruling arises out of preliminary points of law raised by the 2nd respondent Bank (Equity Bank (U) Ltd) in a petition brought under Sections 247, 248 and 250 of the Companies Act 2012. In that petition the petitioners are seeking the following remedies:

1. A declaration that the affairs of the company have been conducted in a manner that is prejudicial to the interests of the petitioners in the company;

2. A declaration that the Loan Documentation, Restructure letter and the Mortgage Deed are null and void and unenforceable against the company;

3. An order that the parties re-negotiate and enter into a legally binding and enforceable loan and Mortgage Agreement;

4. An order that a forensic audit be carried out on the affairs of the company; the report of which to be availed to the entire shareholding and that this be used as a basis for their decisions on how to run the affairs of the company in future;

5. An order of a permanent injunction restraining the 2nd respondent from enforcing and commencing recovery measures against the company's property based on the Loan documentation;

6. Any other orders and/or remedies this court may deem fit.

At the hearing of the petition Mr. Edward Ocen assisted by Mr. Denis Kyewalabye appeared for the 2nd respondent and Mr. Andrew Wambi appeared for the 1st and 2nd petitioners. The 1st respondent was not represented.

Court allowed respective counsel to make written submissions on the points of law. This was done.

The brief background to this ruling is that on 23rd February 2016, the petitioners filed this petition seeking for orders as I have outlined above. The matter was set down for hearing on the 2nd day of May 2016. On that day, learned counsel for the 2nd respondent requested that preliminary points of law be disposed of first. This was allowed.

From the submissions of both learned counsel, it is clear that the 1st respondent is a Private Limited Liability Company with four shareholders namely; Mugoya Mawazi – 650 shares and Mugoya Zam – 150 shares.

Both Mugoya Mawazi and Zam are husband and wife. The two petitioners, to wit, Edward Ssenteza and Banga Michael Ssemugabi each holds 100 shares in the 1st respondent company. The pleadings and submissions show that on 23rd January 2012, the 1st respondent company entered into an agreement to purchase land and building thereon. The agreement is Annexture "R7" to the affidavit of Arocha Joseph. Under that agreement the 2nd respondent bank advanced the 1st respondent company UGX3,900,000,000/= representing 86.7% of the purchase price. Subsequently the 1st respondent company obtained two other credit facilities of UGX 5,150,000,000/= and UGX 500,000,000/= to purchase and complete payment for the purchased building. The facility letter is attached on Annexture "R9" to the affidavit of Arocha Joseph.

The 1st respondent company however, defaulted on the loans. The 2nd respondent Bank then concluded a loan restructuring agreement dated 26th June 2014 with the 1st respondent marked "R11" to the affidavit of Arocha Joseph but still the 1st respondent company defaulted. The 2nd respondent Bank then moved to foreclose and recover the money. It is then that the 1st respondent company filed several suits in the Commercial Court and Land Divisions of the High Court as seen in "R12". "R13" and "R16" which are pending in those courts.

It is after those suits that now the petitioners come up to petition on the ground that they were never involved in all the negotiations and activities leading to all these problems. They therefore feel the affairs of the company have been managed in an oppressive manner to them as minority shareholders and in a manner prejudicial to their interests.

Learned counsel for the 2nd respondent raised preliminary points of law that:

1) ***The petition offends the principles of <u>Lis Pendens</u> rule and is barred under S. 6 of the Civil Procedure Act;***

2) ***The petitioners have no cause of action known in law against the 2nd respondent Bank;***

3) ***The petition is premature.***

These points bring forward the following issues between the parties:

(i) Whether the petition offends the principles of <u>Lis Pendens</u> rule and is barred under S. 6 of the Civil Procedure Act?

(ii) Whether the petitioners have no cause of action known in law against the 2nd respondent Bank?

(iii) Whether the petition is premature?

I have considered the submissions on these issues by both learned counsel and the Law applicable. I will go ahead and resolve the issues as I have identified them.

Issue I: **<u>Whether the petition offends the principles of *Lis Pendens* rule and is barred under S. 6 of the Civil Procedure Act?</u>**

On this issue, learned counsel submitted that the ***<u>Lis Pendens</u>*** rule is to the effect that no court ought to entertain a case in which the same facts and issues are already up for consideration in another case pending before the same court or another court having competent jurisdiction. He also submitted that this rule is entrenched in S. 6 of the Civil Procedure Act. Further that the

rationale for the ***Lis Pendens*** rule is to prevent two different courts from arriving at conflicting judgments on the same facts and further to prevent throwing the doctrine of precedent in disarray and uncertainty.

For this submission learned counsel relied on the case of ***Springs International Hotel Ltd Vs Hotel Diplomat Ltd & Bonny M. Katatumba HCCS No. 227 of 2011*** (Land Division).

Therefore the petition should be struck out with costs.

In reply learned counsel for the petitioners submitted that the petition is properly before court because the petitioners were not party to the suits in Commercial Division and Land Division.

That they only got to know about those transactions and the suits later as evidenced in paragraphs (i) and (j) of the Petition. Further that the suits in the other courts are not about failure or inability of the 1st respondent company to pay its debts. That even the current petition is not about that, but rather is about the petitioners as both minority shareholders and directors challenging the management of the 1st respondent company, because they were totally excluded from the running of the company affairs which include the transactions entered into with the 2nd respondent. That the three suits are therefore substantially different in facts, issues, pleadings and rights sought to be enforced.

Learned counsel also submitted that remedies sought in the petition and powers of court under S. 250(2) of the Companies Act 2012 cannot in any way affect the remedies that are sought after in the other two suits and as such the preliminary objection does not have merit and should be overruled with costs.

In rejoinder, learned counsel for the 2nd respondent submitted that the submissions in reply of the petitioners is untenable in as far as they cannot argue that all they care about in this petition is the management of the Company. Yet they only picked out one transaction whose validity they seek to challenge. He also submitted that this court should look at the likely consequence of each of the courts making conflicting judgment which will make execution difficult or impossible. Further that the purpose of S. 6 of the Civil Procedure Act is to prevent exactly what is happening in this case. He therefore reiterated the earlier prayer.

I have considered the submissions by respective counsel. I am inclined to disagree with learned counsel for the 2nd respondent. He relied on S.6 of the Civil Procedure Act which enacts this:

> ***"No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit, or proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where that suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed."***

I do find that this petition does not fall under such types of suits as envisaged in S. 6 of the Civil Procedure Act because under that section "matters is issue" does not mean any matter in issue but the entire subject in controversy ***Jadu Karsan Vs Herman Singh Bhogal [1953] 20 EACA 74.*** The entire subject in this petition is that the petitioners were not informed or allowed to participate in the decision making process that led to a loan being given to the 2nd respondent to the 1st respondent. This is so because in deciding whether the mortgage is lawful court will not delve into issues of the loan structure, and in deciding whether the rights of the petitioners were violated this court would not go into issues of validity of the loan agreement.

Suits are also not similar in issue where the parties are different and the prayers to court are different. See ***Obbo Vs Owor et al [1988-09] HCB 9293.*** In this case the parties to the petition

are different from all the parties to the other cases. In the instant case the petitioners come as shareholders/directors individually not on behalf of the Company.

In the other suits it is the 1st respondent Company suing the 2nd respondent Bank. The prayers sought are substantially different.

For the reasons I have given, I am inclined to overrule this objection. The same is overruled.

Issue 2: ***Whether the petitioners have no cause of action known in law against the 2nd respondent Bank?***

On this issue, learned 2nd respondent submitted that the petitioners have no locus standi to bring this suit against the 2nd respondent in as far as only a Company can sue to secure its own interests.

Learned counsel relied on the case of ***Foss Vs Harbottle (1843) 2 Hare 461.*** He further submitted that even in the exceptions to that rule stated in ***Edwards Vs Halliwell [1950] 2 All ER 1064*** the petitioners cannot have locus standi to bring a suit against the 2nd respondent on the basis of an agreement between the 1st respondent Company and the 2nd respondent Bank.

The exceptions are:

1) ***Whether the complaint is that the company is acting or proposing to act ultravires?***
2) ***The act complained of requires a special resolution and the required majority to pass the resolution has not been attained;***
3) ***The rights of a shareholder have been infringed;***
4) ***When there is fraud committed on the minority shareholder.***

Learned counsel further submitted that in fact the Company has already instituted suits against the 2nd respondent in other courts so this suit is unnecessary.

In reply, learned counsel for the petitioners submits that the petitioners have a cause of action against the 2nd respondent Bank in as far as it connived with the 1st respondent Company to defeat the interests of the petitioners. Further that the 2nd respondent's actions of ignoring the ***"Know Your Customer"*** Regulations which require them to do due diligence gives the petitioners a cause of action against the 2nd respondent. Learned counsel relied on the case of ***Auto Garage & Anor Vs Motokov [1971] EA 515*** for the submission that perusal of paragraphs (o), (iii) and (iv) of the petition clearly shows that the petitioners have a cause of action against the 2nd respondent Bank. That derivative suits are brought by a member of the Company where the wrongdoers are in control and have prevented the Company itself from filing a suit. That according to the case of ***Pender Vs Lushington (1877) 6 Ch D. 70*** it was held that where a Company is acting contrary to the Articles, the members individually have a right to sue. In this case, he submits that the violation of the Articles is clearly stated in paragraph 6 of the petition which shows that Articles 21, 23, 26, 27 and 43 of the Articles of Association of the 1st respondent Company were not complied with.

In rejoinder, learned counsel for the 2nd respondent Bank submitted that learned counsel for the petitioners has failed to show that the Company failed to bring a suit on its own. That in fact there is undisputed evidence that there are already two suits pending and filed by the Company. Therefore the petition be struck out.

I have carefully considered the submissions by respective counsel in support of their respective case. I wish to note that the applicability of the rule in ***Foss Vs Harbottle*** (supra) has ever since the enactment of the Companies Act 2012 which repealed the Companies Act Cap. 110 greatly diminished in relation to members right to petition. This is because the Companies Act 2012

specifically provides for Minorities under Ss 248 -250. A look at the list for the arrangement of sections at the beginning of the act, those provisions are all under the part entitled "Minorities".

These provisions, especially Ss 247 and 248 give a member liberty to petition either court if the complaint is that the affairs of the Company are being managed in a manner prejudicial to the interests of a member, (see S. 248 of the Act) or to petition the Registrar of Companies if the complaint is that they are being oppressed as members. (See S. 247). The sections do not attach any conditionality to the right to petition. I therefore do not agree with the line of argument that the rule in ***Foss Vs Harbottle*** must be complied with before a member can petition court on matters of Management of a Company.

I believe that as required under S. 14 (2)(b) of the Judicature Act Cap. 13, Common Law should only be applied where there is no specific provision under the written law of the land. For example if the directors and majority shareholders have failed to bring an action enforcing a right of a Company then a derivative action using the Common Law principles in ***Foss Vs Harbottle*** may be brought in court.

However, I am inclined to uphold this point of law on the ground that petitions under Ss 247 and 248 are internal matters of the Company. Therefore for the petitioners to drag the 2nd respondent into this internal fight of members and directors is unacceptable. The 2nd respondent had no role whatsoever in the conduct of the affairs of the Company. I am firm on this opinion because this is not a derivative action in which 3rd parties like the 2nd respondent can be made party to. It is also clear under Ss 50-53 of the Companies Act 2012 if read together, that a third party is under no obligation to inquire into whether the people representing the Company are authorized to do so as long as they appear to have authority as Directors. Under S. 50, a Company can even enter into an oral contract.

Section 53 is more instructive here.

It enacts that:

> ***"53. No duty to enquire as to capacity of a Company or authority of directors.***
>
> ***A party to a transaction with a Company is not bound to enquire whether it is permitted by the Company's memorandum or as to any limitation on the powers of the Board of Directors to bind the Company or authorize others to do so."***

Therefore for those reasons the 2nd respondent did no wrong at all against the petitioners and in the criteria set out in ***Auto Garage & Anor Vs Motokov*** (supra) there is no liability whatsoever on the part of the 2nd respondent for the alleged mismanagement of the Company affairs. I therefore find merit in this point of law that the petitioners have no cause of action against the 2nd respondent bank in this petition which relates to the internal management issues of the Company. On this ground alone, I would strike out the petition as against the 2nd respondent Bank.

Issue 3: Whether *the petition is premature?*

On this issue, the learned counsel for the 2nd respondent submitted that prayer (a) in the petition shows that the prayers sought fall under S. 247 of the Companies Act 2012 wherein the jurisdiction to handle those prayers is vested in the Registrar of Companies. That although the court is vested with similar powers under S. 248 of the Companies Act 2012, the court must be reluctant to interfere in the affairs of the Company as per the case of ***Foss Vs Harbottle .*** Learned counsel then prayed that this court should find that the interpretation of Ss. 247 and 248 of the Companies Act 2012 is that before a Minority shareholder seeks redress from court on complaints relating to oppressive and prejudicial conduct, he or she should first seek redress from the Registrar of Companies since S. 247 was enacted prior to S. 248 being enacted. That the two sections were not enacted to give the Minority shareholders choice of forum but to provide for hierarchy in seeking redress.

In reply, learned counsel for the petitioners submitted that this petition is properly before court because it is brought under Ss. 247 and 248. Further that the petition is hinged on both oppressive and unfair prejudice.

Learned counsel for the petitioners also submitted that Ss. 248 and 247 adopt the words "may apply" and accordingly to Black's Law Dictionary 6th Edition, the word "may" implies permissive, optional or discretional and not mandatory. That the Registrar has only powers to handle indoor affairs of the Company but not complex matters that involve third parties like the matter at hand in the petition. That therefore since there is concurrent jurisdiction with the Registrar of Companies the most appropriate option for the petitioners was to apply to the High Court which has unlimited jurisdiction and inherent powers to make such orders for the ends of justice. As such, learned counsel went on, the petition is not premature. That the preliminary point of law be overruled with costs.

In rejoinder, learned counsel for the 2nd respondents submits that they agree the court and the Registrar have jurisdiction to entertain Minority shareholder petitions but the courts must be more reluctant to intervene in Company affairs especially where they can be resolved internally. That the provisions in Ss. 247 and 248 were not made to give Minority shareholders convenience and choice of forum but to provide for hierarchy in seeking redress.

I have considered the submissions of both learned counsel. There seems to be a lot of confusion as to the difference between Ss. 247 and 248 and derivative actions. Under S. 247, an aggrieved or oppressed shareholder has a remedy of petitioning the Registrar of Companies and it would be the Registrar of Companies to bring the petition to court if he cannot provide a remedy whereas court can only deal with unfair prejudice as per S. 248 of the Companies Act 2012.

For derivative actions Minority shareholders take action when directors or Majority shareholders are not willing to take action.

In ***Re Saul D. Harrison P/C [1995] BBC 475, 488,*** Hoffman LJ remarked that: "***unfairly prejudicial***" is deliberately imprecise language which was chosen by Parliament because its earlier attempt in the Companies Act 1948 to provide for a similar remedy had been too restrictively construed. The earlier section has used the word "oppressive" which the House of Lords in ***Scottish Cooperative Wholesale Society Vs Meyer [1959] AC 324*** said meant "burdensome, hash and wrongful." This gave rise to uncertainty as to whether "wrongful" required actual illegality or invasion of legal rights. The Jenkins Committee on Company Law, which reported in 1962, thought that it should not. To make this clear, it recommended the use of the term "unfairly prejudicial" which parliament tardily adopted in the UK. This very section is reproduced in our present S. 248 of the Companies Act 2012. However, the section on oppression remained in the Companies Act as section 247 albeit with forum changing to be the Registrar of Companies. This means that the Minority shareholders have three possible remedies depending on the grounds available or the circumstances of the case.

These are:

1. ***If the complaint is that the Minority shareholders are oppressed because decisions that are "burdensome, harsh and wrongful" against them are being made by the management of the Company and the acts complained of would as a test amount to grounds for winding up on just and equitable grounds, then the remedy is under S. 247 before the Registrar of Companies.***

2. ***If the complaint is simply that the affairs of the Company are being managed in a manner unfairly prejudicial to the interest of the members then the remedy is under S. 248 of the Companies Act 2012 before the High Court.***

3. ***If the complaint is that there is a wrong against the Company which the Company is unwilling through its directors or Majority shareholders to sue and enforce against, then the members remedy is in a derivative action in court in accordance with the principles in <u>Foss Vs Harbottle.</u>***

The derivative action plaint should aver the steps taken to bring the action in the name of the Company and which steps failed on account of Majority action.

In the instant case and as rightly submitted by learned counsel for the petitioners they mixed oppression with unfair prejudice. However this court can only deal with unfair prejudice as per S. 248 of the Companies Act 2012. I will accordingly partly uphold the objection in as far as matters of oppression are concerned.

The interpretation of Ss 247 & 248 is that before a Minority shareholder seeks redress from court over complaint relating to oppression and prejudicial conduct, he or she should first seek redress from the Registrar of Companies since S. 247 was enacted prior to S. 248 being enacted. The two sections were not enacted to give the minority shareholders choice of forum but to provide hierarchy in seeking redress.

For the reasons I have given in this ruling, I will find merit in some of the preliminary points of law and make the following orders:

1. ***The petition be and is hereby struck out as against the 2nd respondent.***

2. ***The petition be and is hereby struck out in as far as it relates to matters under S. 247 of the Companies Act.***

3. ***The petition shall proceed under S. 248 against the 1st respondent.***

4. ***The petitioners shall pay the 2nd respondent Bank the costs of these proceedings.***

I so order.

Stephen Musota

J U D G E

20.06.2016.