

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

HCCS.NO. 305 OF 2014

BENON RWAMAKUBAPLAINTIFF

5 **V**

CIVIL AVIATION AUTHORITY.....DEFENDANT

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

Introduction

10 By an amended plaint filed on 19th October 2016, the plaintiff sued on his own behalf and on behalf of all persons who were employees of the defendant as at 15th May 1995 for a declaration the said employees are entitled to proceeds of the sale of 3750 shares of Entebbe Handling Services (ENHAS) held in trust for the benefit of the employees . The plaintiff also sought an order for payment of dividends paid by ENHAS to the defendant between
15 1998 and 2008 with interest from the date of payment till payment in full and general damages.

The defendant relied on its written statement of defence filed on 19th September 2014 in which it denied the plaintiff's claims . The defendant in its reply to the amended plaint filed on 7th November 2016 denies it was paid dividends by ENHAS for the period 1998-2008
20 and that the shares were re-sold to ENHAS taking into account outstanding dues owed to the defendant as well as the dividends. the reference NHAS is in error because the company that was the subject of the shareholding agreement is EHACO .

On 11th March 2016 the plaintiff retrospectively obtained a representative order to sue on his behalf and on behalf of 99 others .

25 Aware of the belated representative order, parties continued to rely on the joint scheduling memorandum filed on 9th September 2015 and an addendum filed on 16th March 2016 .

Initially, counsel framed three issues in the JSM but on 21st February 2017 when they appeared before me, both conceded there was one main issue, i.e,

Which persons are entitled to the proceeds from the sale of 3750 shares .

Subsequently, a second issue emerged:

Whether dividends which accrued were ever paid and whether the plaintiffs are entitled to them.

5 Both counsel filed written submissions that I have carefully considered.

Resolution of the case

In civil cases, the legal burden of proof rests on the plaintiff to prove his case. While the evidential burden rests on whoever asserts a fact which he must prove on a balance of probabilities. The plaintiff will lose the case if neither party proves their respective cases.

10 **Issue No. 1 : Which persons are entitled to the proceeds from the sale of 3750 shares which had been reserved for the workers of Civil Aviation Authority.**

Both parties agreed on the following facts with respect to how the plaintiff came to have an interest in the shares.

15 In 1995, before the divestiture of Uganda Airlines Corporation , Government of Uganda privatised ground handling services at Entebbe International Airport and a private limited liability company Entebbe Handling Co ltd (EHACO) took over handling services.

Of the 150,000 shares of ENHAS, 3,750 were reserved for employees of CAA.

20 It is clear from these agreed facts and from the witness statement of DW1 Lubega Yiga Joseph that by a Share subscription and share holders agreement dated 15th September 1995, that employees of CAA were beneficiaries of 3,750 shares.

Who are the employees envisaged by the subscription and shareholding agreement?

The disputed fact is who are these employees.

According to article 1.1 of the agreement, workers of UAL or CAA means

25 *‘any person for the time being in the employment of UAL or CAA at the time of the execution of this agreement’.*

Civil Aviation Authority and Uganda Airlines (UAL) were part of the consortium of parties to the shareholders agreement.

While counsel for the plaintiff relied on section 91 of the Evidence Act to submit that the contract document speaks for itself and therefore extrinsic evidence was not necessary to
5 contradict it, counsel for the defendant submitted that the defendants management team determined a criteria for payment of proceeds of the sale of the shares .

It is not disputed that the defendant's management determined in meetings held on 10th January 2014 and 15th January 2015 that proceeds from sale of shares be distributed among staff who were in employment between May 1998 when shares were paid for and July 2008
10 when the shares were sold to ENHAS. The list of employees who would benefit under this arrangement comprises 1,116 employees.

In other words, the defendant by a management decision sought to alter the terms of the shareholding agreement that described workers as those who were in employment at the date of the agreement 15th May 1995 .

15 Counsel for the plaintiff referred to this agreement between four companies in which UAL relinquishes responsibility for operations of ground handling services at Entebbe to EHACO . The four companies then subscribed to shares, and workers of UAL and CAA were each allotted 2.5% of the shares which translated into 3,750 shares.

Counsel for the defendants submitted that it is unfair to restrict the shares to the employees as
20 at 1995 because the parties to the consortium left the management of the proceeds of the shares to the individual shareholder. An examination of the shareholding shows that CAA and UAL got shares and so did the employees.

Counsel for the defendant further submitted that it is reasonable to extend benefit of these shares to the employees who came in after 1995 when the shares were allotted . He referred
25 to the collective bargaining agreement which defines an employee as any person who has entered into a contract of employment with the Authority.

In other words, counsel is relying on extrinsic evidence to interpret the subscription and shareholding agreement.

As submitted by counsel for the applicant, section 91 of the Evidence Act is about the parole evidence rule. The essence of that rule is that every written document speaks for itself and oral evidence will not be admitted to vary it or contradict it unless it falls in the exceptions listed in section 92 of the Evidence Act. These include: intimidation; duress, mistake,
5 illegality, lack of capacity. Also evidence to of agreement to vary the contents of the document ; any custom that is usually annexed to such contract document.

As indicated earlier, the share subscription and shareholding agreement that conferred a benefit on workers of UAL and CAA was between UAL, CAA and three other parties.

It was the contention of counsel for the defendant that consideration for the shares was paid
10 in 1998 by CAA and therefore that is when the subscription and shareholding agreement came into effect with respect to workers shares.

By article 19 of the agreement, it took effect on 15.5.1995 , the date it was signed by the parties which includes article 1.1 on definition of workers and the number of shares allotted to them.

15 Their intention was to confer a benefit on existing employees of CAA and UAL as at 15th September 1995 , an interpretation that is clear from the agreement itself.

As stipulated in section 92 of the Evidence Act, any change to the terms of that agreement can only be by all the parties and cannot be by a unilateral decision of one party, irrespective of the consensus of the current management of CAA.

20 Having undertaken in writing to be bound by the terms of the agreement, it becomes enforceable at law as a contract.

Privity of contract

The sub issue that arises is whether the plaintiff who is a beneficiary and not a party to the agreement can sue on it. The modern thinking is that if the intention of the contracting
25 parties was to confer a benefit on a third party, the latter can sue on it. The Commercial Court in **HCCS No. 431 of 2014 Asante Aviation ltd v Star Africa Air Charters ltd and ors (ulii)** discussed this point in the following terms:

‘The position has now changed and it is now possible for a person not privy to the contract to sue. Such instances are where the third party is a beneficiary to the

agreement between the other two parties. The test is whether the contracting parties intended the third party to derive benefit from their contract.'

But even without going in depth into privity of contract doctrine, the defendants do not dispute that the plaintiff is entitled to a share of the proceeds of the sale of the shares except
5 that it wants the proceeds spread to employees who were not employees on 15th May 1995.

On the basis of the agreement of 1995; in the absence of consent of other parties to amend its terms to change the description of '**workers** '; and in light of the clear intention of the parties to the agreement, I find that only workers who were in employment on 15th May 1995 are entitled to benefit from the shares allotted to them and sold to ENAHO in August 2008 at
10 \$155,247.

With respect to the list of employees as at 15.9.1995, the payroll of May 1995 submitted by the plaintiff and marked PExh.2 confirms those entitled to benefit from the shares.

Issue No. 2: Whether dividends which accrued were ever paid and whether the plaintiffs are entitled to them.

15 This was added as an issue when the plaintiff filed an amended plaint.

DW1 Lubega in his witness statement shows \$305,000 was paid on 15.3.2008 of which \$213,000 was paid back to CAA for purchase of shares while \$92,000 was paid into the Provident fund. In theory only dividends of \$92,000 is available for appropriation but I will not make orders with respect to the Provident fund which obviously is administered under
20 its own terms and conditions.

Claim for interest

Counsel for the plaintiff submitted that interest accrued on the \$155,247 from 16th October 2008 until payment in full. It was counsel's submission that had the plaintiff been paid money in 2008, he would have had use of it. Counsel relied on McGregor on Damages 15th
25 edition, Sweet & Maxwell. He prayed for 15% p.a. Counsel submitted his client should get an additional 10% to cater for the fall in value of the Uganda shilling.

In response, counsel for the defendant submitted that the plaintiff proposes rate was not supported by evidence moreover the defendant has at all times been ready to pay out the money and the only dispute was with respect to the beneficiaries.

This dispute was not about breach of contract but about a declaration by court on who are the entitled beneficiaries. While it's reasonable to award interest on the proceeds, it's not reasonable to impose another level of interest on account of depreciation of the Uganda shilling as proposed by counsel for the plaintiff. Bearing all these factors in mind, I will
5 award interest at court rate of 8% p.a from October 2008 when shares were sold till payment in full.

Exemplary damages

Apart from the fact that this issue was not framed, exemplary damages are usually granted when servants of the government behave in an arbitrary, high handed manner and violate a
10 claimant's constitutional rights.

Counsel for the plaintiff referred me to **COA Civil Appeal No. 43 of 2010 URA V Wanume Kitamirike** (ulii) where the Court of Appeal reiterated that exemplary damages are awarded in cases of torts but not for breach of contract.

The instant dispute was neither about breach of contract nor was it a claim in tort.

15 Exemplary damages therefore do not arise.

Prayer for proportionate amounts

This prayer was not supported by evidence therefore I will not make the order as prayed.

In conclusion I find that the employees entitled to benefit from the proceeds from sale of shares are those employees in employment in May 1995 as listed in the payroll exhibited in
20 court.

The defendant shall pay \$155,247 with interest at 8% p.a from 16th October 2008 till payment in full.

Costs of the suit to the plaintiff.

DATED AT KAMPALA THIS 22ND DAY OF MAY 2018.

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HON. LADY JUSTICE H. WOLAYO

REPRESENTATION

Kabayiza, Kavuma, Mugerwa & Co. Advocates for the plaintiff

Mukiibi Sentamu & Co. Advocates for the defendant