

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(CIVIL DIVISION)**

**IN THE MATTER OF THE COMPANIES ACT, 2012**

**COMPANY CAUSE NO. 005 OF 2018**

- 1. DAMALIE MUKASA**
- 2. KITYO AGNES:.....PETITIONERS**

**VERSUS**

- 1. EAST & CENTRAL UGANDA INTERGRATED FARMERS ASSOCIATION (ECUIFA)**
- 2. KAAYA MUHAMAD:.....RESPONDENTS**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**JUDGMENT**

The petitioners brought this matter seeking a declaration that the actions of the 2<sup>nd</sup> respondent are oppressive and prejudicial to the interests of the petitioner, an order winding up this the 1<sup>st</sup> respondent, an order that the 2<sup>nd</sup> respondent accounts for all the benefit that has come to him while using company assets, and costs of the petition.

The 1<sup>st</sup> respondent was incorporated on the 11<sup>th</sup> day of February 2001 as an unlimited company with her physical address at Kibuga Block 12 Plot 167 in Kisenyi. The company was incorporated with only 7 members namely;- Agnes Kityo, Kaaya Muhammad, Damalie Mukasa, Sebina Benon, Kibalama Joseph, Musisi Lutwama and Nsobya Sajjabi.

At the moment the majority of the members have since passed on to wit; Ssebina Benon, Kibalaama Joseph, Musisi Lutwama and Ssajabi Nsobya leaving only the petitioners and 2<sup>nd</sup> respondent.

The 1<sup>st</sup> respondent was incorporated with several objectives among which include;

- i) To formulate poverty eradication schemes for rural communities that will enable them eradicate poverty by using whatever they have.
- ii) To strenuously embark and develop an advanced agricultural industry involving manufactured final products.
- iii) To develop modern agricultural industry involving manufactured final products.
- iv) To develop modern agricultural methods for the better productivity and better yields
- v) To purchase, take, receive and lease as lessee, take as gift, devise or bequest or otherwise acquire and to own, hold, use and otherwise deal with any real or personal property or any interest therein situate in or outside Uganda.

The 1<sup>st</sup> respondent in 2001 purchased land comprised in Kibuga Block 12 Plot 167 in Kisenyi-Kampala and a modern animal feeds factory was installed. They also purchased another piece of land comprised in Busiro Block 204-209 Plot 399 land at Kikubampanga, Kakiri where another modern animal feeds factory was built and installed with machinery.

The petitioners contend that the 1<sup>st</sup> respondent was operating smoothly until 2010 when the former Chairman-Ssebina Benon passed on and Kaaya Muhammad the 2<sup>nd</sup> respondent in disregard and violation of the company's articles installed himself as Chairman.

That since 2010, the 2<sup>nd</sup> respondent usurped all the powers of the 1<sup>st</sup> respondent and abrogated the Memorandum and articles of the company; engaged in acts that are oppressive and prejudicial to the interests of other members particularly the surviving members to wit:

- 1) Usurping the chairmanship of the 1<sup>st</sup> respondent and excluding the petitioners;
- 2) Appointing his family-his wife to take charge of all company matters

- 3) Selling off factory machinery at Kisenyi and Kakiri without the consent of the members and without justifiable cause.
- 4) Denying the petitioners access and information regarding affairs of the company.
- 5) Coverting the 1<sup>st</sup> respondent's property at Kisenyi for personal benefit and collecting rent therefrom.
- 6) Failure to account for proceeds of rent collected from the company property.
- 7) Failure to call general meetings and constituting himself into an executive committee and the company.

The 2<sup>nd</sup> respondent contended that he was lawfully elected chairman in accordance with Article 8 of the Articles and memorandum of Association in a meeting held on 29<sup>th</sup> September 2010.

The 1<sup>st</sup> respondent filed civil suit vide HCCS No. 259 of 2011 against the former chairman Ssebina Benon for mismanagement, sell of machinery, property and causing financial loss. The 2<sup>nd</sup> respondent contended that before he was elected the company was grossly mismanaged.

The 2<sup>nd</sup> respondent contended that Hajjat Nuru Kaaya (now deceased) was his wife and was duly elected in the General meeting of the 1<sup>st</sup> respondent and was unopposed. The rest of the allegations were denied and he further stated that the operations have never stopped.

That the 1<sup>st</sup> respondent was registered by the Non-Governmental Organisation Board to fulfil objectives which among others include formulating poverty eradication schemes for rural communities, developing modern agricultural methods and the 1<sup>st</sup> respondent is fulfilling those objectives.

That in the course of running the company, members felt it pertinent to involve new blood into the management of the company, but there were some challenges as the company was limited by guarantee and engaged in charitable causes.

That the company has previously faced with a number of challenges especially during the period of chairmanship of the late Sebina who depleted most of the company assets and the petitioners and the 1<sup>st</sup> respondent have always worked hand in hand in running the affairs of the company and that the petition is brought in bad faith.

The petitioners have been in charge of the company factory at Kikubampanga which they formerly requested for and the 2<sup>nd</sup> respondent cannot be held liable for its sorry state.

### **Issues**

- 1. Whether the company should be wound up?**
- 2. What are remedies available?**

### **Representation**

The petitioners were represented by *Rubeizi Jacob* and *Muhereza Wilbert* while the 2<sup>nd</sup> respondent was represented by *Ssebuuta Hamza* and the 1<sup>st</sup> respondent was represented by *Barungi Richard*

The petitioners' counsel have made written submissions premised on the allegations they made against the respondent and in their view the company should be wound up on the said grounds i.e whether the affairs of the company are being conducted in a manner unfairly prejudicial to the interests of the petitioners.

The respondents' counsel have equally responded to the said submissions and relied on their evidence that the allegations are not true and the company is operating smoothly and there is no justification for the winding up order being sought by the petitioners.

The company has a partnership with African Development Foundation and as such winding up would not only be an injustice to the 1<sup>st</sup> respondent but to the general public as well.

## **Determination**

This court is faced with evidence of the two sides with serious allegations of non compliance with the company's Memorandum and Articles and the other contending total compliance. The court has a duty to establish between the petitioners and the respondents bearing in mind that there are two competing interests and establishing who is telling the truth or whether the petitioners have discharged the burden.

The burden of proof is at all times on the party who alleges a claim on balance of probabilities as per **Sections 101, 102, 103 and 104 of the Evidence Act cap 6**. The petitioners' have made allegations under oath in an affidavit and the same have been responded to by the respondent and this casts a strong doubt on the claim on a reasonable hypothesis of the facts. The petitioners did not discharge their burden of proving any of the facts in the petition. As noted by the persuasive reasoning of **Hon Justice Stephen Mubiru** in **Olanya James v Ociti Tom & 3 others Civil Appeal No.0064 of 2017** who stated that,

***"The question as to whether the plaintiff has discharged the burden of proof on a balance of probabilities depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of evidence of the witnesses and, secondly an ascertainment of which of the two versions is more probable. The enquiry is two fold; there has to be a finding on the credibility of the witnesses and there has to be balancing of the probabilities. Application of Judicial experience requires the court to reject factual allegations if the hypothesis put forward to account for the proved facts is in itself extremely improbable. The Court may reject any hypothesis in absence of evidence supporting it. When the law requires proof of any fact, the Court must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of mere mechanical comparisons of probabilities independent of any belief in its reality...."***

***It's the law of evidence that the party who bears the burden must produce evidence to satisfy it, or his or her case is lost. The probabilities must be high***

***enough to warrant a definite inference that the allegation are true. In a civil suit, when the evidence establishes conflicting versions of equal degrees of probability, where the probabilities are equal so that the choice between them is mere matter of conjecture, the burden of proof is not discharged... The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the trier of fact may reasonably be satisfied... The law does not authorize Court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or others.” (P.6,7).***

The court would not take such evidence or engage in guesswork to prove a case for winding up of the 1<sup>st</sup> respondent and yet it may have far reaching consequences not only to the respondents but to third parties who are benefitting under the nature of work conducted by the 1<sup>st</sup> respondent of poverty reduction as a charitable organisation.

The 1<sup>st</sup> respondent is a Non-governmental Organisation registered on 4<sup>th</sup> day of February 2000. It was upon that certificate of registration that they later incorporated a company limited by guarantee. It is basically doing work for the benefit of the public and not a profit making organisation. It has continued operations even though some of the founding members have died. The nature of the company limited by guarantee or Non-Governmental Organisation envisages continuity even in absence of the founding members.

At least the company has continued in its operations under the main object of its formation of reduction of poverty; The organisation shall carry out activities in the fields of training agricultural technology and poverty reduction. The company is still on its core course and the petitioners have not stated otherwise. Rather their complaint is simply being side-lined or left out of the management of the organisation. It appears the complaints are personal and do not go to the root of the organisation performance or execution of its duties.

I have found that most of the allegations made by the petitioners are baseless and devoid of merit. For example they claim that the 2<sup>nd</sup> respondent installed himself as the chairman but the minutes show that they took part in his election to that

position. The allegations of appointing a wife (now deceased) as treasurer have been rebutted and there are documents showing the petitioners working hand in hand with the treasurer. There are equally allegations of the petitioners mismanaging the project at Kikubampanga.

The petitioners' personal issues should not be used to 'kill' the organisation since this is not for Profit Company and serves the wider public and not personal interests. The authorities cited in the submissions of counsel are distinguishable from the present case since they refer to a company limited by shares and this is a company limited by guarantee-Non-governmental organisation.

The petitioners have brought this petition with a view that they should have a share in the assets of the company after a winding up process. I find this very absurd, for a simple reason this is a company limited by guarantee and Non-governmental Organisation and the members cannot try to share into the property or assets of the company. They only wish to have something out of the company contrary to the spirit and main object of the organisation.

It is also clear that the company had a checkered history in its operations especially in the management of its affairs since inception when the petitioners and 2<sup>nd</sup> respondent challenged the former chairman-Ssebina and later replaced him with the 2<sup>nd</sup> respondent. These facts were not disputed by the petitioners and it may appear it is an extended fight and acrimony between the remaining founding members of the 1<sup>st</sup> respondent.

However, this matter should have been better resolved through a complaint to the registrar which is mandated to carry out investigations in the management of the company. The intrusion into the affairs of a corporate entity should be regarded a sign of collapse of its governance structure. When such intrusion takes place it should be well directed, effective and should have deterrent effect.

It appears that the company has had management issues since inception and the same should be investigated by carrying out a systematic or formal inquiry to discover and examine facts to establish the truth.

Under the Companies Act, an investigation refers to an exploration into the affairs of a company. The aim of such investigation is to obtain any evidence or facts regarding any malpractice in the course of business. This investigation can be of tremendous importance to shareholders/members wishing to bring an action involving mismanagement.

This investigation is fact finding and guides future operations of the company after the whole exercise. As pointed out by the European Court of Human Rights case of ***Fayed v United Kingdom (1994) 18 EHHR 393 ECtHR*** that the fundamental justification for investigation procedure is that the investigation is carried out in the public interest to ensure the proper conduct of affairs of the public companies.

It must be emphasized that an investigation is an extra-ordinary remedy which is, generally speaking, applicable only in limited circumstances. Before the court orders an investigation, the intended investigation must be shown to be prima facie in the interest of the company or the members. Merely to show a difference of opinion as to how the affairs of the company are to be managed is not enough; it is only where there is evidence of serious mismanagement or bad faith that an investigation may be ordered. See ***Re Baker and Paddock Inn Peterborough Ltd [1977] 2 BLR 101 Ont HC; Re Sabex Internationale Ltee [1979] 65 Que SC***

The Companies Act does not specify the standard of proof which the person must satisfy to obtain an order for investigation. However; in ***Re First Investors Corporation [1988] 4 WWR 22***, it was stated that an applicant for an order is not required to prove beyond reasonable doubt or on a balance of probabilities the conduct complained of. The only proof which is necessary is that there are 'sufficient grounds' to warrant an investigation.

In the circumstances of this case, the management of the 1<sup>st</sup> respondent should be conclusively investigated in the interest of the public with clear recommendations for the better management for the 1<sup>st</sup> respondent.

The petition is dismissed with no order as to costs.

The Official Receiver is directed to investigate the operations and management of the 1<sup>st</sup> respondent from its incorporation 2001 to 2020 within a period of 3 months and report back to court with clear recommendations.

It is so ordered.

***Dated, signed and delivered be email and whatsApp at Kampala this 29<sup>th</sup> day of May 2020***

**SSEKAANA MUSA  
JUDGE**