**THE REPUBLIC OF UGANDA**
**IN THE HIGH COURT OF UGANDA AT KAMPALA**
**CIVIL DIVISION**
**CIVIL SUIT No. 202 of 2016**

**MARY MATOVU**
**AS SOLE SURVIVING ADMINSITRATOR**
**OF THE ESTATE OF THE LATE MATHIAS**
**BAZITYA MATOVU ---------- PLAINTIFF**

**VERSUS**

**CENTURY BOTTLING COMPANY LIMITED ---------- DEFENDANT**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

## RULING

The defendant was incorporated on the 26th September 1979 with a nominal share capital of Ug Shs 3,000,000/= divided into 3,000 ordinary shares of Ug Shs 1000 each. The subscribers to the Memorandum of Association were Mohammed Magid Bagalaaliwo, Sarah Mukwaya Bagalaaliwo and Lilian Kyomubi each of whom subscribed to one (1) share.

In February 1981 a further 2,987 shares beyong the 3 subscriber shares were allotted in the defendant as follows;

(i) Mohammed Magid Bagalaaliwo-2,099 shares;
(ii) Sarah Mukwaya Bagalaaliwo-399 shares;
(iii) Lilian M. Kyomubi- 99 shares
(iv) Mathias Bazitya Matovu(now deceased)-300 shares

Making the plaintiff the shareholder of 10.34% of the 2900 issued shares in the defendant. 100 shares of the defendant's capital remained un-alloted at that time.

On the 8th February 1984, by a resolution of the defendant, there was an increase of the share capital of the defendant from Ug Shs 3,000,000/= to 100,000,000/= by issuance of 97,000 shares of Ug shs. 1,000/= and that resolution stated that the directors;

> "***be and are hereby authorised to allot 75,000 ordinary shares of the increased capital to the shareholders of the company on the register of members as at 31st December 1983***"

In total disregard of the terms of the allotting resolution no shares at all on this capital increment were allotted to the plaintiff by the defendant and all 97,000 shares plus the 100 previously un-alloted were allotted by the defendant to members of the Bagalaaliwo family as follows;

(i) Mohammed Bagalaaliwo - 75,750 shares;
(ii) Sarah Bagalaaliwo - 12,650 shares;
(iii) Mr. Mohamad B. Balozi- 1,500 shares;
(iv) Ms. Neama Sheba- 1,200 shares;
(v) Ms. Faridah M. Nabalozi- 1,200 shares;
(vi) Ms. Summayha Nakakawa-1,200 shares;
(vii) Ms. Adilan Nalulyo- 1,200 shares;
(viii) Ms. Sharifa Babirye - 1,200 shares; and
(ix) Ms. Naseeb Nakato- 1,200 shares.

The defendant company made further increase of shares in 1991,1993 and the plaintiff was never considered or allotted any shares until when the company was sold on 23rd September 1995 to Coca Cola Export Corporation.

The plaintiff filed this suit by way of a plaint seeking the following orders;

a. Rectification of the defendant's members' register to have the plaintiff registered as a lawful holder of all such shares as the Estate would

have been entitled to under "the three (3) allotting resolutions" the terms of which the defendant disregarded.

b. Rectification of the defendant's members register to have the plaintiff registered as the lawful holder of all such shares as the Estate would have been entitled to under " the ten (10) share transfers" effected by the defendant in disregard of the plaintiff's pre-emption rights enshrined in Articles 11 to 15 of the Defendant's Articles of Association.

c. In the alternative to (a) and (b) above an account be taken by way of an auditor being appointed by the court to assess the loss occasioned to the Estate by reason of;

    (i) The Estate's having been denied the benefit of the shareholding that would have accrued to it had the Estate been allotted the shares to which it was entitled under "the three(3) allotting resolutions" the terms of which the defendant disregarded;
    (ii) The Estate having been denied the benefit of the shareholding that would have accrued to it had the Estate been permitted to exercise its pre-emption rights under "the ten(10) share transfers" registered in contravention of those rights;

The assessment to include but not limited to a determination of the capital appreciation in the share value of those shares from the time of the plaintiff's entitlements to the various allotments and share transfers to the present day, an assessment of all dividends and other earnings that have accrued on those shares from the time of the plaintiff's

entitlements to the various allotments and share transfers to the present day and an assessment of future capital appreciation and dividends on those shares;

d. Special and general damages for the breach of the Estate's rights;
e. Interest and Costs.

The defendant in its defence stated that the plaintiff was gifted and allotted 300 shares in the defendant company. Article 4 of the Articles of Association provides that the shares in the defendant shall be under the control of the directors who may allot or otherwise dispose of them to such persons and on such terms and conditions as they think fit.

The increased or new ordinary shares were to be allotted to the shareholders of the company on the register of members as at 31st December 1983 for payment in full at par. Mathias B. Matovu did not make any payment in respect of this allotment. The said resolution did not provide the proportions of allotment to any particular shareholder. The effect of non-payment for the shares was acquiescence/forfeiture. The new shares together with the 100 previously unalloted shares were then allotted to Mohammed Majid Bagalaaliwo and Sarah Bagalaaliwo who made payments for them.

Sometime in or about May 1984, a further allotment of 22,100 ordinary shares was made to Majid Bagalaaliwo, Sarah Bagalaaliwo and several of their children namely Mohamed B. Balozi, Naema Sheba, Faridah Nabalozi, Summayha Nakakawa, Adilan Nalulyo, Sharifa Babirye and Naseeb Nakato.

The defendant in its defence contended that the suit is speculative at best and inequitable at worst and ought to be dismissed for lack of merit.

Further the defendant shall object to the suit on the basis of the dispute resolution method contained in the Articles of Association of the defendant.

When the suit came up for scheduling, the defendant's counsel raised a preliminary objection whose effect according to counsel would deprive this court of jurisdiction.

***Whether this matter should be entertained in court?***

The advocates were directed to file written submissions which I have had the occasion of reading and consider in the determination of this preliminary point of law.

The plaintiff was represented by *Mr. Lugayizi Timothy* whereas the respondent was represented by *Mr. Kalibbala W. Ernest*.

***Whether this matter should be entertained in court.***

The defendant's counsel submitted that Paragraphs 3 and 4 of the Plaint, reveal that the complaints of the Plaintiff relate to or arise from acts or omissions relating to shareholding, including allotments, transfers, notice of meetings, etc, all, it is pleaded, in contravention of either the Articles of Association or the Companies Act. The remedies sought are rectification, or in the alternative an account, damages, interest and costs. The suit is filed by a member against the Company.

Article 59 of the Articles of Association provides as follows:-

> *If and whenever any difference shall arise between the Company and any of the members or their respective representatives touching the construction of any of the articles herein contained or any act or thing made or done or to be made or done or omitted or in regard to the rights and liabilities arising hereunder, or arising out of the relation existing between the parties by reason of these presents or of the Act such difference*

> *shall forthwith be referred to two arbitrators one to be appointed by each party in difference, or to an umpire to be chosen by the arbitrators before entering in the consideration of the matters referred to them, and every such reference shall be conducted in accordance with the provisions of the laws of arbitration for the time being in force in Uganda.*

According to defendant's counsel Article 59 reproduced above selected arbitration as the dispute resolution mechanism whenever any differences touching a wide array of matters arose between the Defendant company and its members or their representatives. As a result, filing a suit to claim what should be referred to arbitration is to act contrary to the clear expressed position preferring arbitration. This is therefore the gist of the objection.

The defendant's counsel further submitted that a member of a company is a person who is bound by the Memorandum and Articles of Association of a company. The Defendant company was incorporated under the repealed Companies Act (originally Cap 85 and later revised to Cap 110 of the Laws of Uganda). The repealed Act defined a member under Section 27 as a subscriber to the memorandum of the company and every other person who agrees to become a member of the company, and whose name is entered in the register of members.

In addition, Section 21 of the same said repealed Companies Act provided that the memorandum and articles would, when registered, bind the company and members of the company to the same extent as if they respectively had signed and sealed the same as it contains, covenants on the part of each member to be bound by all the provisions of the memorandum and of the articles. This provision is retained in the new Companies Act of 2012 as Section 21. It was their submission that the question of membership is not in doubt.

The existing legislation on arbitration in Uganda is the Arbitration and Conciliation Act Cap 4 ("ACA"). Under Section 5 thereof, it is provided that:-

> *5(1) A judge or magistrate before whom proceedings are being brought in a matter which is subject of an arbitration agreement shall, if a party so applies after filing a statement of defence and both parties having been given a hearing, refer the matter back to arbitration unless he or she finds;*
>
> *(a) that the arbitration agreement is null and void inoperative or incapable of being performed; or*
>
> *(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.*

This provision effectively means that arbitration agreements will be respected and upheld by a court of law, save in the circumstances stated in paragraphs (a) and (b).

In addition, Section 9 of the ACA provides that "*except as provided in this Act, no Court shall intervene in matters governed by this Act*"

Objections seeking to uphold arbitration have been the subject of judicial consideration in Uganda and elsewhere. In **British American Tobacco Uganda Limited v Lira Tobacco Stores HCMA No. 924 of 2013**, it was held that that the court should not disregard the express provisions of section 5 of the Arbitration and Conciliation Act by permitting a party to proceed with the trial of an action contrary to the statutory provision for reference.

Judicial authority has also set the principle that when the dispute is referred to arbitration, the pending suit lapses. (See **Daniel Delestre and others v Hits Telecom (U) Ltd HCMA 310 of 2013**) ;**Fuglencius Munghereza v Price Waterhouse Coopers Africa Central SCCA No. 18 of 2002.**

The plaintiff's counsel submitted that the application being made is contrary to Section 5 of the Arbitration Act which provides that an application for stay of proceedings under section 5 shall be by motion. He submitted that the defendant cannot lawfully bring this application orally as he alleges since it will deny the plaintiff a right to be heard.

The plaintiff's counsel further submitted that the defendant has taken steps in this suit and is therefore precluded as a matter of law, from bringing this application. The parties had filed a joint scheduling memorandum and they had appeared before the court on several occasions. According to the plaintiff's counsel all this amounted to waiver by the defendant to the arbitration clause.

The plaintiff relied on the case of ***Lofty vs Bedouin Enterprises Ltd [2005] 2 EA 122***, it was held that;

> "*Even if the conditions set out in paragraphs (a) and (b) of section 6 are satisfied the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration, if the application to do so is not made at the time of entering an appearance or if no appearance is entered, at the time of filing any pleadings or at the time of taking any step in the proceedings*" See also ***Turner & Goudy (a firm) v Mc Connell and another [1985] 2 All ER 34***

The plaintiff's counsel further contended that stay of the suit for arbitration is incapable of being performed/ falls outside the purview of the Arbitration clause as an Arbitrator cannot grant the remedy sought being rectification of the register which can only be done by a court pursuant to Section 125 of the Companies Act.

*Determination*

The plaintiff does not seem to dispute the fact that there is an arbitration clause which the defendant contends that should be used to resolve the conflict or dispute. But rather has raised several grounds upon which the said clause or the arbitration exercise should not be triggered.

The plaintiff has contended that there is no formal application made in accordance with Arbitration Act. And or Arbitration rules and specifically rule 9.

The defendant's raised their point of law by way of their pleadings specifically paragraph 8; ***Further the defendant shall object to the suit on the basis of the dispute resolution method contained in the Articles of Association of the defendant.***

It is clear the defendant raised a point of law by way of pleadings and the plaintiff was put on sufficient notice, and in the plaintiff's reply to defence they did not respond to the same.

Order 6 rule 28 provides;

***Any party shall be entitled to raise by his or her pleading any point of law and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing.***

This point of law was set down for determination by court by consent of both parties. The plaintiff having agreed to have the point of law determined before the hearing, he could not be seen to raise any objection for want of form for a formal application by notice of motion. If he felt that

it would not be properly be heard, then he should have raised an objection at that stage.

The Arbitration and Conciliation Act enjoins the court to entertain an application to refer the matter back to arbitration. Section 5(1) provides;

> *A judge or magistrate before whom proceedings are being brought in a matter which is subject of an arbitration agreement shall, if a party so applies after filing a statement of defence and both parties having been given a hearing, refer the matter back to arbitration unless he or she finds;*

There was no need for a factual response in this matter, since it is a point of law based on the document upon which the whole suit is hinged. I agree with the decision in **British American Tobacco Uganda Limited v Lira Tobacco Stores HCMA No. 924 of 2013:** to the effect that the court should not disregard the express provisions of section 5 of the Arbitration and Conciliation Act by permitting a party to proceed with the trial of an action contrary to the statutory provision for reference.

Secondly, the plaintiff had raised another objection to the point of law raised by the defendant that the defendant has taken steps in this suit and is therefore precluded, as matter of law, from bringing this application.

A step or misstep in court is a question of fact which has to be determined based on the peculiar circumstances of each case before the court.

In the case of ***Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd [2008] 4 SLR (R) 460*** at [55] the Court of Appeal of Singapore held that;

"[A]'step' is deemed to have been taken if the applicant employs court procedures to enable them defeat or defend proceedings on their merits and /or the applicant proceeds……beyond a mere acknowledgment of

service of process by evincing an unequivocal intention to participate in the court proceedings in preference to arbitration…."

It can be deduced from the above decision that the general principle is based on a party's unequivocal intention to submit to the court's jurisdiction rather than seek recourse by way of arbitration. In other words, a party takes a step in favour of litigation if he has made an unequivocal election to do so instead of arbitration. See ***Amoe Pte Ltd v Otto Marine Ltd [2014] 1 SLR 724.***

A party may waive or elect to choose between litigation and arbitration. There cannot be a meaningful waiver, election or affirmation, unless there is full awareness of all relevant facts to the competing options of litigation and arbitration. In the case of ***Eagle Star Insurance Co. Ltd v Yuval Insurance Co. Ltd [1978] 1 Lloyd's Rep 357 at 361***, *Lord Denning ML* held:

***"What then is a step in the proceedings?.....On principle it is a step by which the defendant evinces an election to abide by the Court proceedings and waives his right to ask for arbitration. Like any election it must be an unequivocal done with knowledge of the material circumstances…."***

The defendant clearly in her pleadings did not waive the right to arbitrate and categorically stated in paragraph 8 that it will *object to the suit on the basis of the dispute resolution method contained in the Articles of Association of the defendant.*

The step principle intends to maintain the exclusivity of arbitration as a process for dispute resolution and discourages the conduct of court proceedings in parallel to arbitration proceedings. The step principle discourages a party from using a step in litigation to circumvent the arbitration process.

Conversely, a defendant who simply using litigation process to find out more about the claim in court, so as to enable it to make a meaningful election between litigation or arbitration, is not taken to have waived its right to arbitration. Such steps do not advance the merits of the defendant's defence in court, and are very unlikely to have any impact on the arbitration.

The defendant had not taken any essential steps that would amount to waiver or election to have the dispute litigated as opposed to being arbitrated. The steps taken in court where intended to have more clarity as to the nature of the dispute between the parties and determine whether it can be arbitrated in accordance with the Articles of Association.

The plaintiff made the last objection to reference of the matter to arbitration premised on the presumption that the arbitrator has no power to rectify the members register.

The main and primary consideration in establishing arbitration proceedings is that must contain three fundamentals;

- A dispute between the parties must exist.
- There must be a mutual agreement to settle the dispute by arbitration.
- The parties must have agreed to abide by the decision of arbitrator(s).

Arbitration forms competence to adjudicate a dispute between parties comes from contract that they have agreed-(Articles of Association). Therefore, arbitration is a contractual dispute settlement forum.

The parties are bound and it is not stated anywhere, that the decision of the arbitrator shall not be complied with by the Registrar of companies. The decision of an arbitrator is as good as a decision of court and the same can be enforced entirely.

In addition the plaintiff is seeking an account to assess the loss occasioned to the Estate and this can clearly be determined through arbitration.

This matter is therefore referred to arbitration in accordance with the Articles of Association. The matter pending before court therefore lapses. See ***Daniel Delestre and others v Hits Telecom (U) Ltd HCMA 310 of 2013***)

I make no order as to costs.

I so Order.

***Dated, signed and delivered be email at Kampala this 23rd day of April 2020***

**SSEKAANA MUSA**
**JUDGE**