

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI**  
**CIVIL SUIT NO.55 OF 2017**

**1. KAFU SUGAR LIMITED**

**2. JASWANT SINGH RAI ::: PLAINTIFFS**

**VERSUS**

**1. THE ATTORNEY GENERAL OF UGANDA**  
**2. UGANDA LAND COMMISSION**  
**3. KIRYANDONGO DISTRICT LAND BOARD**  
**4. KIRYANDONGO SUGAR LIMITED**  
**5. COMMISSIONER LAND REGISTRATION**  
**6. SARBJIT SINGH RAI**

**:::::::::::::::::::: DEFENDANTS**

**Before: Hon. Justice Byaruhanga Jesse Rugyema**

**JUDGMENT**

- [1] In this suit, the plaintiffs sued the defendants jointly and severally, inter alia, for the following:
- a) A declaration that the allocation of the land comprised in LRV 4591, Folio, Ranch No.23,28,29 and 30, Bunyoro Ranching Scheme, Kiryandongo District (the “suit land”) by the 2<sup>nd</sup> Defendant to the 4<sup>th</sup> Defendant was unlawful, wrongful and violated the legitimate expectations of the plaintiffs.
  - b) A declaration that the actions of the Minister for Lands, Housing and Urban Development without regard to the interest of the plaintiffs was unlawful and or wrongful to the plaintiffs.
  - c) A declaration that the actions of the Chief Government valuer were wrongful and/or unlawful.
  - d) A declaration that the 2<sup>nd</sup> defendant acted unlawfully when it purported to regularize and validate the allocation of the suit land to the 4<sup>th</sup> defendant by the 3<sup>rd</sup> defendant, well knowing that the 3<sup>rd</sup> defendant is not the Controlling authority of the suit land.

- e) A declaration that the allocation of the suit land to the 4<sup>th</sup> defendant for purposes of growing sugar cane contravenes the Government policy on sugar cane plantation.
- f) A declaration that the 6<sup>th</sup> defendant is in breach of his fiduciary duties to the plaintiffs as a Director and shareholder of the 1<sup>st</sup> plaintiff.
- g) Orders for reinstatement of all records pertaining to the 1<sup>st</sup> plaintiff's certificate of Approval for investment in the sugar sector at the Ministry of Trade, Industry and Co-operatives.
- h) Cancellation of the certificate of title issued to the 4<sup>th</sup> defendant by the 5<sup>th</sup> defendant in respect of the suit land.

[2] It is the plaintiffs' case that sometime in 2010, the 1<sup>st</sup> plaintiff applied to the 2<sup>nd</sup> defendant for the grant of a lease over the suit land situate in Kiryandongo District. The 2<sup>nd</sup> defendant duly considered the 1<sup>st</sup> plaintiff's said application and allocated the suit land to the 1<sup>st</sup> plaintiff company pending clearance of the issues raised by the District leadership and obtaining to a NEMA Certificate.

[3] The 1<sup>st</sup> plaintiff was never issued with a Certificate of title to the suit land and as a result, in January 2017 the initial five (5) year term of the lease offer granted by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> plaintiff expired. On 7/3/2017, the 1<sup>st</sup> plaintiff wrote to the Secretary of the 2<sup>nd</sup> defendant requesting an extension of the lease offer but there was no response from the 2<sup>nd</sup> defendant regarding its application, and all its efforts to physically check on the progress of the matter with the 2<sup>nd</sup> defendant yielded naught.

[4] The 2<sup>nd</sup> defendant instead considered an application by the 4<sup>th</sup> defendant in respect of the suit land and granted the same without regard to the 1<sup>st</sup> plaintiff's interest.

[5] The plaintiffs contended that the Minister of Lands, Housing and Urban Development acted improperly and irregularly when she purported to favour the 4<sup>th</sup> defendant's application for the suit land over that of the 1<sup>st</sup> plaintiff on the grounds that in a period of seven (7) years, the first plaintiff had not obtained approvals from the National Environment Management Authority (NEMA) and the Kiryandongo District Administration.

- [6] The plaintiffs contended and averred further that the suit land is only 23 Km from Masindi Port where the 1<sup>st</sup> plaintiff has expansive sugar cane plantation under license from the Ministry of Trade, Industry and Cooperatives. That it would therefore offend the **National Sugar Policy 2010** for the 4<sup>th</sup> defendant to set up a sugar cane plantation within the said radius. 2ndly, that the defendants despite having all the relevant documents relating to the 1<sup>st</sup> plaintiff and the 4<sup>th</sup> defendant before them wilfully ignored the fact that the 6<sup>th</sup> defendant is both a shareholder/Director in both the 4<sup>th</sup> defendant and the 1<sup>st</sup> plaintiff companies and therefore, that the 6<sup>th</sup> defendant breached his fiduciary duties to the 1<sup>st</sup> plaintiff when he subsequently incorporated and promoted the business of a company which has competing interests with those of the 1<sup>st</sup> plaintiff.
- [7] Lastly, that the consideration and grant of the 4<sup>th</sup> defendant's application for the suit land was riddled with fraud, illegalities and massive irregularities on the part of the defendants which were accordingly particularized.
- [8] In their Written Statement of Defence, the defendants denied all the plaintiffs' allegations.
- [9] The 1<sup>st</sup> , 2<sup>nd</sup> , 3<sup>rd</sup> , and 5<sup>th</sup> defendants contend that a lease offer upon fulfilment of the terms and conditions was to be made to the 1<sup>st</sup> plaintiff for an initial period of 5 years extendable to 49 years pending clearance of the issues raised by the District leadership, NEMA and fulfilment of the terms and conditions. That as a result, no formal offer was made to the 1<sup>st</sup> plaintiff due to its failure to meet the terms and conditions for the offer of land whose 5 years lapsed on 5<sup>th</sup>/1/2017.
- [10] On the contrary, that the 4<sup>th</sup> defendant was approved by the 2<sup>nd</sup> defendant and granted a lease offer for the initial five years extendable to 49 years after the date of the grant and contended further that this was without any fraud or illegality on the part of the defendants.
- [11] For the 4<sup>th</sup> and 6<sup>th</sup> defendants, they contended that the 2<sup>nd</sup> plaintiff and the 6<sup>th</sup> defendant are brothers who were since 1998 jointly engaged in various manufacturing business under the tutelage of their late father a one **Tarlochan Singh Rai** until the demise of their father or thereafter

in 2011 that conflicts emerged between them and in 2012, separated and each of them pursued his own business interests.

- [12] That on 4/9/2015, the 2<sup>nd</sup> plaintiff and the 6<sup>th</sup> defendant reached a settlement that documented the existing separation of their businesses and that therefore as a result, the 6<sup>th</sup> defendant ceased to play a role in the affairs of the 1<sup>st</sup> plaintiff from the time of separation and he in the premises neither owed nor breached any duty to the plaintiffs.

### **Counsel legal representation**

- [13] The plaintiffs were jointly represented by **Mr. A.F. Mpanga of M/s A.F Mpanga Advocates, Kampala** and **Mr. Baluti of M/s Baluti & Ssozi Advocates, Kampala** while the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> & 5<sup>th</sup> defendants were represented by **Mr. Usaam Sebuufu of M/s K & K Advocates, Kampala** and the 4<sup>th</sup> and 6<sup>th</sup> defendants were represented by State Attorney **Charity Nabaasa of the Attorney General's chambers, Kampala**. All the counsel filed their respective final submissions for consideration of court in the determination of this suit as permitted and directed by court.

### **Issues for determination**

- [14] During joint scheduling by the parties, 8 agreed upon issues were framed for determination. However, upon perusal of the issues framed by counsel during scheduling, I find that some of the agreed issues are intertwined with each other and were therefore duplicated. I have opted to rephrase them as follows;
1. Whether or not the 6<sup>th</sup> defendant owed any fiduciary duty to the plaintiffs and if so, whether the 6<sup>th</sup> defendant breached the duty.
  2. Whether the 1<sup>st</sup> plaintiff has any interest in the suit land.
  3. Whether the allocation of a lease hold over the suit land and issuing of the Certificate of title thereof by the 2<sup>nd</sup> defendant and the 5<sup>th</sup> defendant to the 4<sup>th</sup> defendant was irregular, and or unlawful.
  4. Whether the actions and omissions of the defendants jointly and/or severally were fraudulent and/or unlawful.
  5. What remedies are available to the parties.

### **Burden and standard of proof**

[15] **S.101(1) of the Evidence Act** provides as follows;

*“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.”*

**S.103 of the Evidence Act** provides further that;

*“The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.”*

In the case of **Nsubuga Vs Kavuma [1978] HCB 307** it was held that;

*“In civil cases the burden lies on the plaintiff to prove his or her case on the balance of probabilities.”*

[16] From the foregoing above, it is clear that the entire burden of proof is on the plaintiff who asserts, and must prove his/her case on the balance of probabilities. The plaintiffs in this case have therefore the burden to prove that they had interest in the suit land, that the 4<sup>th</sup> defendant acquired the suit illegally and or fraudulently and that the 6<sup>th</sup> defendant had and breached his fiduciary duty to the 1<sup>st</sup> plaintiff.

### **Resolution of issues**

**Issue No.1: Whether the 6<sup>th</sup> defendant owed a fiduciary duty to the plaintiffs and if so, whether the 6<sup>th</sup> defendant breached the duty.**

[17] Counsel for the plaintiffs while relying on **S.198 of the Companies Act 2012** and **Bhulla & Ors Vs Bhulla & Anor [2003] EWCA Civ 424 at para 41**, submitted that it is trite law that directors owe fiduciary duties to a company where they carry out business namely as directors of the company. That in that capacity, they are in a fiduciary relationship with the company.

[18] That in the instant case, at all material times, the 6<sup>th</sup> defendant was a shareholder and director in the 1<sup>st</sup> plaintiff and **Sarbjit Singh** (6<sup>th</sup> defendant/DW1) during cross examination admitted that up to 2015, he was still a shareholder and director in the 1<sup>st</sup> plaintiff company.

[19] Also, that the 6<sup>th</sup> defendant owed contractual duties to his co-shareholder, the 2<sup>nd</sup> plaintiff under the 1<sup>st</sup> plaintiff's Memorandum and

Articles of Association (**P.Exh.2**). He was therefore mandated to act in good faith in the interests of the plaintiff by avoiding and/or declaring conflicts of interest and avoiding personal profits at the 1<sup>st</sup> plaintiff's expense. He was required to promote the success of the 1<sup>st</sup> plaintiff's business and to exercise a degree of skill and care as "a reasonable person would do looking after their own business."

[20] On the other hand, counsel for the 4<sup>th</sup> and 6<sup>th</sup> defendants submitted first, that the position of the law is that no fiduciary duties can be owed to an individual shareholder in the company. The fiduciary duty is owed to the company where the director manages the affairs of the company; **Multinational Gas and petro chemical Co. Ltd Vs Multinational Gas and petro chemical Services Ltd [1983] Ch. 258.**

[21] Counsel argued that in the instant case, the 6<sup>th</sup> defendant did not owe any fiduciary duties to either the 2<sup>nd</sup> plaintiff or the 1<sup>st</sup> plaintiff. That **Sarbit Singh** (DW1) ceased to have any role in the 1<sup>st</sup> plaintiff's company's affairs from 2011 when a rife developed with the 2<sup>nd</sup> plaintiff that led to a separation of their business affairs. That the Settlement Agreement of 4/9/2015 (**D.EXH.1**) and later Swap Settlement Agreement of 15/12/2017 (**D.Exh.8**) were for formalising the separation that had occurred in 2011. In both Agreements **D.Exh.1 & D.Exh.8**, the plaintiff company was appropriated and wholly taken up by the 2<sup>nd</sup> plaintiff with a 100% stake as agreed prior to the execution of both documents.

[22] Counsel concluded therefore, that no fiduciary duties were owed to the 1<sup>st</sup> plaintiff company by the 6<sup>th</sup> defendant in the circumstances, that the 6<sup>th</sup> defendant was a director in name only but had in fact resigned and left the 1<sup>st</sup> plaintiff company at all material times from August 2011.

### **Fiduciary Duty of a Director**

[23] As Lord Upjohn observed in **Phipps Vs Boardman [1966] All ER 721, [1967] 2 AC 46, 107;**

*"the facts and circumstances of each case must be carefully examined to see whether a fiduciary relationship exist by its relation to the matter of which complaint is made."*

[24] The Director fiduciary relationship with a company is provided for in **S.198 of the Companies Act 2012** which provides that the duties of

directors include, inter alia; acting in a manner that promotes the success of the business of the company; exercising a degree of skill and care as a reasonable person would do looking after their own business; acting in good faith in the interests of the company as a whole, and this includes avoiding conflict of interest; declaring any conflicts of interest and not making personal profits at the company's expense.

## Case Law

[25] In the Singaporean Case of **Innovative Corporation Pte Ltd Vs Ow Chun Mining & Anor**, H.C.Suit No.410/2016 [2019] SGHC 121 on the scope of directors' fiduciary duties, court pointed out as follows:

*"A fiduciary is "someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence"...*

*This relationship generates a legitimate expectation that a fiduciary will not utilize his or her position in a manner that is adverse to the interests of the principal. Directors fall within the settled categories of fiduciary relationships and there is a strong rebuttable presumption that they consequently owe fiduciary duties to their companies...However, ultimately, whether such duties exist and **their extent turns on the nature and scope of the parties' relationship as shown by the facts of the case.**" [Emphasis]*

In **Multinational Gas and Petro chemical Co.** (supra) Dillon L.J observed thus;

*"The directors...stand in fiduciary relationship to the company, as they are appointed to manage the affairs of the company and they owe fiduciary duties to the company though not to the creditors, present or future or to individual shareholders. The duties owed by a director include a duty of care, as was recognized by Romer J in **In re city Equitable Fire Insurance Co. Ltd [1925] Ch.407, 426-429**, through as he pointed out, the nature of the existent of the duty may depend on the nature of the business of the company and on the particular knowledge and experience of the individual directors."*

In **Canada Aero Services Vs O'Malley [1973] 40 DLR (3d) 371 (CanSC)**, 282 Laskin J observed on a fiduciary duty of a director as follows;

*"An examination of the case law in this court and in the courts*

*of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law...this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business **opportunity** which his company is **actively pursuing**; he is also precluded from so acting **even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.**" **emphasis.***

- [26] In **Phipps Vs Boardman (supra)**, Lord Upjohn also observed thus; *"the fundamental rule of equity [is] that a person in fiduciary capacity must not make a profit of his trust, which is part of the wider rules that a trustee must not place himself in a position where his duty and his interest may conflict."*
- [27] The above authorities simply point to the proposition that a director must not be allowed to use his position as such to appropriate to himself a business opportunity which in fairness should belong to the corporation or obtain for himself a benefit derived from his employment by the company.
- [28] In the instant case, it is the case for the plaintiffs that at all material times, the 6<sup>th</sup> defendant was a shareholder and director in the 1<sup>st</sup> plaintiff company and therefore could not apply for and acquire the suit property of which the 1<sup>st</sup> plaintiff had had a lease offer and had legitimate expectation of leasing.

### **Alleged competing interests in the suit land**

- [29] **Jaswant Singh Rai** (PW1) stated in his witness statement that he and the 6<sup>th</sup> defendant are brothers who incorporated the 1<sup>st</sup> plaintiff company on **28<sup>th</sup> July 2009** and that they were both directors holding equal shares of 50% each (**P.Exhs.1 & 2**).
- [30] That sometime **in 2010**, the 1<sup>st</sup> plaintiff company applied to the Uganda Land Commission (**ULC**) for the grant of a lease of the suit land and the



ULC considered this application and by a **letter dated 5/1/2012**, allocated the suit land to the 1<sup>st</sup> plaintiff company for an initial period of 5 years extendable to 49 years pending clearance of issues raised by the District leadership and obtaining a NEMA Certificate.

- [31] That on **7/3/2017**, the first plaintiff through **Baluti & Ssozi Advocates** wrote to the **ULC** requesting for extension of the lease and submitted **Form 7** (Application for leasehold) on the same day but the 1<sup>st</sup> plaintiff company received no response from the **ULC** in respect of its application.
- [32] That surprisingly, **ULC** instead considered an application by the 4<sup>th</sup> defendant company for a lease on the suit land and granted the same in disregard of the application and the unregistered interest and/or right of the 1<sup>st</sup> plaintiff on the land. The 4<sup>th</sup> defendant was incorporated on 25/1/2012 by the 6<sup>th</sup> defendant with objects similar to these of the 1<sup>st</sup> plaintiff; that is, inter alia, carrying on the business of sugar cane growing, sugar extraction, processing, manufacturing, packaging and sealing.
- [33] That when the 6<sup>th</sup> defendant's company (4<sup>th</sup> defendant) was incorporated, the 6<sup>th</sup> defendant (**DW1**) was a Shareholder and Director in the 1<sup>st</sup> plaintiff company and the 4<sup>th</sup> defendant applied to be granted a lease over the suit land on 5/1/12 before the expiry of the initial 5 year period of the lease allocated to the 1<sup>st</sup> plaintiff company. That the 3<sup>rd</sup> defendant Land Board considered and allocated the suit land to the 4<sup>th</sup> defendant company on 16/12/2016 for an initial period of 5 years extendable to 49 years on fulfillment of the terms of the lease.
- [34] On the other hand, the 6<sup>th</sup> defendant **Sarbjit Singh** (DW1) stated in his witness statement that he had since 1998 engaged in various manufacturing business with his brother, the 2<sup>nd</sup> plaintiff under the tutelage of their late father **Tarlochan Singh Rai** who passed on in 2010. That upon their father's demise, conflicts emerged between them that made the pursuit of existing businesses difficult and the joint investment in new businesses impossible. That in 2011, they separated ways and he ceased to play a role in the 1<sup>st</sup> plaintiff company. That on 4/9/2015, they formalized the already existing separation in a settlement that documented the existing separation of their businesses

**(D.Exh.1)** and that he therefore, ceased to play a role in the affairs of the 1<sup>st</sup> plaintiff from the time of separation in 2011.

[35] Further that on 20/2/2017, the 4<sup>th</sup> defendant applied to the 2<sup>nd</sup> defendant for the grant of a lease over the suit land which was granted on 10/8/2017 for an initial period of 5 years extendable to 49 years on terms and conditions of the lease.

[36] The above evidence as adduced by the 6<sup>th</sup> defendant (**DW1**) was not challenged at all. It also formed the whole of the agreed upon facts in the joint scheduling memorandum (JSM) of the parties. Emphasis of the defendant is on **paras 5.8 & 5.9 of the JSM** which is as follows:

*“5.8: From the year 2012, the 2<sup>nd</sup> plaintiff and the 6<sup>th</sup> Defendant have not made any new investments jointly and have separately pursued their own business interests.*

*5.9: On the 4<sup>th</sup> September, the 2<sup>nd</sup> plaintiff and the 6<sup>th</sup> Defendant reached a formal and written settlement that documented the existing separation of the businesses of the 2<sup>nd</sup> plaintiff and the 6<sup>th</sup> Defendant.”*

[37] The entire of the above i.e, **DW1’s** unchallenged evidence and **paras 5.8 & 5.9 of the J.S.M** and the absence of any evidence to the contrary, has surely to be interpreted in favour of the defendants’ version that the 6<sup>th</sup> defendant ceased to play a role in the affairs of the 1<sup>st</sup> plaintiff from the time of separation in 2011/2012 and later, documented the existing separation of their businesses in **D.Exh.1** and later in **D.Exh.8**.

[38] In the case of **In plus Group Ltd & 2 Ors Vs John Albert Pyke [2002] EWCA Civ 370**, Lord Justice Sedley while holding that the defendant who had been effectively expelled from the companies of which he was a director more than six months before any of the events complained of occurred had no fiduciary duty to the claimants, pointed out that:

*“The defendant’s role as a director of the claimants was throughout the relevant period entirely nominal, not in the sense in which a non- executive director’s position might (probably wrongly) be called nominal but in the concrete sense that he was entirely excluded from decision-making and all participation in the claimant company’s affairs. For all the influence he had, he might as well have resigned.”*

The claim based on fiduciary duty failed.

[39] In the instant case, I find that the 6<sup>th</sup> defendant had ceased to play any role in the affairs of the 1<sup>st</sup> plaintiff's company from the time of separation in 2011. His role was in like terms "nominal" for he was no longer in the decision making position and or participation in the 1<sup>st</sup> plaintiff company's affairs because of the conflicts that had emerged between him and the 2<sup>nd</sup> plaintiff and had separated ways and business. The 6<sup>th</sup> defendant to leave the 1<sup>st</sup> plaintiff's company was not prompted or influenced by a wish or intention to incorporate the 4<sup>th</sup> defendant company and to acquire for himself the opportunity sought by the company i.e, acquire and appropriate the suit land but was rather prompted by his dissatisfaction with the company arising from the disagreements/conflicts with and or the conduct of his brother, the 2<sup>nd</sup> plaintiff in the management of the 1<sup>st</sup> plaintiff company which led him to incorporate the 4<sup>th</sup> defendant company for he had also to establish himself elsewhere. The proposition of Laskin in **Canadian Aero Service (supra)** favours him.

[40] Now that the 6<sup>th</sup> defendant has completely left the 1<sup>st</sup> plaintiff in the hands of the 2<sup>nd</sup> plaintiff 100% as per the swap Agreement (**D.Exh.8**), the 2<sup>nd</sup> plaintiff has followed the 6<sup>th</sup> defendant in his resignation with the intention of depriving him of the opportunity to establish himself with a complaint that he is in breach of the fiduciary duty. In my view, I find that the 2<sup>nd</sup> plaintiff as an elder brother of the 6<sup>th</sup> defendant failed him, and or conflicts failed them (as admitted by the 2<sup>nd</sup> plaintiff during cross examination) in their joint venture in the 1<sup>st</sup> plaintiff company in which each of them enjoyed their rights during their father's life time.

[41] **The Settlement Agreement (D.Exh.1) and Share Swap Agreement (D.Exh.8) between the 6<sup>th</sup> defendant and the 2<sup>nd</sup> plaintiff cannot be viewed separately from the agreed upon facts during scheduling as counsel for the plaintiffs prefer in the submissions in rejoinder.** Court has to consider the entire evidence before it so as to arrive at a just decision. It follows therefore that **Sections 91 and 92 of the Evidence Act** and or the **parole evidence rule** are inapplicable since what would have been extrinsic matters were admitted during scheduling. The scheduling conference is an important feature in our civil procedure that it cannot be held in vain. The written agreements cannot stand alone from the agreed facts.

[42] What is at hand, appear to be that in separation, the 2<sup>nd</sup> plaintiff is aggrieved by the attempts by his young brother, the 6<sup>th</sup> defendant to establish himself and the 6<sup>th</sup> defendant is also fighting not to be rendered a wretched of the earth.

[43] The rules of equity have to be applied in the circumstances of this case as Lord Upjohn put it in **Phipps Vs Boardman (supra) at 123**. In this case, the unchallenged witness statement of the 6<sup>th</sup> defendant (**DW1**) together with **Para. 5:8 & 5:9 of the JSM** clearly show that by 2011/2012, the 6<sup>th</sup> defendant had separated ways with the plaintiffs implying that he had ceased to be a director in the plaintiff's company. The burden was on the plaintiffs to show that by 2011/2012 the 6<sup>th</sup> defendant was still an effective director in contrast to a "nominal" one in the plaintiff's company by evidence for example; 6<sup>th</sup> defendant signed resolutions, memos and or correspondences, payments and or receipt of dividends or remuneration and or attendance of Board Meetings e.t.c. In the words of Lord Justice Brooke in the case of **In Plus Group Ltd & 2 Ors Vs John Albert Pyke (supra)**,

*"The working relationships between the two directors, and between Mr. Pyke and the four companies of which he was a director, were now at an end, although Mr. Pyke remained, in name only, a director of each company for a further 14 months."*

He concluded at **Para.72** thus;

*"There is no completely rigid rule that a director may not be involved in the business of a company which is in competition with another company of which he was a director"*

and in **Para 76**, he held:

*"In the present case, Mr. Pyke...had been effectively expelled from the companies of which he were a director more than six months before any of the events occurred of which the claimants now make complaint. At the same time he was being denied any remuneration from the companies. When he entered into business with Constructive in the Autumn of 1997 he was not using any of the claimants' property for the purpose of that business. Nor was he making use of any confidential information which had come to him as a director of any of the companies...in the circumstances, I consider that the Judge was right when he held that Mr. Pyke committed no breach of fiduciary duty in trading with Constructive."*

[44] In the instant case, the 6<sup>th</sup> defendant (**DW1**) having ceased to be a “director” in the 1<sup>st</sup> plaintiff company in 2011/2012 when he separated ways with the 2<sup>nd</sup> plaintiff because of the disagreements as conceded by the 2<sup>nd</sup> plaintiff and in the **J.S.M**, the 6<sup>th</sup> defendant founding of the 4<sup>th</sup> defendant in 2012 to establish himself elsewhere and applying for the suit land in 2017 as evidenced by **P.Exh.11** are not sufficient to found a breach of his fiduciary duty to the 1<sup>st</sup> plaintiff.

[45] As Gower and Davies in **Principles of Modern Company Law (8<sup>th</sup> Edition)** at **P.559** observed,

*“The reason for depriving a director of a profit made from unauthorized exploitation of a corporate opportunity is not an objection to directors making profits as a result of or in connection with or whilst holding their offices but rather that the prospect of a personal profit may make the director careless about promoting the company’s interest in taking the opportunity. If taking the opportunity personally does not involve any conflict with the interests at the company, there is no reason to deprive the director of his or her profit.”*

While citing Lawrence Collins J. in **CMS Dolphin Ltd Vs Simonet [2001]2 B.C.L.C 733**, the 2 authors stated thus;

*“the proposition [is] that the opportunity is treated as the property of the company so that a director who resigns after learning about such an opportunity is just as accountable as a trustee who retires without properly accounting for trust property.”*

The authors went further and observed thus,

*“It follows of course, that if what the director has learned before his or her resignation does not fall within the category of a corporate opportunity, it is no breach of this aspect of their fiduciary duty to exploit the information personally thereafter. Indeed, in order to encourage the exploitation of director’s talents, the general policy of the courts is not to put executive directors of a company in any worse position than employees in terms of restraints on their post-resignation activities. This means that, in the absence of explicit contractual restraints on the director, he or she is free to exploit after resignation even confidential information carried away in his or her head, unless this information amounts to knowledge of trade secrets.”*

[46] In the instant case, there is no evidence on record that the 6<sup>th</sup> defendant's company (4<sup>th</sup> defendant) used trade secrets obtained from the 1<sup>st</sup> plaintiff company & applied to the 3<sup>rd</sup> defendant Land Board to be granted a lease over the suit land or that he applied for the lease before "*the expiry of the 1<sup>st</sup> plaintiff's lease*" over the same land in 2012.

[47] The 2<sup>nd</sup> plaintiff (**PW1**) himself admitted during cross examination that "*No final offer was given*" to the 1<sup>st</sup> plaintiff company. There was therefore no "lease offer" that had expired as claimed by the plaintiffs. The letter dated 5/1/2012 from the chairman ULC **Hon. J.S Mayanja-Nkangi** addressed to the 1<sup>st</sup> plaintiff Co. (**P.Exh.3**) which the plaintiffs rely on as conferring on them the "*lease offer*" did not amount to or constitute either a lease offer or an allocation of land. It was a mere notification of an offer of a lease that would materialize only upon fulfilment of certain terms and conditions and specifically the plaintiffs securing a National Environment Management Authority (**NEMA**) Certificate.

[48] **P.Exh.3** Reads thus:

*"5<sup>th</sup> January 2012  
M/s KAFU Sugar ltd  
P.O BOX 375  
Masindi*

*RE: ALLOCATION FOR LAND AT KIRYADONGO DISTRICT  
Following your application for the above referenced land for purposes of setting up Sugar plantations and the subsequent communications from the National Forestry (NFA) and the Ranches Committee, I am pleased to inform you that the Uganda Land Commission during its sitting of 15<sup>th</sup>-16<sup>th</sup> December 2011, under Minute ULC Mini.64/2011(a) (i) allocated you the above land in **principle** pending clearance of the issues raised by the District leadership and **NEMA Certificate**.*

*The land will be leased to you for an initial period of 5 years extendable to 49 years on fulfillment of the terms and conditions of the lease.*

*This letter therefore, serves to inform you of this development and **advise that a formal lease offer will be extended to you once the above mentioned issues have been addressed...***

*Yours sincerely*

*Sign.....*

*Hon. J.S Mayanja-Nkangi*

*CHAIRMAN UGANDA LAND COMMISSION" Emphasis*

From the authority of **ORACLE NEWZEALAND LTD VS PRICE HOUSE ADMINISTRATION LTD 1 NZLR CA 135/1999** provided by counsel for the 4<sup>th</sup> and 6<sup>th</sup> defendants, by the statement in the above letter (**P.Exh.3**), *“Uganda Land Commission allocated to you the above land in principle pending clearing of the issues raised by the District leadership and NEMA Certificate”*,

meant as follows;

*“The meaning of the qualification “in principle” was considered by Penlington J in Bpoil New Zealand Ltd Vs Van Beers Motors Ltd HC New plymoth Cp 14/91, 10 March 1992 Van Beers’ acceptance is qualified by the words “in principal (sic)... In my view these words... were deliberately used by Van Beers to make it clear that he had no intention at that time of entering a binding contract. The acceptance in principle allowed the entry into an arrangement as envisaged in the letter of 26 March and at the same time reserved the right to Van Beers Motors to withdraw or to alter its position up until the time that heads of agreements were signed and binding legal relations were created.”*

[49] This is exactly what the phrase “in principle” in the instant case meant. The chairperson **ULC** had no intention at that time of entering a binding contract or promise. The offer in principle was conditioned on the plaintiffs securing a NEMA Certificate and therefore reserved the right to **ULC** to withdraw or alter its position up until the time the NEMA Certificate was secured. In this case, the Certificate was never secured at all and as a result, the plaintiff could not obtain their desired offer. The above (**P.Exh.3**) was a notification letter and not a “lease offer”. It did not confer any land rights to the plaintiffs. The plaintiffs ignored and or failed to secure the required NEMA Certificate as a pre-requisite for the lease offer.

[50] As expressed by the Hon. Minister of Lands, Housing and Urban Development in her letter dated 5/8/2017 (**P.Exh.12/D.Exh.6**), 7 years had elapsed for the 1<sup>st</sup> plaintiff to fulfill the conditions of the lease. The plaintiff had ignored and or abandoned the “opportunity” but to be awakened by the 6<sup>th</sup> and 4<sup>th</sup> defendants vying for the same suit property in the bid of the 6<sup>th</sup> defendant also trying to establish himself after separating in their business ventures with his elder brother, the 2<sup>nd</sup> plaintiff.

[51] A latin term in this regard is “*vigilantibus, non dormientibus, jura subvenient*” which means “Equity aids the vigilant and not the indolent.” So if one sleeps on his rights, his rights will slip away from him. The doctrine does not favour the cause of someone who suddenly wakes up to enforce his or her rights long after discovering that they exist; **Exparte A.R Shaw, in Re Diamond Roch Bring Co. Ltd (1677) QBD 463** and **Boyes Vs Guthure (1969) EA 385**.

[52] In the premises, I find that the plaintiffs attempt to apply for extension of the “lease” in 2017 (**P.Exh.7**) was in futility for there existed no “lease” for extension. The only available option was for the plaintiffs to file a fresh application as it were, Form 7 (**P.Exh.8**). At the time, the 4<sup>th</sup> defendant’s application (**P.Exh. 10 & 11**) was also in place for considerations by **ULC**, the Controlling Authority. In exercise of its discretion, upon consideration and examining both applications, the **ULC** offered the lease to the 4<sup>th</sup> defendant thus the eventual acquisition of the Certificate of title (**P.Exh.18**) by the 4<sup>th</sup> defendant.

[53] In brief, there emerged 2 competing entities for the suit land; the plaintiffs and the 4<sup>th</sup> defendant and the 4<sup>th</sup> defendant emerged the successful applicant upon consideration by the Controlling Authority i.e, **ULC**. There is no evidence on record that the 6<sup>th</sup> defendant used or took advantage of vital company information he had and or company secrets to the prejudice of the plaintiffs in acquiring the suit land. It was common knowledge that the suit land was available for leasing as there was no encumbrance on it from any entity. It cannot be said in the circumstances therefore, that the 1<sup>st</sup> plaintiff was deprived of a business opportunity. There was never any “maturing opportunity” in the suit land as **ULC** was entitled as it did, to also allocate it to any other person or entity upon the 1<sup>st</sup> plaintiff failing to fulfil the terms and conditions set for leasing it.

[54] In my view, this approach in the application of the principle of Director fiduciary relationship to the instant circumstances of this case is the only way the principle can maintain its vigour in the new setting of modern Corporation. A different approach would render the doctrine a mockery of justice. Directors who cease their positions as directors in companies should not be left in the cold with their talents by over



stretching the Directors fiduciary relationship with their former companies. They are entitled to re-establish themselves.

[55] Counsel for the plaintiffs lastly submitted that the 4<sup>th</sup> defendant founded by the 6<sup>th</sup> defendant had essentially the same objects as the 1<sup>st</sup> plaintiff, i.e carrying on the business of sugar cane growing, sugar extraction, processing, manufacturing, packaging and selling. That in violation of **S.4 (2) (1) of the National Sugar policy 2010**, the 4<sup>th</sup> defendant established a sugar cane plantation and sugar mill within a radius of the existing mill. That the foregoing is evidence of the 4<sup>th</sup> and 6<sup>th</sup> defendants setting up unfair competition with the plaintiffs.

[56] On record however, apart from the 2<sup>nd</sup> plaintiff stating and claiming that the 6<sup>th</sup> defendant found the 4<sup>th</sup> which has similar objects as those of the 1<sup>st</sup> plaintiff company, there is no evidence that apart from the name “Kafu Sugar ltd”, the 1<sup>st</sup> plaintiff is actively carrying on the said business of sugar cane growing, sugar extraction, processing, manufacturing, packaging and selling. There is no evidence of any existing sugar mill, or sugar cane plantation of the plaintiffs for which one can conclude that the 6<sup>th</sup> and 4<sup>th</sup> defendants Plantation and Sugar Mill are in the restricted 25 km radius and therefore in competition with the plaintiffs. **Orena Billa** (PW2) did not locate or point at any sugar plantation or sugar mill site of the plaintiffs for consideration of the restricted 25km radius. Thus this court lacks the raw material and evidence upon which to act on and grant the plaintiffs’ sought relief in this aspect.

[57] The **National Sugar Policy** is meant for government to regulate the sugar industry which includes; cane growing and processing. It is however my view that the 1<sup>st</sup> plaintiff which since its incorporation has not under **S.132 of the Companies Act**, filed Company form 18, pertaining to its registered address and has not filed its **Annual Returns** thus dormant (**P.Exh.19**), I am not sure whether it can seek protection from the **National Sugar Policy**. Though counsel for the plaintiffs claim that the 1<sup>st</sup> plaintiff own approximately 4000 hectares of land and has a number of employees, this is not evidence that the 1<sup>st</sup> plaintiff is an “active” company. The fact that it has not filed the mandatory **Annual Returns** since its incorporation is evidence that it is not in operation and therefore it is a dormant and or inactive company.

[58] As regards the 6<sup>th</sup> defendant's establishment of the 4<sup>th</sup> defendant company, the plaintiffs have failed to show how the 6<sup>th</sup> defendant upon cessation with the plaintiffs is prohibited from establishing a business similar to that of the plaintiffs. In **London & Mashona Land Exploration Co. Ltd Vs New Mashona Land Exploration Co. Ltd [1891] WN 165**, court held that there is no completely rigid rule that a director could not be involved in a competing business. See also **In Plus Group Ltd & 2 Ors Vs John Albert Pyke Para 72(Supra)** and **Bell Vs Lever Brothers Ltd [1932] AC 161 at 193/196**.

[59] Though it may be said that the 6<sup>th</sup> defendant had knowledge or information that the 1<sup>st</sup> plaintiff company had earlier on vied for the acquisition of the lease in the suit land in 2010 when the 6<sup>th</sup> defendant was still a director in the company, at the time the 4<sup>th</sup> defendant company applied for lease of the same, there is no evidence that the plaintiffs held any interest or "opportunity" in its acquisition so as to be seen competing for it with the 4<sup>th</sup> defendant.

[60] In conclusion, I find that in the circumstances of this case, in view of the totality of the above, no fiduciary duty was owed to the 1<sup>st</sup> plaintiff company by the 6<sup>th</sup> defendant. The 6<sup>th</sup> defendant was merely a "director" in name but had in fact left the 1<sup>st</sup> plaintiff company in 2011/2022. It was up to the plaintiffs to file the required notices with the Registrar of companies documenting the changes in the 1<sup>st</sup> plaintiff's company's Directorship and shareholding for the 1<sup>st</sup> plaintiff's own good. The plaintiffs' failure to do so did not and does not change the reality that the business relationship between the plaintiffs and the 6<sup>th</sup> defendant had ceased.

[61] The 1<sup>st</sup> issue is found in favour of the 4<sup>th</sup> and 6<sup>th</sup> defendants.

**Issue No.2: Whether the 1<sup>st</sup> plaintiff has any interest in the suit land.**

[62] At the outset, counsel for the plaintiffs submitted that the 1<sup>st</sup> plaintiff need not have an interest in the suit land to make a claim against the defendants. That the suit land constituted the 1<sup>st</sup> plaintiff's (maturing) business opportunity which it was at all material times pursuing. That the 6<sup>th</sup> defendant as a shareholder and a director in the 1<sup>st</sup> plaintiff at the material time was prohibited from having a personal interest

conflicting with the interests of the 1<sup>st</sup> plaintiff because he was under a positive duty to make the business opportunity available to the 1<sup>st</sup> plaintiff.

[63] As I have already observed, the 1<sup>st</sup> plaintiff's claimed "(maturing) business opportunity" had long been extinguished by the plaintiffs' failure to fulfill the terms in the lease offer Notification letter from the chairperson **ULC** dated 5/1/2012 (**P.Exh.3**) which notified the plaintiffs of the existence of the "opportunity" and the terms therein. The failure by the plaintiffs to fulfill the terms effluxed the "opportunity" and thereby rendered the suit land available to the public, including the 4<sup>th</sup> and the 6<sup>th</sup> defendant for leasing especially so, that the 6<sup>th</sup> defendant had ceased to be a "director" in the 1<sup>st</sup> plaintiff's company.

[64] As I have already observed and found, there is no evidence that the controlling Authority, **ULC** "allocated" the suit land to the 1<sup>st</sup> plaintiff for any period upon any terms and conditions. It would only be so, if the 1<sup>st</sup> plaintiff had acquired a "lease offer" of the suit land and or was in occupation of it that it would claim an equitable interest but none of these are available to the plaintiffs in this case.

### **Legitimate expectations**

[64] Counsel for the plaintiffs submitted that under the doctrine of legitimate expectation, the plaintiffs expected to ultimately have the lease on the suit land extended. He argued that it has been held that even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and if so, the courts will protect his expectation. Counsel relied on the following authorities:

- 1. Atwongyeire Robert Vs B.O.G Kyambogo College School  
H.C.M.C.No.216/2016.**
- 2. Madras City Wine Vs State of Tamil Nadu & Anor S.C India Appeal  
No. 4981/1994 and**
- 3. Alex Agandru Vs Etoma Francis H.C.C.S No.7/2011.**

[65] Both counsel for the defendants do not agree. According to them, at no point in time did the 1<sup>st</sup> plaintiff receive an unqualified guarantee that it would receive the lease for the suit land and that furthermore, the plaintiffs' failure to transmit the necessary proofs of having complied

with the conditions attached to **P.Exh.3** (Notification to the plaintiffs of the lease offer), no legitimate expectation materialized in the circumstances.

[66] According to **Atwongyeire Robert Vs Board of Governors Kyambogo College School (Supra)**, the principle of legitimate expectation may arise from-

*“a promise and conduct or representation. The principle...is concerned with the relationship between the public administration and the individual. It seeks to resolve the basic conflict between the desire to protect the individual’s confidence in expectations raised by administrative conduct and the need for administrators to pursue changing policy objectives. The principle means that expectations raised as a result of administrative conduct may have legal consequences. Either the administration must respect those expectations or provide compelling reasons why the public interest must take priority.”*

[67] The case of **Madras City Wine Vs State of Tamil Nadu & Anor (supra)** summarized the principle of legitimate expectation as follows:

*“legitimate expectation may arise-*

- (a) if there is an express promise given by a public authority; or*
- (b) because of the existence of a regular practice which the claimant can reasonably expect to continue;*
- (c) such an expectation must be reasonable. However, if there is a change in policy or in public interest, the position is altered by a rule or legislation, no question of legitimate expectation would arise.”*

At page 15 of the judgment, court observed that:

*“The existence of a legitimate expectation may give a number of different consequences; it may give locus standi to seek leave to apply for judicial review.”*

Its application was explained in the case of **Council of Civil Service Unions Vs Minister for the Civil service [1984] 3 All ER 935 at 943-44** thus:

*“But even where a person claiming some benefit or privilege has no legal right to it, as matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and if so, the courts will protect his expectation by Judicial review as*

*a matter of public law. This subject has been fully explained by Lord Diplock in O'Reilly Vs Mackman, [1982] 3 All ER 1124, (1983) 2 AC 237... legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."*

[68] The total effect of the above authorities is that the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons be entitled to rely on the statement and enforce it through the courts. It is a perfect ground for judicial review in administrative law to protect a procedural or substantive interest when a public authority rescinds from a representation made to a person. See **Union of India Vs Hindustan Development Corporation, J.T (1993) 3 S.C 15 at pages 50-51** where court observed thus;

*"legitimate expectation" is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action and this creation takes its place beside such principles as rules of natural justice, unreasonableness, the fiduciary duty of local authorities and "in future", perhaps, the principle of proportionality."*

**Administrative law, sixth Edition by HWR Wade page 56-57** reads thus;

*"...A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its powers to fulfill. The protection is limited to that extent and a judicial review can be within those limits."*

[69] The plaintiffs in this case are partly seeking a judicial review of the 2<sup>nd</sup> defendant land commission decision to allocate the suit land to the 4<sup>th</sup> defendant on the grounds that it was unlawful and violated the legitimate expectations of the plaintiffs. The plaintiffs are relying on promises and representations contained in the following correspondences:

- a) Letter dated 5/1/2012 from the chairman ULC to the 1<sup>st</sup> plaintiff **(P.Exh.3)**.

- b) A memorandum of understanding between the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> defendant dated 12/3/12 **(P.Exh.4)**.
- c) A letter dated 17/2/2012 from NEMA to the 1<sup>st</sup> plaintiff **(P.Exh.5)**
- d) Letter dated 25/1/11 from the Ag. Executive Director N.F.A to the Secretary ULC **(P.Exh.6)**.
- e) A letter dated 29/3/2011 from ULC to the Ranches Restructuring Committee.
- f) Letter dated 23/12/2010 from Secretary ULC to Executive Director N.F.A **(P.Exh.20)**.
- g) Letter dated 29/3/2012 from ULC to Commissioner Surveys and Mapping **(P.Exh.22)**.
- h) Letter dated 3/4/2012 from the Ministry of lands, Housing and Urban development to the ULC **(P.Exh.23)**.
- i) Letter dated 16/1/2012 from ULC from the Chief Gov't Valuer **(P.Exh.24)**.
- j) Letter dated 15/2014 from the office of the District Chairman Kiryandongo to the Ministry of Lands, Housing and Urban Development **(P.Exh.26)**.

[70] I have perused and examined each of the above documents/correspondences; I do find that they save for the M.O.U between the 1<sup>st</sup> plaintiff and Kiryandongo Local Government **(P.Exh.4)**, they are mere correspondences to and from the various stake holders to the relevant authorities in the process of conducting due diligence onto the suit land before a decision could be made by **ULC**, the Controlling Authority to lease out the suit property. None amounts to any representation or promise for the plaintiff's acquisition of the lease of the suit land. Besides, **P.Exh.23, 24, 25** and **26**, none was either addressed or copied to the plaintiffs. It follows therefore, that none could be regarded as a representation or promise to the plaintiffs that they were entitled to allocation of the suit land. The argument by counsel for the plaintiffs that these correspondences were public documents, accessible to anybody and therefore were capable of representation to the plaintiff is untenable.

A correspondence to be capable of representation and therefore influence the plaintiffs must have either been addressed to and copied to them. The plaintiffs must have been privy to the correspondences.

[71] As regards the letter dated 5/1/2012 **(P.Ex.h3)**, I have already alluded to it that it was mere notification of an offer to plaintiffs pending

clearance of the issues raised by the District leadership and a NEMA Certificate. Whereas the District Leadership entered into a Memorandum of understanding (M.O.U) that was signed by the Chief Administrative Officer as the Head of the administration of the district council (**S.64 of the Local Government Act**), the plaintiffs did not pursue the NEMA Certificate for a period of 7 years as inter alia, was queried by the Hon. Minister of Lands, Housing and Urban Development (**P.Exh.12**) during her intervention.

[72] It is the contention of the defendants that the failure to secure the NEMA Certificate and as a result, the 2<sup>nd</sup> defendant was not obliged to issue the suit land to the plaintiffs. **P.Exh.5** authored by the Executive Director NEMA addressed to the plaintiffs dated 17/2/2013 though clearly indicated that NEMA had no objection to the land allocation, it was not a substitution of a NEMA Certificate which is issued after an Environment Impact Assessment has been carried out for purposes of catering for the environmental aspects. It was a term of **P.Exh.3** that a NEMA Certificate be obtained before a formal lease offer for the plaintiffs is made. In the words of **Folomera Nalongo Vs Luwero Town Council H.C.C.S No.303/1993, [1995] IV KALR 24-27, P.Exh.3** amounted to a “conditional offer and not a binding contract between the applicant and the Controlling Authority.”

[73] In the instant case, it was a condition precedent that any consents required under the law, most specifically from NEMA in form of a Certificate, would first have to be obtained. There is no evidence that the plaintiffs complied with the legal and procedural requirements leading to an offer for a lease.

[74] Besides, it is further the contention of the defendants that none of the clearances from NEMA (which does not amount or constitute a NEMA Certificate) and National Forestry Authority (**P.Exh.5 & 6**) were duly communicated to the 2<sup>nd</sup> defendant. In view of the denial by the defendants of the receipt of the alleged clearances from MEMA and National Forestry Authority (N.F.A), the onus was on the plaintiffs to adduce evidence and prove that the clearances from NEMA and N.F.A (**P.Exhs.5 & 6**) were in existence, available and were duly served upon the 2<sup>nd</sup> defendant. The plaintiffs in this case failed to discharge the onus. Neither **P.Exh.5** nor **P.Exh.6** bore any proof of acknowledgement of receipt by the 2<sup>nd</sup> defendant. When a party adduces evidence which

is sufficient to raise a presumption that what he alleges is true, the onus is on the other party to counter the allegation and produce evidence to rebut the presumption.

The plaintiffs failed on this aspect save for **P.Exh.6** for which as per **P.Exh.21** it appears to have been duly communicated to the 2<sup>nd</sup> defendant commission as the chairman appeared alluding to it in this letter.

[75] In the circumstances where there is no evidence that the 2<sup>nd</sup> defendant commission was furnished with the required clearance from NEMA and in particular the NEMA Certificate for consideration before the lease offer could be issued to the plaintiffs, I find that the plaintiffs' claimed legitimate expectations did not materialize and also in public interest, no question of legitimate expectation would arise.

[76] A bonafide decision of the public authority, **ULC** reached upon considerations where the plaintiffs failed to comply with the condition precedent for the lease and the suit land had been pending leasing for a period of 7 years would satisfy the requirement of non-arbitrariness and therefore withstand judicial scrutiny. For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look for them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. The legitimacy of an expectation can be inferred only if it is found on the sanction of law or custom or an established procedure followed in regular and natural consequence; **Union of India & Ors Vs Hindustan Development Corporation & Ors (supra)**.

[77] In the instant case, it has not been shown by the plaintiffs that the 2<sup>nd</sup> defendant failed to follow the existing procedure thus resulting in denial of a right directly arising out of legitimate expectation. In contrast, I find that the plaintiffs instead wished ULC to make an unlawful decision to consider them without the prerequisite NEMA certificate set as a condition for the lease.

[78] Besides, it was the duty of the plaintiffs to take all the necessary steps and ensure that the 2<sup>nd</sup> defendant commission was furnished with all



the relevant forms of clearance required for issuance of the lease offer. The failure to do so deprived them of the right of any legitimate expectation over the suit land; See **Cinnamond Vs British Airports Authority [1980] 2 ER 368, [1980] 1 WLR 582, C.A** where it was pointed out that a person's own conduct may deprive any expectations he may have of the necessary quality of legitimacy.

[79] In conclusion, I find that surely there is no evidence in this case that the 2<sup>nd</sup> defendant in issuing the lease title to the 4<sup>th</sup> defendant did so arbitrarily to the detriment of the plaintiffs. It was out of the plaintiffs' own failure to pursue the relevant clearances and in particular the **NEMA** Certificate to its conclusion. They slumbered and the 4<sup>th</sup> defendant took the opportunity.

[80] The 3<sup>rd</sup> issue is in the circumstances found in the negative. The plaintiff is found to have had no interest in the suit land.

**Issues 3 & 4: (a) Whether the allocation of lease hold over the suit land and issuing of the certificate of title thereof by the 2<sup>nd</sup> defendant and the 5<sup>th</sup> defendant to the 4<sup>th</sup> defendant was irregular and or unlawful.**  
**(b) Whether the actions and omissions of the defendants jointly and/or severally were fraudulent.**

[81] Counsel for the plaintiffs submitted that the 6<sup>th</sup> defendant secretly conceived a plan leading to the fraudulent grant of the lease and certificate of title to the 4<sup>th</sup> defendant. That it was in bid to defeat the 1<sup>st</sup> plaintiff's unregistered equitable interest in the suit land to have it for his company, the 4<sup>th</sup> defendant. That the 6<sup>th</sup> defendant admitted during cross examination, that the 4<sup>th</sup> defendant company is owned and managed by him and his sons.

[82] However, as I have already observed, the 1<sup>st</sup> plaintiff had neither any form of unregistered equitable interest or "opportunity" in the suit land worth mentioning that was prone to be defeated by the 6<sup>th</sup> and 4<sup>th</sup> defendants' conduct or action.

[83] It is well settled that fraud means actual fraud or some act of dishonesty; **David Sejjaka Nalima Vs Rebecca Musoke, Civil Appeal**

**No.12/85 (C.A).** See also **Wainaha Saw Milling Co. Ltd Vs Wainone Timber Co. Ltd (1926) A.C 101** as per Lord Buckmaster.

In **Fredrick J.K.Zaabwe Vs Orient Bank Ltd & 5 Ors S.C.C.A No.4 of 2006**, Katureebe J.S.C adopted the definition of fraud in the **Black's Law Dictionary, 6<sup>th</sup> edition, page 660** as;

*“An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.”*

According to **Kampala Bottlers Ltd Vs Damanico (U) Ltd S.C.C.A No.22 of 1992**, even if fraud is proved, it must be attributable directly or by implication, to the transferee. Wambuzi C.J Stated thus;

*“...Fraud must be attributable to the transferee... it must be attributable either directly or by necessary implication...the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act...”*

On the burden of proof, the Chief Justice observed thus;

*“I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters.”*

See also **J.W.R Kazzora Vs M.L.S Rukuba S.C.C.A No.13/1992**.

[84] In the instant case, the plaintiffs having failed to prove that they had any form of unregistered interest or “opportunity” in the suit land, it cannot be found that the 6<sup>th</sup> and 4<sup>th</sup> defendants’ procuring registration of the suit land was to defeat their interest and therefore the 6<sup>th</sup> and 4<sup>th</sup> defendants could not be found guilty of any fraud. The plaintiffs were neither in occupation of nor held the suit land by customary tenure and therefore, the propositions in **Kampala District Land Board & Anor Vs National Housing & Construction Co. Ltd S.C.C.A No.02 of 2004** and **Marko Matovu Vs Muhammed Seviru & Ors [1979] HCB 174** are not applicable to the instant case.

There is no evidence that the plaintiffs had been allocated the suit land and therefore had rights on the same. The notification by **UCL in P.Exh.3** was subject to fulfillment of securing and presenting a NEMA certificate that the plaintiffs ignored or failed to fulfill.

**Alleged irregularities, haste, ill intention, valuation of land, payment of premium and ground rent and lack of a deed print.**

[85] The 4<sup>th</sup> defendant company in the instant case is the registered proprietor of the suit property by virtue of the Certificate of title of the suit land (**D.Exh.2**). **S.59 R.T.A** provides thus;

***“59. Certificate to be conclusive evidence of title***

*No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.”* [Empahsis]

[86] In **Dr. A. Kekitiinwa & 3 Ors Vs Edward Haudu Wakida C.A C.A No.3/97** while considering the above provision, it was held that anyone impeaching a registered title must prove actual fraud on part of the registered proprietor, dishonesty of some sort, and not what is called constructive or equitable fraud.

[87] Counsel for the plaintiffs in his submissions complained of irregularities, to wit that the lease agreement (**D.Exh.15**) was signed on 4/9/2017 and the title (**D.Exh.2**) was issued on the same date at 9:50 am implying that the signing of the lease agreement, affixing of the common seal, paying stamp duty and verifying payment and title preparation cannot be done in that short time; that the 5<sup>th</sup> defendant prepared the certificate of title without being instructed/authorized by the 2<sup>nd</sup> defendant, the Controlling Authority; that premium and ground rent were paid without valuation of the suit land; and lastly, that the title has no evidence of a Deed print.

[88] As correctly submitted by the learned State Attorney in this case, the above alleged irregularities were never pleaded in the plaint. Counsel

for the plaintiffs argued that the irregularities were impliedly pleaded and that others were a matter of evidence rather than pleadings.

[89] It is however a cardinal principle that fraud cannot be presumed. It has to be pleaded with particulars and strictly proved; **O.6 r.3 C.P.R.** See also **Kampala Bottlers Ltd Vs Damanico (U) Ltd (supra)**. It is mandatory that fraud is pleaded and particulars given for it to be proved. The particulars must be clear and not vague.

[90] In this case, I do agree that the above alleged irregularities were never pleaded and this ought to have been the purpose of amending the plaint that was admitted by consent of counsel.

Despite the omission to plead these irregularities, I am unable to agree with counsel for the plaintiffs that it is not practicable possible for the Controlling Authority officials to sign a lease agreement and issue a certificate of title on the same day, if not at around the same time. I am not persuaded that such action on the part of **ULC** (2<sup>nd</sup> defendant) or 5<sup>th</sup> defendant officials amount to an irregularity.

[91] I do agree that the 5<sup>th</sup> defendant prepares a certificate of title upon instruction or authorization by the Controlling Authority. Indeed, in this case as per **D.Exh.14** dated 28/8/2017, Secretary **ULC** instructed the Commissioner Land Registration to prepare the certificate of title in favour of the 4<sup>th</sup> defendant in accordance with the terms and conditions of the lease offer. The authenticity of **D.Exh.14** was confirmed by **Andrew Nyumba** (DW2) the Ag. Secretary **ULC**. He doubted **P.Exh.28** which was also in the same terms but was dated 6/9/2017, 2 days before the authorization for issuance of the certificate of title. In my view, the existence of **D.Exh.14** that is logical, renders **P.Exh.28** a letter that was issued in error and this error cannot be attributed to the 6<sup>th</sup> and the 4<sup>th</sup> defendants.

[92] As regards the valuation of the suit land and payment of premium and ground rent, it is the contention of counsel for the plaintiffs that no inspection and valuation of the suit land ever took place. However, there is evidence of **D.Exh.12** dated 21/8/2017 where the Secretary **ULC** instructed the Chief Government Valuer to assess the premium and Ground Rent payable. The counsel for the plaintiffs claim that by 2013 premium was Ugx 627,009,000/= and Ground Rent was Ugx 31,350,450/= as per **P.Exh.24** and therefore, that it is impossible for

the Government Valuer to assess the same suit land in 2017, and premium be Ugx 627,016,250/= and Ground Rent Ugx 31,350,813/=, is not supported by any empirical evidence. Rural land unlike Urban land does not rapidly gain value. The suit land in question is regarded as rural land.

- [93] As regards the lack of the Deed print in the certificate of title in **D.Exh.2**, as I have already observed, this irregularity like the others above was never pleaded and during cross examination, it was never put to the 6<sup>th</sup> defendant/**DW1** and therefore, he never got an opportunity to defend himself or explain the anomaly. As a result, he takes the benefit of doubt since besides, **D.Exh.2** was admitted by consent of counsel and no objection was raised during its admission regarding the absence of a Deed print. It is possible that the Deed print was merely missed out during photocopying.
- [94] Besides the totality of the above, the essence of the indefeasibility of a certificate of title under **S.59 R.T.A** is that any informality or irregularity in the application or in the proceeding previous to the registration of the certificate cannot be used, as the plaintiffs are trying or would want this court to do, to impeach the 4<sup>th</sup> defendant's certificate of title.
- [95] In conclusion, I find that the plaintiffs have not adduced evidence to support their claims that the Chief Government Valuer did not conduct physical inspection of the suit land and the same and or that he duplicated land values which had been previously given in respect of the suit land.
- [96] The 2<sup>nd</sup> defendant land commission issued the suit land to the 4<sup>th</sup> defendant for it was available for allocation since the plaintiffs had not acquired any form of interest in the suit to form basis for competition. When the plaintiffs eventually renewed their interest, the 4<sup>th</sup> defendant had lawfully applied for it and the 2<sup>nd</sup> defendant lawfully considered the 4<sup>th</sup> defendant for the lease.
- [97] In the premises, I find that the plaintiffs have failed to adduce evidence in support of their allegations of fraud against all the defendants. The 4<sup>th</sup> defendant acquired the suit land lawfully without any fraud and is therefore protected from any threat of ejection.

**Issue No.5: Remedies available to the parties.**

**[98] (a) Declarations:**

- i. The allocation of the land comprised in **LRV 4591, Folio 4 Ranch No.23,28,29 and 30 Bunyoro Ranching Scheme situate in Kiryabdongo District** (the suit land) by the 2<sup>nd</sup> defendant to the 4<sup>th</sup> defendant was lawful and was therefore not in violation of any legitimate expectations of the plaintiffs.
- ii. This court is inclined not to make a declaration that the allocation of the suit land to the 4<sup>th</sup> defendant for purposes of growing sugar cane contravenes the Government policy on sugar because it lacks the raw material and evidence for the basis of the declaration sought.
- iii. The 6<sup>th</sup> defendant has never been in breach of his fiduciary duty to the plaintiffs as a Director and Shareholder of the 1<sup>st</sup> plaintiff.
- iv. An order for the reinstatement of all records pertaining to the 1<sup>st</sup> plaintiff's Certificate of Approval for investment in the sought sector at the Ministry of Trade, Industry and Cooperatives was not canvassed during the trial proceedings and there is therefore no evidence as a basis for its grant.

**(b) Cancellation of the Certificate of title**

The 4<sup>th</sup> defendant's certificate was not obtained through any fraud and as such it cannot be impeached and or cancelled.

**(c) General damages, interest and costs**

The plaintiffs' evidence fell short of proving the case against the defendants on the relevant standard of proof and having failed to discharge the onus on them, they are not entitled to any of the remedies or orders as sought in this claim including general damages, interest and costs.

[99] The entire suit is in the premises dismissed with costs to each of the defendants.

Dated at Masindi this 17<sup>th</sup> day of **June, 2022.**

.....  
**Byaruhanga Jesse Rugyema**  
**JUDGE.**