THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
COMPANY CAUSE NO. 28 OF 2021

NABISERE MUKAMUSINZI AISHA SENTAMU :::::::::::::::::::::::: APPLICANT

VERSUS

1. **MIRAGE TRADING CO. LIMITED**
2. **SENTAMU ABDUL :: RESPONDENTS**

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] The Applicant brought this Cause by Notice of Motion under Section 98 of the CPA and Order 38 rules 1, 2, 3, 5, 7, 9 & 10 of the CPR seeking the following orders and declarations;

a) Declarations that;
   i) The Resolution dated 19th January 2015 is null and void and of no legal consequences.
   ii) The illegal transfer of shares of the Applicant in the said Resolution is null and void and contrary to the Company Articles of Association and the Companies Act.
   iii) The transfer of shares to Ssengoba Altaif Sentamu a minor without legal capacity and consideration is null and void.
   iv) The transfer of shares of the Applicant without a special meeting by the company be declared null and void.
   v) The appointment of Nantume Mariam as director be declared null and void.
   vi) The Resolution signed by the Applicant as an illiterate without a certificate of translation be declared null and void.

b) Orders that;
   i) The shares of the Applicant be valued after auditing and be sold to any person of her choice.
   ii) The Company declares the profits and loses it has been making since incorporation.

iii) The Applicant be reinstated as director and shareholder of the Company.

iv) An annual General Meeting be convened immediately or as soon as court deems fit.

v) The 2nd Respondent ceases to act as company director for failure to retire as a director after a year.

vi) The Respondent produces audited books of accounts of the company for the last 14 years.

vii) An audit of the company be carried out to establish its net worth, financial status and all assets acquired since its establishment.

viii) The company values the shares of the Applicant after an audit is carried out.

ix) Any government agency holding the properties of the Company to wit land and cars to provide a general search and make a report about such properties for proper audit.

x) Costs of the suit be provided for.

[2] By way of background, sometime in 2009, the Applicant and the 2nd Respondent incorporated the 1st Respondent company having 9 shareholders with the 2nd Respondent holding 550 shares and the Applicant holding 50 shares, among other shareholders that were minor children at the time of incorporation. On 19th January 2015, a board resolution was registered transferring the shares of the Applicant to Sengoba Altaif, a minor; and the shares of Salim Nyanzi, then an adult, to Salimati Nakabanda, a minor. The resolution also removed the Applicant from being a director of the company.

[3] The Applicant brought this application upon grounds summarized in the Notice of Motion and also set out in the affidavit in support of the application deposed by the Applicant. Briefly, the grounds are that the Applicant was a shareholder and director in the 1st Respondent company with 50shares before being hoodwinked to sign unknown documents. At incorporation of the

company, the 2nd Respondent was a majority shareholder with 550 shares, the Applicant had 50 shares and the remaining shareholders who were minors had 20 shares each. The Applicant was appointed director alongside the 2nd Respondent; they executed their duties diligently and the company started making a lot of money and acquired a lot of properties. In 2015, the Applicant started having family misunderstandings with her husband (the 2nd Respondent) culminating into the 2nd Respondent bringing a document from lawyers stating that she had sold her shares and ceased to be a director. The Applicant stated that she has never sold her shares to a one Ssengoba Altaif Sentamu, a minor and that she never understood the contents since they were not translated to her and only realized that she signed a document disposing of her shares when the 2nd Respondent proposed to divorce her. She further stated that the 2nd Respondent closed her office and sent her office properties to their residential home and informed her never to go back to the company premises. She also stated that the company has never held any annual general meeting since its incorporation nor declared any profits for sharing or losses contrary to the Articles and Memorandum of Association.

[4] The Respondents opposed the application through an affidavit in reply affirmed by **Ssentamu Abdul**, the 2nd Respondent and Managing Director of the 1st Respondent company. The deponent stated that the Applicant was a director and signatory to various resolutions of the 1st Respondent Company till January 2015 when she ceased to be a director and shareholder without any complaint of not knowing what she was signing. He stated that he did not sign for the minor-children shareholders but just wrote their names. He stated that although it is true that the company acquired a number of properties, some of the properties listed by the Applicant are not its property. He further stated that the Applicant was employed by the company when she ceased being a director and shareholder. The deponent also stated that the Applicant had earlier on filed a similar cause in this Court, together with a divorce cause in the Family Court and another complaint in the Labour Office. Upon a meeting

involving the parties, elders and other members of the family, an agreement was reached whereupon the said court actions were withdrawn by consent of the parties and the Applicant was compensated for her interest in the company and family property. He concluded that the Applicant is not entitled to any of the remedies sought.

[5] The Applicant, by leave of the Court, filed a supplementary affidavit affirmed by **Salim Nyanzi Ssentamu**, one of the hitherto minor-children shareholders. The Respondents filed a reply to the supplementary affidavit and the Applicant filed affidavits in rejoinder thereto. I have taken the contents of the said affidavits into consideration as well.

Representation and Hearing

[6] At the hearing, the Applicant was represented by **Mr. Ogomba Issa, Mr. Paul Asaba** and **Mr. Mulongo Peter** from M/s Praxlex Advocates; while the Respondents were represented by **Mr. Deo Bitaguma** of M/s Bitaguma & Co. Advocates; **Mr. Kagoro Friday Roberts** of M/s Muwema & Co. Advocates and **Mr. Luyimbazi Nalukoola** of M/s Nalukoola Advocates & Solicitors. Counsel sought and were granted leave to cross examine three deponents of affidavits, namely, the Applicant, the deponent of the supplementary affidavit and the 2nd Respondent; which was conducted and thereafter, counsel made and filed written submissions which I have considered in the determination of the matter before the Court.

Issues for Determination by the Court

[7] Five issues were raised for determination by the Court, namely;

a) Whether the application is time-barred?

b) Whether the application is incompetent and/or premature before the Court?

c) Whether the Resolution dated 19th January 2015 is null and void?

d) Whether the 2nd Respondent mismanaged the affairs of the Company to the detriment of the Applicant?

e) What remedies are available to the parties?

Resolution of the Issues

Issue 1: Whether the application is time-barred?

Submissions by Counsel for the Respondents

[8] Counsel for the Respondents cited the provisions of Section 3(a) of the Limitation Act to the effect that no action founded on contract or tort shall be brought after six years. Counsel also cited the decisions in *Iga v Makerere University [1972] EA 66* and *Godfrey Magezi v National Medical Stores & 2 Others, HCCS No. 636 of 2016* to the effect that a suit brought after the expiration of the period of limitation and in absence of a ground of exemption from the law of limitation being pleaded, the pleading would be rejected. Counsel argued that the Applicant's claim herein is founded on a board resolution dated 19th January 2015 and share transfer forms dated 19th January 2015; for which the six-year time frame ended on 19th January 2021. Counsel stated that the instant cause that was filed on 27th October 2021 is late by 8 months and hence barred by limitation and ought to be rejected by the Court under Order 7 rule 11(d) of the CPR.

Submissions by Counsel for the Applicant

[9] In reply, Counsel for the Applicant submitted that the Applicant's cause of action is not based on contract or tort as provided for under Section 3 of the Limitation Act. Counsel submitted that company resolutions and transfer of share forms are not contracts but are rather a company matter brought under Section 248 of the Companies Act. Counsel argued that in the present case, there is no formal contract between the parties and the acts complained of relating to company resolutions, transfer of shares, appointment of directors, meetings and audited financials, among others, cannot be construed to fall under contract. Counsel also cited the case of *Balwinder Kaur Sandhu v Noble*

Builders (U) Ltd HCT-00-CV-CL-08-2005 wherein it was held that there wass no time limit under either statute or case law for rectification of a company's register. Counsel further submitted that if the claim in the instant action were to fall under contract, it would still have been saved by Section 25 of the Limitation Act owing to the fact that the claim being based on mistake and fraud pointed out against the 2nd Respondent, the time would have started running in 2020 when the Applicant came to learn of the said mistake or fraud.

Determination by the Court

[10] The position of the law is that once a claim is caught up by time limitation, the same is barred by law and cannot be entertained by the court except where the party seeking to institute a claim can take advantage of any of the exceptions set out by the limitation statute. In line with the provision under Order 7 rule 6 of the CPR, the party bringing the action is obliged to show grounds upon which the exemption from the limitation provision is claimed. In the present case, the action by the Applicant is being objected to by the Respondents' Counsel on the ground that while it is based on contract, it was brought after the expiry of six years from the date on which the cause of action arose as provided for under Section 3(1)(a) of the Limitation Act Cap 80. It was argued that even if the Applicant was to rely on any exemption under the limitation statute, none was pleaded in the Motion as is required under the law. For the Applicant, it was argued that the matter is not governed by the law of contract but rather by the provisions of the Companies Act 2012 which are not subject to the highlighted limitation provision.

[11] The crux of the present matter in this regard is whether the Applicant seeks to enforce contractual rights or is seeking remedies specifically provided for under the Companies Act 2012. I note that although the Applicant did not cite the provisions of Sections 248 and 250 of the Companies Act, the Cause is based on remedies provided for thereunder. Section 248 of the Companies Act provides for protection of members of a company against prejudicial conduct. It

provides that a *"member of a company may apply to the court by petition for an order under this part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or some part of its members including at least himself or herself or that any actual or proposed act or omission of the company including an act or omission on its behalf is or would be so prejudicial"*. Section 250 of the Act provides for the range of orders the Court may issue upon such an application.

[12] It is a settled position of the law that citing a wrong law or not citing any law at all does not make an action defective provided the court is clothed with jurisdiction to entertain the matter brought before it. I also note that under Section 248 of the Companies Act, the action is supposed to be brought by way of a petition. However, under Order 38 rule 5 of the CPR, a party with claims akin to those provided for under Section 248 of the Companies Act may bring an action by way of a Notice of Motion. For that reason, a party that opts to move the Court by way of a Notice of Motion cannot be denied the benefit of relying on Section 248 of the Companies Act for purpose of establishing their cause of action.

[13] It is clear to me that the present case by the Applicant is raising complaints over mismanagement of the company affairs and indulging by the 2nd Respondent into conduct allegedly prejudicial to the Applicant. Such is not a claim that can be said to be based in contract. Rather, it is one based on the provisions of the Companies Act and enforcement of the Applicant's rights as a minority of the company in issue. Such a matter is not subject to the provisions of the Limitation Act cited by the Respondents' Counsel. For this reason, the objection based on time limitation is devoid of merit and is overruled.

Issue 2: Whether the application is incompetent and/or premature before the Court?

Submissions by Counsel for the Respondents

[14] It was submitted by Counsel for the Respondents that the instant application was premature before court for having been brought without exhausting the procedure laid down in the company's Articles and the Companies Act. Counsel cited the provisions of Section 138(2) and (4) of the Act which empower a member to requisition for holding of an Annual General Meeting and the Registrar on application of any member of a company to call or direct the calling of the AGM. Counsel submitted that the petition before court does not show that the Registrar of companies was moved or a requisition was made for such a meeting yet matters pertaining to failure to hold company meetings, among others, are filed before the Registrar of Companies for remedies and not the High Court.

[15] Counsel also submitted that that the petitioner was fully settled by a settlement agreement and ceased to be a shareholder in the company. Counsel pointed out that the Applicant intimated to court during cross examination that she got all the properties except one. Counsel argued that the matter before court was compromised in accordance with Order 25 rule 6 of the CPR by way of the settlement agreement dated 24th April 2021. Counsel prayed that the Court finds the application incompetent.

Submissions by Counsel for the Applicant

[16] In reply, Counsel for the Applicant argued that the complaint of the Applicant is far beyond meetings and that Section 142 of the Companies Act allows the Court to order or call for any meeting of the company on its own motion or upon application by any member or director of the Company under Section 248 of the Companies Act. Counsel submitted that the acts of the 2nd Respondent complained of in the petition have been unsatisfactory and

prejudicial to its members and shareholders. Regarding the contention that the matter was compromised by a settlement dated 24th April 2021, Counsel submitted that Order 25 rule 6 CPR deals with consents validated by the court after parties reaching a settlement when there is a pending suit before court and that there has never been any consent endorsed by the Court in the instant case.

Determination by the Court

[17] It ought to be understood from the outset that the justice of this matter is affected by its background facts. The 1st Respondent (the company), although a separate legal entity, is and has always been running as a family affair. By the understanding between the promoters who were also the company's first two directors, namely, the 2nd Respondent and the Applicant, shares were given to 7 children who were of minor age at the time of its incorporation. It is clear that from the early years, the brain behind the company were the two initial directors, also husband and wife. I have seen numerous resolutions attached to the Notice of Motion pertaining to various matters of the company that were signed by the said two directors. Apart from the impugned resolution dated 19th January 2015, which allegedly divested the Applicant of her shares and position of director, the other resolutions are not contested. Taking that in mind, it is clear to me that this Cause cannot be determined in isolation of the relevant background facts.

[18] It is indicated on record that when the parties faced a disagreement over the management of the affairs of the company, and over the position of the Applicant as shareholder and director, the Applicant filed Company Cause No. 008 of 2021 on 24th March 2021. The Applicant also filed a divorce petition in the Family Division of the High Court and a Labour Complaint before the Labour Office of Kampala Capital City Authority (KCCA). During the pendency of the three said legal actions, a meeting was held consisting of the parties, family elders and family members (including the children-shareholders in the

company) in which a settlement was reached for purpose of resolving all the three named legal actions. The settlement was recorded and concluded on 24th April 2021. It was adduced before the Court as Annexure "FF3" and its translation as "FF2" to the affidavit in reply. Consequently, by letter dated 30th April 2021, signed by the present Applicant and the 2nd Respondent, Company Cause No. 008 of 2021 was withdrawn based on the terms of the said settlement. The withdrawal was entered by the Court on 5th May 2021.

[19] It ought to be noted that apart from the step to enter the withdrawal of the Cause, no steps were taken to register the settlement in court for purpose of its enforcement. Nevertheless, no evidence has been adduced by the Applicant that she rescinded the said agreement or settlement in any manner. Similarly, the 2nd Respondent has shown that the said settlement was acted upon and the property listed therein as having been given to the Applicant in full and final settlement of her interest in the company was actually handed over and only one of the properties was pending legal steps to conclude its transfer. The Applicant admitted receipt of some of the properties except one of them. She also indicated some of the properties were pending delivery of duly signed transfer forms.

[20] In my considered view, given that the said settlement, which had the consequence of effecting a withdrawal of a court action, has never been rescinded, that it created rights and obligations, and that it was acted upon to the benefit of one party and the detriment of another, it is a binding contract which cannot just be wished away by one of the parties. The act of filing a different suit in the exact terms as the withdrawn one, without stating anything regarding the fate of the said agreement and without relinquishing the benefit taken from the said agreement; in law amounts to approbation and reprobation and is barred on ground of estoppel.

[21] Under the law, the principle guarding against approbation and reprobation is said to be a species of the doctrine of estoppel. According to **Halsbury's Laws of England, Vol. 47 (2014) [paragraph 312 under Estoppel]**, the principle that a person may not approbate and reprobate seems to be intermediate between estoppel by record and estoppel by representation. The principle expresses two propositions;

(i) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile (spring back or rebound); and

(ii) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.

[22] In *Republic v Institute of Certified Public Secretaries of Kenya, HCMA No. 322 of 2008*, the court cited the statement of **Sir Evershed** in the case of *Banque De Moscou V Kindersley (1950) 2 All ER 549*, who in reference to such conduct stated;

"*This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish Lawyers (frame it) approbating and reprobating or, in the more homely English phrase, blowing hot and cold.*"

[23] Regarding the doctrine of estoppel, the position of the law is that a party is precluded from denying the existence of some state of facts which he or she has formerly admitted. Section 114 of the Evidence Act provides that when one person has, either by word or conduct, intentionally caused a person to believe a thing to be true and to act upon such belief or to alter his position, neither his nor his representative in any suit or proceeding will be allowed to deny the representation so made. In *DFCU Bank Limited v John Magezi [2021] UGCommC*

133, Mubiru J. listed the necessary requirements for the doctrine of estoppel to be established, as follows;

a) The existence or anticipation of some form of legal relationship between the parties;
b) A representation or promise about a past, present or future state of affairs made by one party (the representation must be clear, definite, unambiguous and unequivocal);
c) Reliance by the other party on the promise or representation;
d) Reasonableness;
e) Detriment on the part of the other party; and
f) Conscionability of the transaction.

[24] On the case before me, the above stated settlement by agreement has never been vitiated in any way. The agreement was executed in a language well understood by the Applicant who has since derived benefit out of it. I do not find any ambiguity or unconscionability on the part of the settlement agreement. In my considered opinion, a proper action by the Applicant would have been seeking either to vitiate the agreement, to legally avoid it or to have it enforced. For the Applicant to take benefit, even in part, of the terms of the agreement on the one hand and then opting to disregard the settlement on the other hand, constitutes conduct amounting to approbation and reprobation and is barred on account of estoppel. As such, although for reasons relatively different from those advanced by the Respondents' Counsel, I am in agreement that the present Cause before the Court is incompetent and ought to be dismissed. It follows therefore that the other issues raised in the application remain only academic and are unsustainable before the Court.

[25] Nevertheless, it is clear to me that enforcement of the terms of the settlement agreement will better serve the interest of justice in this matter rather than venturing into the academic questions concerning exclusion of the Applicant in the management of the 1st Respondent seeing that, for all practical

purposes, the Applicant is apparently no longer part of the company. In the circumstances, I accordingly consider the settlement agreement as approved by the Court for enforcement and order that the Respondents ensure full compliance with the terms of the settlement agreement within ninety (90) days from the date of this order; failure of which the Applicant will be at liberty to take out execution proceedings.

[26] In the premises, I make the following orders;

a) The application is dismissed for being incompetent before the Court.

b) The Settlement agreement between the parties dated 24th April 2021 is approved by the Court for enforcement and the Respondents shall ensure full compliance with its terms in favour of the Applicant within ninety (90) days from the date of this order; failure of which, the Applicant shall be at liberty to take out execution proceedings.

c) In the spirit of the settlement, each party shall bear their own costs of these proceedings; except that if execution proceedings are occasioned, the costs of execution shall be met by the Respondents.

It is so ordered.

Dated, signed and delivered by email this 11th day of March, 2024.

Boniface Wamala

JUDGE