IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, J.S.C., ODER, J.S.C., AND KAROKORA, J.S.C.)

CIVIL APPEAL NO.64 OF 1995

BETWEEN

1. SALIM JAMAL
2. SHABIR ABJI :: APPELLANTS

3. ALNOOR JAMAL

AND

1. UGANDA OXYGEN LTD.
2. OXYCO HOLDING LTD. : : : :: : :: : :: :::::::::::::::::::::::::::::::::::: RESPONDENTS
3. B.E. SHAMJI

(Appeal from Judgment and orders of the High Court of Uganda at Kampala (Egonda - Ntende J.) dated 12.12.1995 in H.C.C.S. No. 282 of 1994)

JUDGMENT OF ODER J.S.C.

This appeal arises out of a suit in the High Court in which the appellants were the unsuccessful defendants and the respondents the successful plaintiffs. The appeal is against the judgment and orders of the High Court in that suit in favour of the respondents.

When the appeal was called for hearing, the respondents raised a preliminary objection on a point of law. It was that the appeal had been prematurely made to this Court then it out to have been made first to the Court of Appeal, established by the new Constitution, which one into force on October, 8, 1995. Only after such an appeal had been considered by the Court of Appeal should a further appeal have been filed in

this Court by the unsuccessful party if it so wished.

The objection was opposed by the appellants. After hearing sides, we overruled the objection reserving our reasons for doing so, which are now given in this judgment.

In his submission and reply, Mr. Mubiru - Kalenge, learned counsel for the respondents, contended that under the new Constitution this Court had jurisdiction to hear appeals only from the Court of Appeal. It had no jurisdiction to hear appeals from the High Court. Further, Civil Appeals to this Court are instituted by filing, inter alia, memorandum and records of Appeal under rule 81(1) of the Rules of this Court, and not merely by filing notices of appeal under rule 74(1). The situation was different from that of Criminal Appeals, which were instituted by lodging notices of appeal under rile 58(1) of the Rules. If the legislature had intended that Civil Appeals to this Court should be instituted by filing notices of appeal without more, then it would have said so. The procedure of instituting Civil appeals would have been made identical to that of instituting Criminal appeals.

In the instant case, counsel said, the notice of appeal was filed on 18.4.1995, before the Constitution came into force, but the memorandum and record of appeal were filed on 29.12.1995 after the new Constitution had been promulgated. In view of the provisions of rule 81(1), it was contended; this meant that the appeal was instituted in this Court subsequent to the new Constitution having come into force, by lodging the documents specified in rule 81(1). The appeal, therefore, prematurely came to this Court when he ought to have been filed in the Court of appeal first. It is therefore, incompetent and should be struck out.

Opposing the objection, Mr. Babigumira, learned counsel for the appellants, submitted that under the provisions of Article 280 of the new Constitution this Court had jurisdiction to entertain this appeal as a matter which was pending in this Court, when the Constitution came into force, because the notice of appeal was filed before October, 8, 1995. Counsel contended that for all intents and purposes a notice of appeal filed under rule 74(1) institutes an apea1 in this Court. Rule 81(1) is a follow up from rule 74 (1), because without a notice of appeal an appeal cannot be instituted under Rule 84 (1). So, the institution of an appeal commences with the filing of a notice of appeal. This view is strengthened; it was said, by the definition provisions under rule 2, where “appeal”, in relation to appeals in this Court, is defined as including an intended appeal, and an “appellant” as including an intended appellant.

> Article 280 of the Constitution provides:
>
> “Legal proceedings pending immediately before coming into force of this Constitution before any Court including Civil Proceedings against the Government, may be proceeded with and completed.”

This was a saving provision, intended to save Legal Proceedings which were pending before this and other Courts at the promulgation of the Constitution. The provision meant that legal proceedings so pending should be proceeded with and completed instead of being extinguished and brought to an end at the stage where the new Constitution found them to be when it came into force.

The Constitution came into force on 8.12.1995. Following the promulgation of the Constitution. The Constitution (Consequential Provisions) Statute, 1996 was enacted to impliment the provisions of Article 280. Section 9 of the Statute, which commenced on the same date as the date the Constitution, came into force, states:

> "Any proceedings pending before any Court immediately before the coming into force of the Constitution, and continued under article 280 of the Constitution, may be continued and completed by the Court as composed at the time of the coming into force of the Constitution and shall be subject to the rules of procedure applicable to that Court at that time."

In my view; the operative word in both Article 280 of the Constitution and Section 9 of the Statute is "pending." The Legal Proceedings were saved to be continued with and completed must have been "pending" before the Court concerned.

In giving effect to the Constitutional and statutory Provisions the word "pending" must be given its ordinary meaning. In my view, the definition of that word as made in Black's law Dictionary, 5th Section, satisfies such a requirement. There, "pending" is defined as:

> "Begun, but not yet completed during; before the conclusion of; prior to the completion of; unsettled; undetermined; in the process of settlement or adjustment. Thus action or suit is "pending" from its inception until the rendition of final judgment."

An appeal to this Court is begun by lodging a notice of appeal under rule 74(1). The institution of an appeal as provided for under rule 81(1) is preceded by filing of a

notice of appeal under rule 74(1). In order for an appeal to be instituted under rule 81(1) a notice of appeal must first have been filed.
A notice of appeal is thus a condition precedent to the institution of an appeal. Without a notice of appeal there cannot be an appeal. This means that a notice of appeal is an essential first step in the process of this Court being siezed of an appeal. The first step in the proceedings of an appeal to this Court is not, therefore, the institution of an appeal as appear to be required by rule 81(1)

It appears that the provision of that rule that:

"an appeal shall be instituted by lodging in the appropriate registry,.....:
(a) amorandum of appeal .....;
(b) the record of appeal……;
(c) the prescribed fee; and
(d) security for costs"

is a technical requirement because of the conditions which are specified therein. The meaning of the Phrase "an appeal shall be instituted by lodging in the appropriate registry ....." should, I think, be confined to the context of that rule.

In the instant case, the notice of appeal was lodged on 18.4.1995, and the documents required under rule 81(1) were filed on 29.12.1995. Applying the meaning of the word "pending" to which I have referred, and the effect of the rule 74(1), which I understand to the first essential step in the process of an appeal in this court, I think that this appeal was pending when the Constitution came into force on October 8, 1995. It was one of those legal proceedings for which Article 280 of the 1995 Constitution and Section 9 of the Constitution (Consequential Provisions) Statute, 1996 were intended. For, purposes of these provisions, therefore, the appeal was pending when the constitution came into force.

For the above reasons the Court overruled the respondent's preliminary objection.

I proceed now to consider the merit of the appeal. The background to the appeal is that B.E.Shamji (respondent 3) and, Alnoor Jamal (appellant 3) are business partners

with vast and substantial interests in business concerns in Uganda, Kenya, Tanzania, Zimbabwe, and the United Kingdom. One of those concerns is Oxyco Holding Ltd (OHL) (respondent 2), a company registered on 20.11.1989, and based, in Kenya. OHL was formed for the sole purpose of acquiring a Uganda company, namely, Uganda oxygen Ltd (UOL) (respondent 1) from its former share holder, East African Oxygen Ltd. Shamji and Alnoor are the only shareholders of OHL. The former appears to be the majority shareholder, and Chairman of the Board of Directors, of OHL. The latter and Salim Jamil (appellant 1) also appear to be directors of UOL. Alnoor holds one share and OHL 149,999 shares in UOL.

It was alleged by the respondents in the suit in this case that Salim and Shabir Abji (appellant 2) were not directors of UOL, but the appellants al1eged on the other hand that Salim and Shabir were directors and that Shamji as no longer a director, of UOL. These were, some of the issues to be decided in the suit.

After the formation of OHL, negotiations were carried out with East Africa Oxygen Ltd, the then shareholders of UOL, ending in the transfer of all the shares of UOL to OHL and Alnoor Shamji provided the whole of the purchase price of Kenya Shs.15m/=, out of joint ands of Shamji and & Alnoor. Alnoor was to be in charge of Management of OHL and UOL. This arrangement was similar to arrangements for some of their joint businesses.

Salim, a brother of Alnoor and a director of OHL appears to have taken over the management of UOL as soon as it was taken over by OHL. It appears that he was also in-charge of several other companies in which Alnoor had interests. Salim continued to be in charge of UOL until trouble erupted between Shamji and Alnoor over their joint business interests. Whatever mutual trust and understanding had developed between Shamji and Alnoor since 1986, when they first started transacting business together, evaporated.

In late 1992, and early 1993 Shamji began to interest himself in the affairs of UOH, resulting in a suit being filed against him by the present appellants at Mengo Chief Magistrate’s Court. As a result of that suit an interim injunction was obtained against him, barring him from UOL. Shamji, in turn, instituted a suit, against Alnoor and obtained some injunction order, which was subsequently discharged by the Principal Judge in a revision order dated 23.5.1993. Shamji had in the meantime withdrawn the suit in the Magistrates Court. On 2.5.1994 he and the other respondents instituted the suit giving rise to this appeal.

On 25.5.1994 the Deputy Registrar of the High Court issued an interim injuction barring the appellants from participating in the affairs of UOL. That order became the subject of a. multiplicity of proceedings, judicial and administrative, but it remained standing and was not made an issue in the suit from which this appeal arose.
The gist of the respondents’ allegations and claims as stated in their amended plaint in the suit was that in the early half of 1993 Shamji as a Director, Chairman of the Board of Directors of UOL therein and the Majority shareholder with a derivative interest therein visited the premises of UOL. He discovered that Salim, and Shabir had held themselves out as, and purported to have been appointed, directors of UOL, whereas they had never been so appointed. No company resolutions of UOL had been passed

and registered appointing the two men as directors of UOL or authorising them to open and operate bank accounts in the name of the company. Yet they had done so.

On various dates between 1992 and 1993 all the appellants, namely Salim, Shabir and Alnoor, jointly and severally caused massive financial and other losses UOL by various frauds and fraudulent means for example, opening bank accounts without the UOL's board authority and withdrawing funds therefrom for unspecified purposes; ordering payment of funds and supply of goods to other companies without value or consideration being given and against the interest and benefit of UOL: ordering un recorded disposal of by-products of manufactured products of UOL to the detriment of the company; and ordering selling of the company's goods to other companies at little or no value at all causing a loss to the company. An audit check of UOL's account and the auditor's report revealed massive fraud and irregularities perpetrated by Salim and Shabir. The loss to the company caused by Salim, Shabir and Alnoor amounted to shs. 230.929, 355/=

It was also pleaded in the plaint that it was just, equitable and lawful for the Court to intervene into the dispute between the respondents and the appellants as the same could not be resolve internally or administratively, within the company, because of the fraudulent conduct of the appellants and their actions which were ultra vires several articles of the Articles of Association of UOL, and in contravention of the Articles of Association; the appellants purported to remove Shamji from being a director of UOL without authority, Alnoor purported to appoint Salim and Shabir directors of UOL, and to exercise majority powers of OHL in which Shamji held the majority shares. The plaint then prayed for:

> "(a) a declaration that the 1st and 2nd defendants (Salim and Shabir) are not directors of the 2nd plaintiff (OHL) and resolutions passed by and with any of them are null and void.

(b) A permanent injuction restraining the 1st, 2nd and 3rd defendants (Salim, Shabir and Alnoor) from interfering, in the business of the 1st plaintiff (UOL), and from operating bank accounts thereof' without proper authority.

(c) An order far an account to be taken in respect of the 1st plaintiff's (UOL) affairs from the date of filing the suit until judgment.

(d) An order that the 1st, 2nd and 3rd defendants (Salim, Shabir, and Alnoor) account for shs. 230,929,355/= which was fraudulently removed from the 1st plaintiff (UOL) and any other funds found misappropriated

(e) Costs of the suit

(f) Any other further relief that the Court may deem fit.

In their amended written statement of defence, the appellants raised the following preliminary objections in paragraph 2 thereof:

> "(a) neither the 1st nor 2nd plaintiffs (UOL and OHL) authorised institution of
>
> the suit or instructed M/S Shonubi, Musoke & Co. Advocates at all .....:
> (b) the third and the only actual plaintiff never had and has hitherto no locus standi to sustain a suit in the affairs of the purported 1st plaintiff (UOL) the suit matter herein . . . .
> (c) this honorable court has no jurisdiction in such internal matters of a private company as validity of appointment of directors; internal management, its banking, audit etc. which are the subject herein and being matters wherein Board and company meetings can provide necessary remedies.
> (d) this honourable Court is barred by Section 6 of the Civil Procedure Act from proceeding with the trial of this suit or proceedings (including any interlocutory proceedings there under) because the matters in issue in this suit, namely, appointment of Salim Jamal and Shabir Abji as directors of Uganda Oxygen Ltd. mismanagement and, or loss and failure to account for the funds of the same company are also directly and substantially in, issue in Mengo Chief Magistrate's Court Civil suit No. 483 of 1993 between the purported 2nd and 3rd plaintiffs and the third defendant litigating under the same title and the
> said suit is pending final disposal
> (e) both the purported 2nd and 3rd plaintiffs are barred by S.7 of the Civil Procedure Act, Cap 65, from bringing this suit because High Court Civil Revision Cause No. 1 of 1994 finally decided that they cannot sue in the same matter which this suit is again raising".

The rest of the averments in the w.s.d. in essence, denied the allegations of fraud and others made in the plaint; contended that Shamji was properly removed as a director

of UOL, and that Salim and Shabir were properly appointed as directors of UOL by valid resolutions, and in accordance with the Articles of Associations of the Company. The w.s.d. then prayed for dismissal of the suit with costs.
At the commencement of the trial the appellants' learned counsel then, Mr. Muhanguzi, reserved the preliminary points of law, saying:

> "I would like to reserve points of preliminary objections until after all evidence has been called so that they are argued at the stage of submissions. Though they are largely matters of law, they might entail a necessity to call evidence. I am ready to proceed."

The trial of the suit then Proceeded on that basis, after the framing of 10 issues agreed to by both the parties. The issues were:

1. Whether the first and second defendants are directors of the first plaintiff?

2. If issue 1 is answered in the negative whether their actions were illegal?

3. Whether the third plaintiff was illegally being excluded as a director and shareholder and whether the purported actions of the defendants to remove the third plaintiff between 23rd and 25th May, 1994 were valid acts?

4. Whether the third plaintiff is the majority shareholder in the second plaintiff?

5. Whether the 1st, 2nd, and 3rd defendants fraudulently caused loss to the first defendant company?

6. Whether the defendants' acts and omissions were ultra vires to the memorandum and Articles of Association?

7. What amount of loss if any was caused in the first plaintiff by the defendants?

8. Whether the defendants jointly and severally are liable to account for Ug. shs. 230,929,305/=?

9. Whether the circumstances of this case warrant count's intervention?

10. Whether the acts of the defendants complained of by the plaintiff were bona fide?

The learned trial judge in a lengthy and carefully considered judgment made findings on the issues as framed, deferring his decisions on the preliminary points raised in the w .s .d.., which he dealt with subsequently. He answered the 1st issue in the negative, saying that appellant 1 Salim) and the appellant 2 (Shabir) were not directors of the respondent 1 (UOL). He found that by a unanimous agreement between them Shamji (respondent 3) and Alnoor (appellant 3) there were only two directors of U0L. These were Shamji and Alnoor.

In answer to the 2nd issue the learned trial judge found that as between Salim and Shabir on the one hand and UOL on the other, the acts of the two men)while purporting to be directors of that company) were null and void.

Regarding the 3rd issue**,** the learned trial judge found that the purported dismissal of Shamji (respondent 1) as a director of UOL was void and of no effect, just as all the other acts of the appellants as purported directors of the, company from 24.8.199 , when Shamji and Alnoor unanimously agreed to be the directors of UOL, were void.

The learned trial judge declined to answer the 4th issue on the grounds that it was a subject matter of a contested suit rending in the High Court of Kenya between Shamji (respondent 3) and Alnoor (appellant 3). He observed, however that in the Kenya suit, a temporary injunction had been issued by a judge of that court (produced at the trial of the suit in the instant case as exhibit 96) indicates that Shamji contends that he is the shareholder of 55%, and Alnoor contends that he is the holder of 50% of shares in OHL (respondent 2).

On the 5th issue concerning fraud, the learned trial judge's answer was in the positive. He found that shs. 193,500,000/= was fraudulently paid from UOL to M/s Nakiwa Enterprises and M/S Frester & Company for no value received; that payments to these two firms was a fraudulent transfer of funds authorised by Salim (appellant 1) from the funds of UOL to persons outside the company who were not entitled to receive the funds in any way; that UOL (appellant 1) lost the sums of shs. 234,100,000/= and shs. 65,000,000/= paid outside Uganda through Red Fox Forex Bureau due to a fraudulent design by Salim (appellant 1) and executed at his behest by Ravindra Singh Chauhan (PW5).

Regarding the 6th issue, the acts complained of as having been ultra varies the Articles and Memorandum of UOL (1st respondent) were contained in paragraph 10 of the plaint. These were:

> "(a) opening accounts without Board sanctions or duly passed resolution and withdrawing fluids therefrom, for unspecified purposes.
> (b) ordering the payment of funds and supply of goods to other companies without value or consideration being when and against the interest and benefit of the first defendant.
> (c) ordering the unrecorded disposal by-products or products manufactured by the 1st defendant.
> (d) Ordering selling of the 1st plaintiff company's goods to other companies at little or no value and a loss to the 1st plaintiff."

In his answer to the 6th issue relating to these complaints the learned trial judge said that in his view, the acts complained of were not ultra varies Articles and Memorandum of Association, but were acts void of authority as these who purported to do them did not hold the office whose authority they had purported to he exercising.

Regarding the 7th issue the learned trial judge answered that no witness for the respondents was able to estimate the total loss suffered by UOL (respondent 1). Nor was he (the learned judge) in a position to do so on the evidence before him, save for the findings he had made under the 5th issue.

On the 8th issue the learned trial judge said that the respondents had relied on audit Report (exhibit 2.6) of Tharkara (PW2) for claiming that shs. 230,929,355/= had been misappropriated from UOL (respondent 1). But on the evidence before him, the learned trial judge said that the transaction was reversed soon after PW2 took over as caretaker of UOL and the company regained that stock of goods in its Book Accounts. All along, the goods had remained in UOL's premises. If the appellants were to account for anything, it would not be shs. 230,929,355/=, but the loss incurred by UOL (respondent 1) as a result of Salim's (appellant 1's) instructions and the transfer of "Advani" Stock to Super Products Ltd. However, no evidence had been adduced on that aspect and no award could be made in the circumstances.

The learned trial judge next answered the 10th issue, namely, whether the acts of the defendants were bona fide. He said that in the light of his findings on the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th issues, it was not necessary or useful to consider the 10th issue at all.

Finally, the learned trial judge dealt with the 9th issue, namely, whether the circumstances of the case warranted Court's intervention. Relying on many decided cases and other authorities in this and other jurisdictions, the learned trial judge concluded that Shamji (respondent 3) as Director of UOL (respondent 1) could challenge hi co-directors for excluding him from the Board and affairs of the company as happened in this case. Shamji had been systematically excluded from affairs of UOL (respondent 1). There was no evidence that he was invited to any meeting of the Board through the defendants especially, Salim (appellant 1) and Shabir (appellant 2), who purported to hold various Board meetings of UOL (respondent 1) all over East Africa. Shamji (respondent 3) was also entitled to say that not only the persons excluding him were doing so wrongfully but also that they were not entitled to sit on the Board if that be the case.

The Court would issue an order restraining them from doing so until proper appointment was made.

The learned trial judge then found that Shamji (appellant 3) was entitled to bring the action he had done in his own right for his exclusion from the Board of Directors and the consequences of such exclusion. Shamji (appellant 1) was also entitled to declarations that he was a member of the Board of Directors, and that Salim and Shabir (appellants 1 and 2 respectively) were not directors of UOL (appellant 1), and that the resolutions purported to be passed by Salim and Shabir or with any of then in that regard were void.

The learned trial judge then next dealt with the question whether Shamji (respondent 1) as a director of UOL could maintain an action for wrongs done to UOL and perhaps to the derivative interest of OHL (appellant 2). He held the view that as the Board of OHL (respondent 2) was controlled by Salim (appellant 1) and Alnoor (appellant 3) who were responsible for the wrongs committed against UOL and OHL's (respondent 2's) derivative interest in UOL (respondent 1) OHL (respondent 2) could maintain a

derivative action to protect its interest as a shareholder UOL (respondent 1) in view of the extensive fraud that had been committed against UOL (respondent 1) by Salim (appellant 1). However, HOL (respondent) could not properly maintain an action against the appellants because the appellants responsible for the fraud were in control of the Board of Directors of OHL (respondent 2).

The learned trial judge also said that ordinarily because of the concept of separate personality between a company and its shareholders Shamji (respondent 3) would be helpless as he cannot maintain a derivative action in UOL (respondent 1) for he cannot maintain a derivative action in UOI (respondent 1) for he was not a shareholder in UOL. But an exception to the concept of separate corporate personality was that the corporate veil would be lifted where it was shown, as in the instant case, that fraud had been committed. The corporate veil would be lifted to ensure that justice was done. The Court should not look helplessly in the face of such fraud. He then found that in the light of all the facts in this case, particularly the fraud committed by Salim (appellant 1), a nominee and agent and brother of Alnoor, (respondent 3) could maintain the action he had brought in order to protect his substantial holding in OHL (respondent 2), which virtually owned UOL (respondent 1). Short of allowing the action, Shamji (respondent 3) would have no remedy against the fraudulent acts of Salim (appellant 1) in particular who was supported and protected by the Alnoor (appellant 3)

The learned trial judge, however, found that the actions instituted by UOL (respondent 1) and OHI (respondent 2) had been done without authorities of the two companies and he struck the action out.

He then expressed the view that Shamji (respondent 3) should have sued not only the three appellants, but also joined UOL (respondent 1) in the suit in order to enable the court to make trial orders that bind all the parties involved in order to avoid a multiplicity of suits and to bring to an end to litigation covering substantially the same matters. The learned trial judge then concluded:

> "In the circumstances of this case, I am reluctantly constrained to an unusual step. Using the inherent jurisdiction of this court, I add Uganda Oxygen Ltd. as the fourth defendant in this suit under Order I Rule 10(2) of the Civil Procedure Rules. I order defendant No. 1 to pay to defendant No.4 the sums herein adjudged as due to defendant No.1 on account of defendant's fraudulent acts in the affairs of defendant No.4. Defendant No.1 and 2 are hereby restrained from purporting to be directors of defendant No.4, at least until a proper and valid appointment. The resolutions passed by the defendants No.1 and No.2 and with any of them are void, The suit by plaintiff No.3 is therefore allowed with costs."

"Hence this appeal."

Six grounds of appeal set out in the memorandum of appeal. They are to the effect that.

l. The learned trial judge erred in law and fact in misdirecting the separate corporate existance of plaintiffs 1 and 2

2. The learned trial judge erred in law and fact in holding that plaintiff No. 3 and Defendant No. 3 had by corporators/shareholders unanimous agreement appointed themselves the only Directors of plaintiff No.1 when plaintiff No .3 was not corporator/shareholder of plaintiff No.1.

3. The learned trial judge erred in law when he prematurely held defendant No.1 liable to plaintiff No.1 for shs. 193,500,000/= and interest plaintiff No .1 paid on the overdrafts before considering the preliminary objection that the suit of plaintiff No .1 was not maintainable by reason of having been instituted by counsel who had no instructions.

4. The learned trial judge erred in law and fact when he held that plaintiff No .3 could maintain derivative separate or any action at all against the defendants especially after striking out plaintiffs' No.1 and No.2 from the suit.

5. In the circumstances of this case, the learned trial judge erred in law and fact when he substituted plaintiff No.1 as defendant No.4 after striking it from suit and proceeded to deliver judgment.

6. The learned trial judge erred in law and in fact when he awarded plaintiff No.1 special damages and made findings of fraud which were based on pleadings that lie had struck off the memorandum of appeal then prayed that:

(a) the appeal be appealed.

(b) the judgment of the lower court be set aside end substituted with an order dismissing the suit.

(c) the order of the trial court substituting plaintiff No.1 as defendant No.4 be set aside

(d) the appellants pay the costs on appeal and in the court below.

(e) interest at court rate from the date of judgment till payment in full.

(f) Any further alternative relief as the Hon. Court deems fit and just."

In his submission under grounds 1 and 2, Mr. Blaze Babigumira, learned counsel for the appellants and said that the appellants were challenging the learned trial judge's finding that Shamji (respondent) was appointed a director of UOT (respondent 1). He contended that such purported appointment of Shamji as a director of UOL, was not done in accordance with the provisions of Sections 184 and 185 of the companies Act (Cap.85). The shareholders of UOL did not appoint Shamji by a resolution in a meeting of the shareholders of UOL or otherwise. The Purported unanimous agreement between Shamji and Alnoor did not amount to such a resolution, because Shamji was not a shareholder of UOL. There were only two shareholders of UOL, namely OHL (respondent 2) and Alnoor (appellant 3).
Shamji was not one of then. As such, he had no authority to it in a meeting of shareholders of UOL to elect the company's directors.

The learned counsel criticised the learned trial judge for relying on the case of Parker & Cooper Ltd V. Reading (1926) 1. ch 975 for deciding that Shamji was properly appointed a director of UOL by written agreement between himself (Shamji) and Alnoor. The learned trial judge was also in error because OHL, in which Shamji held shares and of which UOL was a wholly owned subsidiary, did not appoint Shamji a director of UOL by duly authorized representatives. There was no evidence that OHL either held a meeting or unanimously appointed or authorised Shamji to attend a meeting of UOL with Alnoor to appoint directors of UOL.

In deciding that Shamji was appointed a director of UOL, it was contended, it appears that the learned trial judge disregard or lost sight of the corporate existance of UOL and OHL.

Under grounds 1 and 2 the learned counsel finally submitted that it was not possible for Shamji, not being a shareholder of UOL, and in the absence of evidence that he had authority to represent OHL, to meet or agree with Alnoor as a shareholder of

UOL to appoint its directors. As a result, it was said, Shamji was never appointed a director of UOL, contrary to what was held by the learned trial judge.

In reply, Mr. Mubiru Kalenge, learned counsel for the respondents, submitted that the circumstances of OHL (respondent 2) warranted lifting the corporate veil because of the massive fraud which had been committed against it by Salim (appellant 1) who was a mere nominee of Alnoor. The learned counsel contended that the learned trial judge finding that such a fraud had been committed against UOL was neither disputed nor challenged by the appellants; that as the Board of Directors of UOL, comprising Shamji and Alnoor was unable to meet, and was helpless to take any action about the fraud due to the animosity between them that as the fraud was being perpetrated by Salim whose principal was Alnoor, and since the Board of UOL was unable or unwilling to institute legal action in the names of UOL, Shamji as a member of UOL was entitled to step in and take the necessary action as, in fact he did.

The learned counsel further contended that just as in the case of UOL, where the organs of the company could not function due to the animosity between two of its three directors, so was the situation in OHL. Its two directors, Alnoor and Shamji, who were also directors UOL, could not meet after OHL had been formed, for the same reason. In the circumstances, it was contended, the learned trial judge had to go round the concept of corporate personality and lift the corporate veil in order to meet the ends of justice.

To my mind, there is no doubt that ever since the famous case of Salomon V. Salomon & Co. (1897) A.C, 22. Courts have rigidly applied the principle of corporate personality. But exceptions to the principle have also been made where it is too flagrantly opposed to justice or convenience or in the interest of Revenue collection. In such exceptional cases, the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by holding and subsidiary companies.

One of the early cases in which the corporate veil was lifted is Gilford Motor Company Limited V Horne (1933), ch. 935. In that case one Edward B. Horne had been employed as the Managing Director of the appellant company, Gilford Motor Company Ltd. on a tern of six years. The company's business was that it assembled and sold Motor cars called Guildford Motor cars and supplied spare parts of, and serviced, such cars. Clause 9 of Horne's terms of employment as Managing Director provided:

> "The Managing Director shall not at any time While he shall hold the office of Managing Director or afterwards solicit, interfere with or endeavor to entice away from the company any person, firm or company who at any time during or at the date of the determination of the employment of the managing director were customers of or in the habit of dealing with the company and also will

> not at any time within five years from the determination of this agreement either solely or jointly with or as agent of any other person, firm or company, be engaged, directly or indirectly, in any business similar to that of the company within a radius of three miles from any premises wherein the business of the company shall for the time being be carried on."

Three years later, and by mutual agreement between then, Horne and the company terminated Horne's employment by him resigning. After the resignation took effect, Horne established and carried on at his borne a business of supplying spare parts and service for all models of the Guildford and other vehicle, under the name "EB. Horne." In 1931 a Limited Company under the title of "J .M. Horne" was incorporated as a private company. It's primary objects were to carry on the business of factors agents and distributors and vendors of accessories and spare parts of all classes of vehicles etc. "J.M." were the initials of Mrs. Horne. The directors were Mrs. Jessie May Horne, who owned 101 of the 500 shares of the new company and. another person, who owned 101 of the shares.

The judge who tried the case found that:-

> "The defendant company is a company which, on the evidence before me, is obviously carried wholly by the defendant E.B. Horne ... ... As one of the witnesses said in the witness box, in all dealings which he had had with the defendant company the "boss" or the "governor," whichever term is the appropriate one was the defendant E.B. Horne and I have not any doubt on the evidence I have had before me that the defendant company was the channel through which the defendant Horne was carrying on his business.
> Of course, in law, the defendant company is a separate entity from the defendant Horne, but I cannot help feeling quite convinced that at any rate that one of the reasons for the creation of that company was the fear of Mr. Horne that he might be in breaches of the covenant in carrying out the business, as, for instance, in sending out circulars as he was doing and that he might possibly avoid that liability if he did it through the defendant company.

There is no doubt that the defendant company sent out circulars to persons who were at the crucial time customers of the plaintiff company."

Though the trial judge refused to grant an injuction in favour of the plaintiff for breach by the defendant E.B. Horne of the covenant in clause 9, the court of Appeal granted the injuction against Horne. Hanworth, M.R., held that the company was a mere cloak or sham. It was a mere device for enabling E.B. Horne to continue to commit breaches of clause 9. Under the circumstances the injuction must go against E.B. Horne and J.M. Home Ltd.

Agreeing with Lord Hanworth M.R., Lawrence L.J. said:

> "Secondly as to the question whether the injuction ought to extend to restraining the defendant company then the soliciting of the plaintiff's customers, I am of the opinion that the evidence amply justified the learned judge in drawing the inference that the company was a mere cloak or sham for the purpose of enabling the defendant to commit a breach of his covenant against solicitation ..... In these circumstances I agree with the finding of the learned judge that the defendant company was a mere channel used by the defendant Horne for the purpose of enabling him, for his own benefit, to obtain advantage of customers of the plaintiff company and that therefore the defendant company ought to be restrained as well as the defendant Horne."

Romer L.J. came to the same conclusion,

The case, I think, is an important exception to the principle enunciated in Salomon (supra) for the following reasons. First, it ignored the separate corporate personality of the defendant company in order to stop LB. Rome using it to continue in breach of his covenants, and secondly it held the defendant company bound by a. Covenant to which it was not a party, a covenant previously binding the promoter of the new

company.

In the case of Pioneer laundry and Dry Cleaners Ltd. V. Minister of National Revenue (1939) 4 All. ER the principle of corporate personality was up held. It was a case of Revenue in Canada. The Privy Council held that the Minister of National Revenue was not entitled, in the absence of fraud or improper conduct, to disregard the separate legal existance of the appellant company and to inquire as to who its shareholders were and its relation to its predecessors. The tax payer was the company and not its shareholders. This would seem to imply that fraud and improper conduct in the company would justify disregard of the separate existance of the company.

Moir V. Wallersteiner (1975) 1 All. E.R. 849 illustrates how the law can go behind the corporate personality of a company to the individual member to allow the member to bring a derivative action. Derivative action is a suit by a shareholder to enforce a corporate cause of action. The corporation is a necessary part and the relief which is granted is a judgement against a third party in favour of the corporation. An action is derivative when the action is based upon a primary right of the corporation but is asserted on its behalf by the shareholder because of the corporation's failure, deliberately or otherwise, to act upon the primary right.

The brief facts in Wallersteiner (supra) as far as they are relevant to our case are these: The plaintiff was a minority shareholder in a public company, H.B. Ltd; B & Co. Ltd which was a subsidiary of H.B.Ltd. The defendant was a majority shareholder in HB Ltd. and was a director of both companies. The plaintiff discovered that the defendant had been guilty of misconduct in managing the affairs of both companies in that inter alia, he had procured loans from each company by means of a transaction ("the circular cheque transaction") by which moneys of the companies had been applied for the defendant's benefit to enable him purchase shares in H.B. Ltd. The Board of Trade refused to hold an inquiry into the matter and the plaintiff was prevented from raising the matter at shareholders' meetings. The only way, therefore, in which the plaintiff could get redress for the wrongs done to the companies, was by bringing action in the courts. The defendant brought an action for libel against the plaintiff, in respect of statements made by the plaintiff concerning the defendant's conduct of the company's affairs. By way of counter claim to that action, the plaintiff sought declarations that the defendant was guilty of wrongs done to both companies and orders that the defendant pay specified sum to the companies including a sum in respect of the circular cheque transaction. In the counter-claim the plaintiff sued in his own name and made H.B. Ltd. and. B & Co. Ltd. parties to the counterclaim. In default of delivery of a defence to the plaintiff's counterclaim the plaintiff obtained from the Court of appeal final judgment in the counter claim against the defendant for £ 234,773 with interest" in respect of the circular cheque transaction and interlocutory judgment on the counter claim for damages to be assessed by a judge in respect of another transaction. It was held by the Court of Appeal, inter alia, that:

(i) The court had power under its equitable jurisdiction to award interest wherever a trustee, or any one else in fiduciary position, such as a director of a company, misused money which he controlled in his fiduciary capacity for his own benefit.

(ii) It was open to the court in a minority shareholder's action to order that the company should indemnify the plaintiff against the costs incurred in the action: Where the wrongdoers themselves controlled the company a minority shareholder's action brought to obtain redress, whether brought in the plaintiff's own name or on behalf of himself and the other minority shareholders, and even if brought without the company's authority, Was in substance a representative action on behalf of the company to obtain redress for the wrongs done to the company. Accordingly, provided that it was reasonable and prudent in the company's interest for the plaintiff to bring the action and it was brought by him in good faith it was a proper exercise of judicial discretion or (par Lord Denning MR.) in accordance with the principles of equity, that court should order the company to pay the plaintiff's costs down to judgment whether the action succeeded or not..

On the derivative action brought by the plaintiff in that case Lord Denning MR said at page 857:

> "It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate and distinct from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in Foss V. Harbottle (1843) 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs - by directors who hold majority of the shares - who then can sue for damages? Those directors themselves are the wrong doers. If a board meeting is held they will not authorise proceedings to be taken by the company against themselves.
>
> If a general meeting is called they will vote down any suggestion that the company should sue themselves. Yet the company is the one person who is

damnified.

It is the person who should sue otherwise the law would fail in its purpose; injustice would be done without redress. In Foss V. Harbottle (supra) Wigram V-C, saw the problem and. suggested a solution. He thought the company could sue in the name of someone who the law bas appointed to its representative.

A suit could be brought by individual corporators in their private characters, and asking in such character the protection of rights to which in their corporate character they were entitled.
This suggestion found fufilment in the Merry Weather case (1867) LR 5 EQ. 464n. which came before Wood V-G on two occasions.
It was accepted in that case that the minority shareholders might file a bill asking leave to use the name of the company. If they showed reasonable ground for charging the directors with fraud, the court would appoint the minority shareholders as the representative of the company to bring
proceedings in the name of the company against the wrongdoing directors. By that means the company would sue in its own name for the wrong
done to it. That would be, however, a circuitous course as Lord Hatherley L.C. said himself, at any rate in cases where the fraud itself could be proved on the initial application.

To avoid that circuity, Lord Hatherley L.C. held that the minority shareholders themselves could bring an action in their own names (but in truth on behalf of the company) against the wrong doing directors for the damage done to them by the directors, provided always that it was impossible to get the company itself to sue them. He ordered the fraudulent directors in that case to repay the sums to the company ..... stripped of mere proceeding the principle is that, where the wrong doers themselves control the company, an action can be brought on behalf of the company by the minority shareholders, on the footing that they are its representatives, to obtain redress on its behalf."

In The Principles of Modern Company Law. 3rd Edition. at page 587, the right of a shareholder to bring a derivative action as discussed by the learned author 1.0. Gower is in line with the decision in Moir V Wallersteiner (supra). The learned author explains the difference between two types of action which may be bought by or on behalf of the company. One is the type of case of which Foss V Harbottle (supra) is an example, where a wrong has been done to a company. An action is brought to restrain its continuance, or to recover the company's property, or damages, or compensation. There, the company plaintiff is the true plaintiff. The other is where the dispute is not an internal one between those interested in the company, but are between the company

on the one hand and third parties on the other, and. it makes no difference in principle that the third parties happen to be the directors or controlling shareholders of the company. If any one other than the company is allowed to appear as plaintiff it is an anomaly, allowed only as a matter of grace to prevent a serious wrong from going unremedied, because the wrong doers control the company. The learned author then states on the same page:

> "Where such an action is allowed, the member is not really suing on his own behalf nor on behalf of the members generally, but on behalf of the company itself ..... The plaintiff shareholder is not acting as a representative of the other shareholders but as a representative of the company.....

The English Courts have recognised that a derivative action may sometimes be brought by an individual member where it is impracticable for the company to do so. The best illustration of this recognition is afforded by the proceedings arising out of the fraudulent promotion of the east Pant Du Lead Mining Co. The owners of a derelict mine formed a company, of which they became directors and shareholders, and sold the mine to it for a substantial sum. The outside shareholders sought to relieve the company of the purchase and to recover the money paid to the sellers. An action was commenced in the name of the company, but was dismissed when the miscreants secured, through the exercise of their votes, the passing of a resolution directing that the company should discontinue the proceedings in the case of East Pant Du Lead Mining Co. V Merry weather (1864)2 H. & M. 254. A shareholder then started a new action in the name of himself and all other members except the fraudulent directors.
It was held that not-with-standing Foss V Harbottle (supra) the court should allow an action framed in this way, since otherwise it would be inpossib1e to set aside the fraud. Atwool V Merry Weather (1867) L.R 5 Eq 464n."

Further, according to the learned author on page 588 of L.C.B. Gower's Principles of Modern Gower's Principles of Company Law 3rd, Edn.

"(i) Not every wrong to the company will justify a derivative action to remedy it. Normally the wrong complained of must be such as to involve fraud on the minority, which could not be validly waived by the company in a general meeting, such conduct include**:**

(a) Expropriation of the property of the company or, in some circumstances, that of the minority;

(b) Breach of the director's duties of subjective good faith and

(c) Voting for company resolutions not bonafide in the interests of the company.

(ii) It must be shown that the alleged wrong doers control the company.

(iii) The company must be a defendant in the action; in effect, a nominal defendant. As already pointed out the company is the true plaintiff, and if a money judgment is recovered against the true defendants, the wrong doing directors or other controllers, this will be in favour of the company and not in favour of the individual shareholder who is a nominal plaintiff. So long as the company is a party, judgment can be given in its favour and any decision in the case becomes res judicata. So far as the company is concerned.

(iv) The shareholder must sue in a representative capacity or behalf of himself and all the other members other than the real defendants. On the face of it this seems anomalous. As already pointed out the plaintiff is not really suing on behalf of the shareholders but on behalf of the company, But the requirement fulfills a useful purpose, for it ensures that all the other shareholders are also bound by the result of the action. If, therefore, judgment is given for the defendants a second derivative action cannot be brought by another member, for the matter will be res judicata as regard all of them"

Two recent decisions in our jurisdiction will, I think, suffice to illustrate that courts will go behind the corporate veil in the interest of justice, on grounds of fraud, to enforce compliance with contractual obligations or to enforce economic realities obtaining under a holding company and its subsidiaries. The first is that of National Enterprises Corporation & Others V. Nile Bank Ltd: Civil Appeal No. 17 of 1994 (SCU) (unreported). The brief facts were that the 1st appellant, National enterprise Corporation (NEC) was a body incorporated by an ordinance in 1989. It established a number of companies in which it had majority shareholding. They were the 2nd appellant NEC Trading Company Ltd (NECTCL) and the 3rd appellant NEC Mobility Ltd. (NECML). It had another subsidiary called NEC Bakery and Confectionary Limited. (NECBCL) which was incorporated in October, 1990. The respondent was a

limited liability carrying on business of banking in Uganda. The dispute in that case arose as a result of the respondent's seizure of three motor vehicles of the appellants following failure to repay an initial loan of shs. 16 million which had risen to shs. 160 million obtained by the 1st appellant on behalf of NECBCL. When NEC wanted to establish NECBCL as a subsidiary one Dr. Duncan T. Kafero, who later became General Manager of NECBCL, wrote to the respondent bank applying for an overdraft facility of shs. 16 million "as working capital base to enable them start production of bread at their newly completed modern bakery at Kawempe."

On 23.2.90 the Board of Directors of the 1st appellant passed a resolution which authorized NEC to borrow shs. 16 million from the respondent bank from the account of NEC Bakery to be applied towards preliminary capital arid recurrent expenditure of the newly established NEC Bakery in order to facilitate prompt operation of the factory.

On 22.10.1990 the 1st appellant executed a debenture in favour of the respondent bank to secure advances to NEC Bakery by allowing the NEC Bakery to overdraw its current account with the bank or for granting to it financial accommodation from time to time to an aggregate amount not exceeding shs. 50 million or such lower limit as might for time being be fixed by the bank. The debenture charged the company's fixed assets and floating assets as security and provided for remedies in the event of default.

All this was done before NECBCL was incorporated, which was done on 24.10.1990.

Subsequently the respondent bank opened a loan account in the name of NECBCL. The account became over-drawn by shs. 160 million. After repeated demands for payment had been made without success, the respondent on 19.7.1993, seized two lorries, one of which was registered in the names of the 1st appellant said the 2nd appellant.

On 21.7.93, in the exercise of its rights under the debenture, the respondent advertised for sale the two lorries and two other vehicles registered in the names of the 1st appellant. The lorries which had been seized and the vehicles advertised for sale were in possession of the 3rd appellant by powers of attorney executed by the 1st and 2nd appellant on 6.12.1993. The 3rd appellant kept away the three vehicles threatened with seizure. But they were subsequently seized, nonetheless.

The appellants therefore filed an action for wrongful seizure and detention of their

vehicles, claiming their recovery or market value, and damages for loss of use of the vehicles and defamation arising out of the advertisement. The action was dismissed. In order to hold that the debenture was enforceable, between the respondent and the 1st appellant the learned judge lifted the veil of NECBCL and held, in effect that that was one of the cases where the principle of corporate personality should not be used to defeat justice.

The appellant's appeal to this court was dismissed. One of the grounds of appeal was that the trial judge erred in law and on the facts in making erroneous and ambiguous findings regarding the principle of lifting the veil.

This Court (as per Odoki J.S.C) noted with approval the following passage in the learned trial Principal Judge's judgment:

> "I think that this is the right situation n which an exception to Salomon V Salomon (1897) AC 22 would be applied. It is clear from the evidence that the 1st plaintiff in this case owns 98% in the 2nd plaintiff and about that percentage in NEC Bakery and Confectional Ltd. However although the courts are in general precluded by the Salomon case from treating a company as "alias
> agent, trustee or nominees" of its members, they will nevertheless do so if corporate personality is being blatantly used as a cloak for fraud or improper conduct. There is a dictum which has been so influential in the United States, for instance that when the notion of legal entity is used to defeat public convenience, Justify wrong, protect fraud or defend crime, the law will regard the corporation as an association of persons. Courts will also do so where agency can be established in fact, either in respect of particular transactions or even as regards the whole of company's business. They are more ready to hold
>
> that agency is established where the controlling shareholder is another company; indeed there is evidence of a general tendency to ignore the separate legal entities of various companies within a group and to look instead at the economic entity of the whole group. See L.C.B. Gower, Modern Company Law 2nd Edition at page 208."

This court agreed with the above passage of the judgment in question said went on to say that the principle stated therein had received approval in Canada where they were applied in Outario Court of Appeal in Monley Inc et al V Fallis (1977) 38 PR (1980-84) LRC Comm. at P.744, where Lacourciere is quoted to have said:

> "This is a case where the court is not precluded from lifting the corporate veil, and in effect, regarding the closely related respondent Companies as essentially one trading enterprise in the interests of the affiliated companies in circumstance where the refusal to do so would allow the appellant to escape the consequences of his breach of a fiduciary trust. Cases where this derogation of Salomon's case (Salomon V. Salomon and Co. (1897) AC 22), is permitted are collected in Professor Gower's modern Company law, 2nd Ed. 1957 particularly in C. 10 entitled lifting the veil."

The other relevant local case is that of Fam International Limited & Another V. Mohamed Halid El. Fatih, Civil Appeal No. 16/93, (SCU) (unreported). In that case the appellants brought an action against the respondent for a permanent injuction to restrain the respondent, his agents, or servants from holding out as a director of the 1st appellant or disclosing any of the company's secrets or processes the knowledge of which he obtained while in the appellant's employment. It was alleged in the plaint that the respondent had been employed on a casual basis from October 1988 till his dismissal in June, 1991 for gross misconduct and fraud. Some of the alleged frauds were that the respondent caused to be incorporated a sham private limited company called "Ayfa Trade and Bird Breeding Ltd." and later fraudulently attempted to change its name to "Fam International limited," then already in existance under the directorship of the 2nd appellant and one other, by uttering a false certificate of incorporation improperly obtained and a special resolution purportedly signed by the directors of the sham company, contrary to section 2 of the Companies Act, with the intention of defrauding the 1st appellant.

In his written statement of defence, the respondent denied the allegations made by the appellants and contended that he was an original shareholder and director of Ayfa Trade and Birds Breeding Ltd which on 7.7 .1988 lawfully changed its name to Fam International Ltd. He also pleaded a counter claim in which he prayed for; inter alia, a declaration that the 1st appellant was illegally and fraudulently incorporated.

Two of the six issues framed at the hearing of the case were, 2nd whether on 12.6.1988 the respondent fraudulently caused incorporation of Ayfa Trade and Birds Breeding Ltd. and on 7.9.1991, he fraudulently attempted to change it to Fam International Ltd. and, 3rd whether there was fraud behind the incorporation and backdating to 5.9.1988 of the 1st appellant.

On the basis of the evidence accepted by him, the learned judge answered the 2nd issue in the negative, holding that the appellant had failed to prove the allegations in the plaint that on 12.6.1988 the respondent fraudulently caused the incorporation of Ayfa Trade & Bird Breeding Ltd or he fraudulently attempted to change it to Fam International on 7.9.1988. The 3rd issue was answered in the affirmative, the learned judge holding that the 1st appellant was fraudulently incorporated through backdating of incorporation. The appellant's action was dismissed and part of the respondent's counterclaim was allowed and he was granted a declaration that the 1st appellant was fraudulently incorporated and an order that it be wound up.

The appellant appealed on several grounds in that case.

The second of the grounds of appeal was that the learned judge erred in law and in fact that he went behind the 1st appellant's certificate of incorporation and declared that the 1st appellant's incorporation was fraudulent. The third one was that the leaned judge erred in law and fact as regards the question of fraud in that he applied the wrong standard of proof and imputed the act of a third party to the appellants, thus holding that there was fraud on their part.

In dismissing the two grounds of appeal referred to, Odoki, J.S.C. said, inter alia:

> "In my judgment the main ground upon which a court is entitled to go behind the certificate of incorporation is fraud. Once fraud is alleged, then it is open to the court to extend its inquiry to matters precedent and incidental to registration:- .....
>
> In the instant case the respondent challenged the 1st appellant's certificate of incorporation on ground of fraud. He alleged that the 1st appellant was fraudulently incorporated by backdating the certificate of incorporation. The

> appellants led evidence to prove that the incorporation was not fraudulent. The learned judge had to inquire into the allegations of fraud. He found that the 1st
>
> appellant was fraudulently incorporated by backdating the certificate of incorporation. He wanted a declaration to that effect. In these circumstances, I unable to say that the learned judge erred in going behind the certificate of incorporation and in declaring that the 1st appellant Was fraudulently incorporated."

In the instant case the learned trial judge has been criticised in ground one of the appeal for disregarding the separate corporate existance of UOL and OHL. In his finding, criticised under this ground, the learned trial judge said:

> "Ordinarily because of the concept of separate personality between a company and its shareholders the plaintiff No.3 would be helpless as be cannot maintain a derivative action in No.1 for he is not a shareholder in plaintiff No.1.
> If he is not a shareholder be would not be able to claim an. action based on one of the exceptions to the rule in Foss V. Harbottle. There are cases, however where the veil of corporate personality has been lifted. This has been mainly in the areas of revenue law. The corporate personality cannot be used in my view as a cloak or mask for fraud. Where this is shown to be the case it may be an appropriate case for lifting the veil of corporate personality to ensure that justice is done and the court does not look hopelessly on in face of such fraud. In the case of Pioneer Laundry and Dry Cleaners Ltd Vs Minister of National Revenue 1939 4, All E.R.254, Lord Thankerton who delivered the opinion of the Privy Council stated.....

The above opinion seems to suggest that where fraud or improper conduct can be shown then it may be possible to disregard the corporate personality. I am aware this was in respect of a matter related to revenue law but I think the principle is nevertheless important and transcends revenue law.

In the instant case plaintiff No. 2 was incorporated solely for the purpose of purchasing plaintiff No.1**.** The purchase money put up by plaintiff No.3 was sourced from the proceeds of plaintiff No.3 and defendant No.3.'s trading or investment activities. Plaintiff No.2 owns all the shares (save one) in plaintiff No.1's share capital. Plaintiff No.2 therefore overwhelming controls plaintiff No.2 was in reality a difference in names only for it was controlled by the majority of Directors of plaintiff No.2. In the light of all the facts of this case, particularly the fraud committed by defendant No.1 a nominee agent and brother to No.3, I find that the plaintiff maintain this action against the defendants in order to protect his substantial holding in plaintiff No.2 which virtually owned plaintiff No.1 (save for the share held by the defendant No.3). Short of allowing this action the plaintiff No.3 would have no remedy against the fraudulent acts of defendant No.1 in particular and supported and protected by defendant No.3."

In my view the conclusion of the learned trial judge in this passage of his judgment is consistent with the several authorities I have referred to in this judgment. The decision of the learned trial judge in respect of ground one of the appeal cannot therefore be faulted, because OHL of which Shamji was a shareholder and which wholly owned its subsidiary, UOL, are in essence one economic or commercial unit, if the corporate personality of UOL is disregarded, as it should be in the circumstances of this case. Secondly, all the three appellants are in complete control of the subsidiary, UOL. Because of this and the animosity that existed between Alnoor and Shamji no meeting of shareholders or Directors of the two companies could be held to, stop the wrong doings which Shamji alleged, and the learned trial judge found to have happened. They were persons defrauding the subsidiary company, UOL. The principle of corporate personality should not be used by them as a cloak for their proved fraud or improper conduct. Thirdly there was no way the appellants; the wrong doers who were in control of UOL could bring an action to remedy the wrongs they were doing. In the circumstances, and on the authorities I have referred to, Shamji was entitled to bring an action to remedy the wrongs they were doing. In the circumstances, and on the authorities I have referred to, Shamji was entitled to bring a derivative action against the appellants, as be did. As lord Denning said in Moir V. Wallrsteiner (supra) it was UOL that was demnified. It was the one which should have sued, but it could not. In the circumstances of the instant case, as a shareholder, through UOL since the two companies were, in fact, one brought the action in his own name (but in truth on behalf of U0L) against the wrong doing appellants Shamji did not bring the action alone. OHL as a shareholder also joined in the action, but the learned trial judge found that the relevant organs of OHL did not authorise the suit. This was to be expected

because the only two shareholders and directors of OHL were feuding and could not be expected to meet or pass a resolution for that purpose.

In the circumstances the learned trial judge properly acted, in my view, to lift UOL corporate veil. Shamji was also entitled to and did properly; bring a derivative action against the appellants. Ground one of the appeal must, therefore, fail. This also disposes of ground fain' of the appeal, which must also fail.

It is what the learned trial judge said in the following passage of his judgment attracted the complaint in ground two of the appeal. He said this:

> "Since defendant No.3 and plaintiff No.3 were the only shareholders of plaintiff No.2 and plaintiff No.2 and defendant No.3 were the only shareholders of plaintiff No.1 it was possible by their unanimous agreement to agree on the member and names of directors of plaintiff No.1 (see Parker & Cooper Ltd V Realming (l926) 1 ch. 975).) In the instant case, they agreed that the directors of plaintiff No.1 shall be plaintiff No.3 and defendant No.3 and I find that those two are the directors of plaintiff No.1 by unanimous agreement of the corporations or members of plaintiff No.1. In the light of this
>
> unanimous agreement even if there had been at law a valid appointment of defendants No.1 and No.2 at the meeting of the Board of plaintiff No.1 on 6.12.1990 such appointment lapsed when the next annual general meeting was due when it was purported to be held on 24th August, 1991"

The evidence on which the learned trial judge made his finding one from the uncontroverted evidence of Shamji as PW6, which the learned trial judge accepted as true, only evidence from Alnoor would have controverted Shamji's evidence in this regard since the alleged written agreement was made between only the two of them. But Alnoor did not give evidence. Talking about what he and Alnoor did Shamji said:

> "We had a meeting on 7.1.1989 we reduced something in writing after the meeting Mr. (Alnoor) Jamal wrote down himself in his handwriting on 2

pieces of paper. We both of us signed the agreement we reached. We handed it over to Vora. Mr. Vora is our company secretary to Oxyco Holding Ltd. (Exh P.52 is shown to the witness). This is a copy of the document we signed after the meeting. The original document to day is in the High Court of Kenya, as an exhibit. I am not quite sure of the High Court Civil suit number of the case. I do not recall the number.

I have to pay you in total US $ 800,000 or equivalent at 23.5. equals 18.6 million

This means that at the end of that day Mr. (Alnoor) Jamal had to pay me that money which I loaned him. It cannot be interpreted to mean I owed Alnoor Jamal that money. “Our total distribution of overseas cash is based on 55% to 45% ratio.”

This means that all overseas cash we had accumulated would be shared in the proportion of 55% to 45% ration although Mr. (Alnoor) Jamal’s proportion in the holding was lower than 45%.Overseas cash means overseas profits on suppliers.....”
“After this all our shareholding in various companies is based on 55% to 45% ration and we should formalize as thus.”

This meant that at that stage all existing companies jointly held the shareholding would be changed from 61.11 in my favour and 38.88 (in favour of (Alnoor) Jamal would be changed to proportion of 55% in my favour and. 45% in (Alnoor) Jamal’s favour. All our future joint ventures which were in the Pipe-line and what we would acquire would be based on the same 55% to 45%.....

The signature on the left hand side is mine and on the right is Jamal’s (Alnoor’s) signature. The whole document is in Mr. (Alnoor) Jamal’s hand writing.

This formular was followed in companies where we had an interest. After N.C.R. Tanzania we acquired Uganda Oxygen Limited through Oxyco Holdings Ltd. where we have the same formular. . . . . .
After acquisition of Uganda Oxygen Limited we confirmed this arrangement with (Alnoor) Jamal. This was soon after the company was acquired, soon after the agreement was signed. We confirmed the shareholding and also agreed to have both of us me as a Chairman and him as a Director of Uganda Oxygen Limited. This is what we agreed to. We agreed similar to Oxyco Holding Limited. I became Chairman and Mr. Alnoor Jamal became a Director. At a later date, Mr. Alnoor Jamal suggested to have his brother Jamal as a director of Oxyco Holdings Ltd. so that he can interest (sic) in running of Uganda. Oxygen Ltd. and report to Mr. Alnoor Jamal who would in

turn report to me. We have never had any meeting when we, Alnoor Jamal and myself appointed Salim Jamal as a Director of Uganda Oxygen Limited".
According to me Salim Jamal is not a Director of Uganda Oxygen Limited."

It is indeed, correct that Shamji was not a director or shareholder of UOL. But two points must be noted in this regard. The first is that if the corporate veil of UOL was lifted and its separate personality disregarded, as to have held that the learned trial judge did so then the true position was that Shamji was shareholder of UOL. Secondly according to the agreement referred to in Shamji's evidence which, in my view, the learned trial judge was entitled to accept as true, Alnoor and Shamji shareholders in OHL, the holding company of UOL, agreed that both of than should be Directors of UOL.

In the circumstances, I find no merit in ground two of the appeal, which must also fail.

In my view, ground three of the appeal should be considered in two parts.

The first part is that the learned trial judge erred in law when he prematurely held the defendant No.1 liable to plaintiff No.1 for shs 193,500,000/=. I will deal with this first. As we have seen from the many authorities I have referred to above a shareholder of a company is entitled to bring an action against wrong doing directors, or those who have control, of the company. Such action may seek payment of damages by, or recovery of the company's property including money, from the wrong-doers to the company. In the instant case Salim Jamal (appellant) was such a wrongdoer: If Shamji's action as a shareholder of UOL was proved against Salim as it was then he would be liable to pay what would be judged due to the UOL. The learned trial judge found him to be liable to the company UOL in the sum of shs. 193,500,000/=. But I think that as according to the authorities I have referred to, it was essential to join UOL as a defendant in such a suits The order for what s Salim should pay the company should have been made after the company, UOL had been properly joined as a defendant under order I rule 10 of the civil Procedure Rules and after the company's case stated and proved evidence (if any) bad been considered and adjudicated. More about joinder of UOL as a defendant later, when I shall be dealing with ground five of the appeal.

The second part of ground three of the appeal as I understand, it criticises the learned trial judge for having considered and made findings on the merit of the case before deciding on the preliminary objections raised in the appellant's Written statement of defence.

As I have already said in this judgment it was the counsel for the appellants

(defendants) at the trial who encouraged the learned trial judge to hear evidence before deciding on the preliminary objections. The learned trial judge did so, but instead of first considering and, disposing of the preliminary objections before considering the substance of the case in his judgment, he did the reverse.

This in my view with respect was an error on the part of the learned trial judge. I think that he ought, in his judgment, to have first dealt and disposed of the objections that the suits by UOL (appellant 1) and OHL (appellant 2) were incompetent for want of instructions, and then proceeded on to consider the suit by Shamji (appellant 3,) which, as I have already found, was properly brought.

I think, however, that the learned trial judge's error in question did no occasion a failure of justice, because when if the suite by UOL and OHL were struck out at an earlier stage than they were done, Shamji's suit rand pleadings against the appellant which bad been brought jointly with the other two plaintiffs (flow respondents) would in my view, still have remained and continued intact. Not all the suits would have been struck out.

In the circumstances, I think that ground three of the appeal should also fail. This in my view also disposes of ground six of the appeal, which should also fair.

Finally ground five of the appeal. Early in this judgment, I have recited the passage of his judgment in which the learned trial judge decided to add UOL as the fourth defendant. As I have already said the authorities I have referred to are to the effect that a company in a position such as UOL was in this case, should be joined as a defendant in a suit brought by its shareholders against wrong doing directors, or persons in control of the company, in our case UOL as a defendant. To that extent the learned trial judge, in my view was right to join UOL as a defendant. Secondly he had a discretion to do so under order 1 rule (2) of the Civil Procedure Code. The only problem, however, is that UOL was joined as a defendant so late in the proceedings that neither it nor the respondents (plaintiffs) had opportunity to do anything more about the pleadings, especially with regard to the provisions subrule (4) of rule 10, of order 1. The order and rules in question provide:

> "10(2) The court may at any stage of the proceedings either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved, in the suit, be added.
>
> (3) …….

(4) where a defendant is added or substituted, the plaintiff shall unless the court otherwise directs, be and amended in such manner as may be necessary, and amended copies of the summons of the plaint shall be served on the new defendant, and, if the court thinks fit, on the original defendants."

In view of the discretionary powers in rule 10 (2) and (4) above, I think that the learned trial judge, after adding UOL as a defendant, as he did, should have afforded an opportunity to the remaining plaintiff, Shamji, to amend the plaint in the suit and to serve it on the new defendant, UOL and the others. This be did not do, and I think that by not so doing be did not exercise his discretion judicially. In that regard, there was a failure of justice, in my judgment.

In the circumstances ground five of the appeal succeeds to that extent.

In the result, this appeal should partially succeed, but the respondents should have 5/6 of the cost of the appeal and of the suit in the court below. The orders of the learned trial judge should be set aside and be substituted with the following:

(a) The plaint in the suit should be amended, indicating Shamji as the only plaintiff, and that he is suing as a shareholder and as a representative of the other shareholders of UOL.

(b) the plaint, in the suit should be amended, joining UOL as the 4th defendant;

(c) The issue of fraud by the three appellants against UOL having proved and not challenged in this appeal should not form an issue in the amended plaint.

(d) The amended plaint should be restricted only to the issue of quantum of liability by the three appellants (as defendants,) in favour of, and should pray for remedies to UOL.

(e) The amended plaint should be filed in court and served on all the four defendants within 21 days from the date hereof.

Dated at Mengo this 14th day of April 1997.

A.H.O. ODER,

JUSTICE OF THE SUPREME COURT.

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, J.S.C., ODER, J.S.C., AND KAROKORA, J.S.C.)

CIVIL APPEAL NO.64 OF 1995

BETWEEN

1. SALIM JAMAL
2. SHABIR ABJI :: APPELLANTS

3. ALNOOR JAMAL

AND

1. UGANDA OXYGEN LTD.
2. OXYCO HOLDING LTD. : : : :: : :: : :: ::::::::::::::::::::::::::::::::::::: RESPONDENTS

3. B.E. SHAMJI

(Appeal from Judgment and orders of the High Court of Uganda at Kampala (Egonda - Ntende J.) dated 12.12.1995 in H.C.C.S. No. 282 of 1994)

JUDGMENT OF ODOKI JSC

I have had the benefit of reading in draft the judgment of Oder JSC and I agree with him that this appeal should succeed only in part.

The learned trial judge was not entitled to take the unusual step of adding a plaintiff as a defendant while writing his judgment and in proceeding to deliver judgment against the new defendant without following the procedure laid down under Order 1 rule 10(4) of the Civil Procedure Rules. No reason was given for this unusual step and I am unable to hold that his failure to do so did not occasion a miscarriage of justice.

As Karokora JSC also agrees, there will be an order in the terms proposed by Oder JSC.

Delivered at Mengo this 14Th day of April 1997

B. J. ODOKI

JUSTICE OF SUPREME COURT

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, J.S.C., ODER, J.S.C., AND KAROKORA, J.S.C.)

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JUDGMENT OF KAROKORA, JSC

I have had the advantage of reading in draft the Judgment of Oder, **JSC** and I do agree with it and the Orders he proposed.

I have nothing to add.

Dated at Mengo this 14th day of April 1997

A. N. Karokora

JUSTICE OF SUPREME COURT