

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA**

**AT MENGO**

**(CORAM: ODER, J.S.C., TSEKOOKO , J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C.  
AND KANYEIHAMBA, J.S.C.)**

**CIVIL APPEAL NO. 4 OF 1998**

**BETWEEN**

**SHIV CONSTRUCTION CO. LTD .....APPELLANT**

**AND**

**ENDESHA ENTERPRISES LTD .....RESPONDENT**

**(An appeal from the judgments of the COURT OF Appeal (Manyindo, D.C.J., Berko, J.A. and Engwau, J.A.) dated 28<sup>th</sup> April 1998 in Court of Appeal Civil Appeal No. 43 of 1996)**

**JUDGMENT OF TSEKOOKO, J.S.C.:**

The appellant was the defendant in the High Court where the respondent was the plaintiff. The respondent instituted an action claiming for specific performance of a joint venture Agreement (exh. P1) and won the action. The appellant appealed to the Court of Appeal and lost the appeal. Hence the present appeal.

The facts in this case are a tale of two men and their respective companies, the appellant company and the respondent company. The story begins with Jadva Kadva Karsan Patel (D.W.1) who is the Managing Director of the appellant company and Depak Kumar Prenchand Haria (P.W.1) who is the Managing Director of the Respondent Company. P.W.1 is a Kenyan Asian who has had business activities in Uganda from about 1979. He incorporated the appellant Company in 1980 in this Country. Patel (D.W.1) is also a Kenyan. He used to be a building foreman in a Company called Kay Dee Construction Co. Ltd. Which belonged to his relatives. In 1980s he set up the appellant company essentially to deal in the Construction Industry. During

1985 the two men met in a Hindu temple and struck a friendship. Haria stayed in Patel's home for two weeks. In 1986 the appellant Company carried out some construction work or renovation for either Mr. Haria's family or for the respondent Company. It is not clear which but that is immaterial.

On 5<sup>th</sup> Sept. 1986 the appellant company applied to Kampala City Council (K.C.C.) for and was allocated a plot of land of land described as plot No. M 477 near Kyambogo, a suburb of Kampala City. On 17<sup>th</sup> Oct. 1986 K.C.C had estimated its (plot's) measurement to be 0.43 hectares (see Exh. P.23). On 20<sup>th</sup> October 1986 a lease (Exh. P. 24) was given to the appellant. The appellant proposed to construct a workshop to manufacture precast products on certain conditions. On 14<sup>th</sup> June 1987 the Ministry of Industry wrote to the appellant a letter (exh. D3) authorizing the appellant to operate a small scale industry to manufacture precast materials and slabs on the same plot. On 5<sup>th</sup> April 1988 K.C.C. granted the Appellant a license (exh. D4) to erect and operate a factory/workshop for the manufacture for sale of concrete pipes and precast materials. Appellant was required to submit progress reports every 6 months and renew the license every year. The license obviously relates to the same small scale industry which appears to have been a temporary affair. So far evidence suggests that only one workshop and offices were to be constructed on the plot.

During 1988, Haria (P.W.1) and Patel (D.W.1) hatched a plan to form a joint business venture. They wanted to set up an industrial project. The evidence of the two men is in conflict as to what type of industry was to be set up. Whereas Haria says that they agreed to set up a textile industry. Surprisingly, the joint venture Agreement (exh. P1) contains nothing about the nature of the industry. But objects 3(a), 3(i) the Memorandum of Association of the Company refer to setting up soap industry and textile industry. It appears the respondent had more money and was prepared to spend more on the joint venture Company. The parties negotiated and agreed to form a joint industrial project under the name Endesha Industries Ltd. The two engaged the services OF m/s Muwayire-Nakana & Co., Advocates, who drew the joint Venture Agreement (exh. P1) and the Memorandum and Articles of Association on 7<sup>th</sup> December 1988. Endesha Industries Ltd was indeed incorporated the following day, on 8<sup>th</sup> December 1988. These dates are significant spelt out the objectives to make Endesha Industries Ltd a reality. Those objectives are the subject of these proceedings.

The joint Venture Agreement (exh.P1), was put in evidence by consent, at any rate without objection from the appellant. The incorporation of Endesha Industries Ltd. was a fulfillment by the appellant and the respondent of their duties and obligations under that agreement. Indeed, after the incorporation of the company, the appellant and the respondent began, and they continued, to perform their duties and obligations as set forth in exh. P1. These duties and obligations included provision of labour, building materials and construction of the go-down.

The written statement of defence and the counterclaim by the appellant and the evidence of D.W.1 adduced at the trial suggest that prior to 8<sup>th</sup> December 1988, Patel or the appellant had put some structures on part of plot M 477. It is however, remarkably surprising that neither exh. P1 nor p2 which were drawn at the same time refers to any existing developments on the plot. Apart from the testimony of D.W.1, whom the Court of Appeal found to be unreliable, no credible evidence shows exactly what was on plot M 477 before the parties entered into a joint Venture Agreement. I say no credible evidence because the evidence of D.W.5 Wasswa appears to contradict D.W.1 and exhs. D1, D2, D3 and D4.

BETWEEN EXECUTION OF EXH. P1 ON 7<sup>TH</sup> December 1988 and 15<sup>th</sup> May 1990 the respondent delivered a variety of building materials to the site as a result of which a substantial structure was erected and, according to P.W.1, another structure was constructed and completed. As I stated earlier exh P1 did not stipulate the type of Industry which Endesha Industry Ltd. would operate. However, D.W.1 claimed it was to be a soap Industry. P.W.1 claimed it was to be a textile Industry and that is why certain parts of the structures on the plot were constructed to accommodate a textile Industry. It would seem that because the appellant lacked sufficient funds the respondent provided or paid for labour for the appellant as stipulated in exh. P1.

It appears that after the completion of construction in 1990 there was a misunderstanding between P.W.1 and D.W.1. in spite of the misunderstanding, in 1991 P.W.1 looked for and placed orders for importation of textiles industrial machine from Switzerland for making textiles such as Bikoyis, etc. the relationship between P.W.1 and D.W.1 continued to worsen. On 4<sup>th</sup> March 1991, D.W.1 advertised in the New Vision newspaper invitations (exh. P 16) for tenants for a go-down. This was the go-down for use by Endesha Industries Ltd. the relationship between the two men (rather than the two parties to these proceedings) divided further. On 11<sup>th</sup> March 1991, the appellant wrote exh. P15 to the respondent calling for a meeting to sort out problems arising

from the running of Endesha Industries Ltd. D.W.1 issued to P.W.1 an order barring the latter access to the site on the ground that P.W.1 had not spent any money on the project. In point of fact D.W.1 wanted Endesha Industries Ltd. to be dissolved. Because D.W.1 denied the respondent access to the suit property, the respondent brought an action in the High Court against the appellant claiming for specific performance and for general damages for breach of the joint Venture Agreement (exh. P1). In response, the appellant filed an amended defence and counter-claim. In its defence, the appellant challenged the competence of the respondent to sue.

In its counter-claim, the appellant claimed for daily loss of 5000 dollars and general damages arising from an injunction which had been issued by the High Court in favour of the respondent, in effect, barring the appellant from using the go-down.

Whilst D.W.1 maintained that P.W.1 or the respondent did not contribute any penny to the construction of the go-down or the other structures on the disputed site, yet during the trial many receipts were tendered in evidence on behalf of respondent, and unchallenged, as evidence of payments made by P.W.1 to purchase or transport materials for construction on the site. Indeed D.W.3, Mathew Okello, testified that the respondent spent at least 21m/= on the construction work.

The following issues were framed for the decision of the trial Court:-

- “(1) Whether the Plaintiff’s suit is misconceived and bad in law.
- (2) Whether the plaintiff is suing as a share-holder in Endesha Industries; if not then under what capacity.
- (3) Whether the suit agreement is a partnership Deed and whether it is enforceable.
- (4) Whether the parties obligation under the suit agreement ceased to exist upon incorporation of Endesha Industries.
- (5) Whether the plaintiff attempted to defraud the Defendants in the suit agreement and if so what suit agreement.
- (6) Whether either party breached the suit agreement.

(7) Whether the parties are entitled to the remedies prayed for in the pleadings.

Issues on Counter-Claim were –

(8) Whether the Defendant has been restrained by Court from using the suit premises.

(9) Whether the Defendant has suffered any loss as a result of the suit and the injunction”.

The learned trial Judge heard the suit in which a considerable number of documentary exhibits (P1 to P33 and D1 to D17) were produced in evidence. At the conclusion of the trial, the learned trial judge on 27<sup>th</sup> September 1996 decided the suit in favour of the respondent and dismissed the appellant’s counter-claim in the following words –

1. The defendant Company is direction to immediately make plot M 477 accessible to the plaintiff Company and to transfer the same to Endesha Industries Ltd. when the developments are completed.
2. The plaintiff is awarded shs. 11,900,000/= for payment of the storage charges of the machinery.
3. The plaintiff is awarded general damages for breach of contract of shs. 1.m/=.
4. ....
5. The plaintiff is awardee interest on 2 and 3 above at Court rates per annum.
6. The plaintiff is awarded costs of the suit. The defendant’s counter-claim stands dismissed.

The appellant appealed against the decision of the trial judge to the Court of Appeal. Twelve grounds of appeal were preferred in the Court of Appeal. Except for ground ten, the rest of the grounds of appeal in the Court of Appeal were unsuccessful Ground ten was against the award of shs. 11.9m/= decreed as storage charges. The appellant has appealed to this Court against the judgment of the Court of Appeal except as regards the decision about shs. 11,9m/=

In this Court the appeal is based on the following seven grounds of appeal.

1. The learned Justices of Appeal failed to appreciate that the suit property mentioned in the pre-incorporation agreement between the parties was meant to be the shareholding of the

appellant in Endesha Industries Ltd. and hence erred in law in holding that the respondent as a promoter could bring an action against the respondent (sic) as a shareholder in Endesha Industries Ltd. to enforce payment of its shareholding in Endesha Industries Ltd. pursuant to the incorporation agreement.

2. The learned Justice of Appeal erred in law in holding that the trial judge properly made as order for the appellant to transfer the suit property to Endesha Industries Ltd. when there was evidence that the appellant had already paid for there was evidence that the appellant had already paid for its shares in Endesha Industries Ltd.
3. The learned Justices of Appeal failed to appreciate that whatever contribution was made by either to appreciate that whatever contribution was made by either of the parties under the pre-incorporation agreement would constitute consideration to Endesha Industries for acquiring shares therein and hence erred in holding that there was valuable consideration furnished by the respondent to the appellant under the said agreement.
4. The learned Justices of Appeal erred in law in failing to appreciate that whatever obligations were imposed by the pre-incorporation agreement to form Endesha Industries Ltd. ceased to be enforceable between the appellant and the respondent inter se after the incorporation of Endesha Industries Ltd. which imposed different obligations by its memorandum and Articles of Association to which both parties were signatories.
5. The learned Justices of Appeal erred in law in confirming an order of the trial judge for the appellant to transfer the suit property in the name of Endesha Industries Ltd. when at the time of the said order the lease in respect of the suit property had long expired.
6. The learned justices of Appeal erred in law in holding that the appellant had a right to recover the suit property as a trustee of Endesha Industries Ltd. when it did not sue as such trustee.
7. The learned Justices of Appeal erred in law in confirming the decision of the learned trial judge rejecting the appellant's counter-claim.

I think that the word "respondent" appearing for the second time in the first ground was meant to be "appellant".

Mr. James Nangwala, who had represented the appellant in the Courts below, argued the appeal on behalf of the appellant. He argued grounds one and two together. But his

arguments in effect also covered grounds 3 and 4. Learned Counsel submitted that the Court of Appeal did not appreciate the facts in the case and consequently came to wrong conclusions. Counsel referred to the proposition of Company law, which is correct, that a Company cannot take benefit of a contract made on its behalf prior to the incorporation of the company except where it is subsequently adopted by the Company in its favour of a new one incorporating the terms of the original is made after incorporation: see **Mawogola Farmers Lstd. Vs. Kayanja (1971) E.A. 272 at 274.** Learned counsel then contended that the trial judge and the Court of Appeal failed to appreciate the purposes mentioned in exh. P1. I do not quite appreciate the contentions, but learned counsel appears to argue that exh P1 did not provide for enforcement of rights of the new Company because enforcement of rights of the new company is provided for it in its Memorandum and Articles of Association (exh. P2). I think that generally that is correct. Learned counsel made a well established proposition that a Company is regulated by its Memorandum and Articles of Association in the management of the Company's affairs. Learned Counsel then made a statement that exh. P1 as a contract between the appellant and the respondent is not an enforceable contract. The basis for this rather bold and in my opinion incorrect contention was that the appellant Company's Memorandum and articles of Association contained provisions for enforcement of rights of the new company. He referred to Section 54 (1) (b) and 54(2) of the Companies Act as well as articles 3 and 15 to 21 of the Articles of Association of Endesha Industries Ltd. He cited a number of authorities to support his arguments. The authorities included **Rayfield vs. Hands (1960) Ch. 1 at page 5 Company Law by R. Pennington, 3rds Ed., (1973), pages 141; In Re South Blackpool Hotel Co. (Megottis case) (1867) IV LR. Eq. 238 at 240; in the Re London, Hamburg and Continental Exchange Bank – (Evans case) (1867) 2 L.R. Ch. App. 427 at 430.** Counsel submitted that if the Court of Appeal had appreciated these factors by which I understand Counsel to mean management of an incorporated Company, the Court should have held that the respondent as promoter or agent could not institute these procedure Rules confers no right to the respondent to institute these proceedings.

In response, Mr. Tibaijuka, Counsel for the respondent, argued grounds 3 and 4 first which related to the issue of consideration. He then argued grounds 1,2,4 and 6 together.

I will consider arguments on grounds 1 and 2 first.

Mr. Tibaijuka supported the decisions and the reasoning of the Courts below. He submitted that exh. P1 was not a pre-incorporation agreement made on behalf of Endesha Enterprises Ltd. that the suit leading to these proceedings was not instituted as a Company cause. He referred us to Gower's Principles of Modern Company Law, 3<sup>rd</sup> Ed., pages 280 – 282 in support of the proposition that the promoters can enter into a binding contract prior to incorporation of a company. That where a benefit of a contract is intended for a Company to be incorporated, specific provisions can be made in a contract to cater for such eventuality.

In the case before us the parties to exh. P1 freely agreed to perform certain duties and to fulfill specified obligations until a go-down was completed and an industry put in place. I think that this is reflected in Clause 10 of exh. P1. Mr. Tibaijuka cited **Senyonga vs. Kakoza** Supreme Court Civil Appeal No. 9 of 1990 (unreported); **Jiwaji vs. Jiwaji** (1968) E.A. 547 and **Lulume vs. C.M. Board (1970)** E.A. 155 to support the proposition that as exh. P1 was a business agreement, this Court should construe the agreement in such a way as to give the agreement business efficacy. I think that on the facts of this case this argument is sound. In any case the issue here is not interpretation of exh. P1. The issue raised by the appellant is that exh. P1 ceased to apply or to have effect on the matters set out in it (Exh. P1). I am not persuaded by Mr. Nangwala's arguments. As I have already stated in this judgment, the agreement (exh. P 1) was freely executed by the parties on 7<sup>th</sup> December 1988. Surprisingly, that was the same day when the appellant and the respondent signed the Memorandum and Articles of Association of Endesha Industries Ltd which was incorporated the following day (8<sup>th</sup> December 1988). I say surprisingly because if the duties and the obligations created by exh. P1 were not expected to endure beyond the incorporation of Endesha Industries Ltd., I can not find any earthly reason why exh. P1 was made at the same time as exh. P2 and why provisions to that effect were not included in the agreement. Short of a perfect heavenly miracle, in the circumstances of this case it would be inconceivable for the parties to exhibit P1 to have carried out their duties and obligations under exh. P1. The parties could not have fulfilled the duties and obligations imposed upon them by the provisions of exh. P1 before the incorporation of Endesha Industries Ltd., on 8<sup>th</sup> December 1988 which is one day after execution of exh. P1. The construction work alone took years. I refer in particular to paragraphs 4, 5, 6,7,8,9 and 10 exh. P1. Unless the matters provided in those paras had been accomplished already, neither party could have performed its part of the bargain between the



execution of exh. P1 on 7<sup>th</sup> December 1988 and the incorporation of Endesha Industries Ltd. on 8<sup>th</sup> December 1988. It would be naïve to say that these duties and obligations had been accomplished already. If that were so there would have been no need for exh. P1 to be executed. If that was the state of affairs, i.e. stipulation to do what had already been carried out, then exh. P1 and the Memorandum and Articles of Association (exh. P2) would surely have clearly stated so. Moreover the conduct of P.W.1 and D.W.1 shows that their intention in making exh. P1 was to perform and fulfill the respective duties and obligations in the future and their evidence supports this. Thus after execution of exh. P1, the delivery of building materials was effective P.W.1 and D.W.1 by 7<sup>th</sup> December 1988, when exhs P1 and P2 were signed by the parties, that the appellant and the respondent intended and meant to carry out their parties of the bargain set forth in exh. P1 until Endesha Industries Ltd. became operational. With respect to Mr. Nangwala, I think that the intention of the parties to exh. P1 was to create contractual relationship whereby each party would perform its promises in exh. P1 until an Industry was set up and until the suit plot was transferred to Endesha Industries Ltd.

In the first and sixth grounds of appeal and in his arguments. Mr. Nangwala complains that the Court of Appeal held that the respondent instituted the suit as a promoter or as a trustee of Endesha Industries Ltd. I think grounds one and two in the appeal before us are a version of grounds 1, 2 and 9 of the appeal in the Court of Appeal. That Court considered the said grounds 1, 2 and 9. The leading judgment of the Court of Appeal was delivered by Berko, J.A. The other members of the Court concurred with him. The relevant passages relating to grounds 1,2 and 9 appears 664, 666 and 667 of the record of appeal in the judgment of the learned Justice of Appeal.

At page 664, the learned Justice of Appeal, (Berko) stated –

“Grounds 1, 2, 9 and 11 can conveniently be considered together. The issues in those grounds are (i) whether the respondent, as a promoter can bring an action against the appellant, another promoter, to enforce the terms under a pre-incorporation contract purporting to have been made for the benefit of Endesha Industries Ltd. prior to its incorporation and (ii) whether the judge was right in making an order for specific

performance of the contract purporting to have been made for the benefit of Endesha Industries Ltd. before it was incorporated.

It is true that until a Company has been incorporated it cannot contract or enter into any other act in law. Nor once incorporated can it become liable on or entitled under a contract purporting to be made on its behalf prior to incorporation, for ratification is not possible when the ostensible principal did not exist at the time the contract was originally entered into. See *Kelner vs Baxter* (1866) L.R. 2 CP 174. The principle was succinctly put by the Privy Council in the case of *Natal Land and Colonization Company Ltd vs. Pauline Colliery & Development Syndicate Ltd.* (1904) P.C. 120 the headnote reads –

“A Company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the Company came into existence. In order to do so a new contract must have been made with it after its incorporation on the same old one”

The learned Justice of Appeal then referred to *Newborn vs. Sensolid (G.B.)* (1954) 1 Q.B.D. 45 and to the Contract Act (Cap. 75 of the Laws of Uganda) and other cases and continued at page 666 –

“Although a contract for the benefit of a third party generally does not enable a third party to assert rights arising under it, the contract remains enforceable and binding nevertheless between the promisor and the promisee and in an appropriate case, the promisee can even seek a remedy of specific performance of the contract.

The case of ***Beswick vs. Beswick (1968)*** A.C. 58 is a good illustration of the principle.

.....

The authorities where the remedy of specific performance has been applied in such circumstances are numerous. In ***Hohler vs. Aston (1920)*** Ch. D. 420, Sergeant, J., enforced a contract relating to the purchase of a house for the benefit of third parties”.

It is obvious from the passages which I have just reproduced from the judgment of the learned Justice of Appeal that the learned Justice properly directed himself to the relevant principles and

correctly related those principles to the facts of the case before the Court of Appeal before he concluded that the right and indeed the duty of one of the contracting parties to take action to enforce contract made for the benefit of a third party is not in doubt.

There can be no doubt that the intentions of the parties before us (enshrined in the provisions of exh. P1) were to perform for the benefit of Endesha Industries Ltd. indeed, Clauses 5, 6, 7, and 10 which I will reproduce later envisaged that the acts which each party was to perform were for the mutual benefit of the parties and for the benefit of Endesha Industries Ltd. each party made a solemn promise to the other to carry out its duties and obligations under the contract to ensure “success of the new Company”. For instance, paragraph 5 of exh. P1 binds the appellant as follows –

“The first participant has agreed for the mutual benefit of both participants and for the success of the new company, it will provide land, labour, machinery and tools to erect a go-down for the new company in lieu of their share 5% share contribution in the new company”.

Furthermore, by clause 13 of exh. P1, the appellant and the respondent contracted that “any dispute concerning the duties, obligations and rights and benefits to the participants hereunto shall be referred to an arbitrator ..... provided that nothing herein shall effect the right of each party to Justice of Court on reference of a dispute for Court decision”. This means that the parties contemplated possibilities of disputes which could be referred to either arbitration or to a Court of law, as is now the case.

After reviewing the facts in these proceedings and relating them to the law, I cannot find any error of either law or fact committed by the learned Justices of the Court of Appeal.

Learned Counsel (Mr. Nangwala) referred us to Section 54 (1) (b) and 54(2) of the Companies Act and submitted that the contract embodied in exh. P1 is not one envisaged by the provisions of Section 54. That a contract for allotment must be between that because of these provisions the respondent could not enforce exh. P1.

These provisions read as follows –

“54. (1) Whenever a Company limited by shares or a Company limited by guarantee and having a share capital makes any allotment of its shares, the Company shall within sixty days thereafter deliver to the Register for registration.

(b) in the case of shares allotted as fully or partly up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and a return stating the number and nominal amount of shares so allotted, the extend to which they are to be treated as paid up, and the consideration for which they have been allotted.

(2) Where such a contract as above-mentioned is not reduced to writing, the company shall within sixty days after the allotment deliver to the registrar for registration the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract shall be deemed to be an instrument within the meaning of the Stamps Act, and the registrar may as a condition of fulfilling the particulars, require that the duty payable thereon be adjudicated under section 34 of the Act”.

These provisions clearly do not support the contentions of Mr. Nangwala to the effect that the respondent could not enforce rights and obligations contained in exh. P 1 after incorporation of Endesha Industries Ltd.

I think that grounds 1 and 2 must fail. So must 6.

I think that the conclusions which I have reached on the first and second grounds dispose of this appeal. As Mr. Nangwala quite correctly pointed out, the appeal is based on these grounds which are also connected to grounds three and four. As a matter of fact Mr. Nangwala did not raise substantial arguments on the 3<sup>rd</sup> and 4<sup>th</sup> grounds three I propose to discuss briefly.

The complaint in ground three is that the Court of Appeal erred by holding that exh. P1 shows that the respondent provided valuable consideration to the appellant. The complaint raised by the fourth ground of appeal is that because of the incorporation of Endesha Industries Ltd., the appellant and the respondent could not enforce their obligations set forth in exh. P1 because the

Memorandum and Articles of Association (exh. P2) of the new company imposed different obligations.

I must straight away say in regard to ground four that the contents in exh. P2 did not replace those in exh. P1. Nor did the incorporation of Endesha Industries on 8<sup>th</sup> December 1988 extinguish the rights and duties of the parties to exh. P1 which had been executed on the previous day (7<sup>th</sup> December 1988). If this was to be the case the memorandum and articles would have stated so. There is no credible evidence from the record of evidence and documentary exhibits to support the contention of Mr. Nangwala that upon incorporation, the joint venture agreement ceased to exist.

Mr. Nangwala argued ground three by criticizing the holding by the Court of Appeal (page 668) that there was valuable consideration. On ground 4, learned Counsel submitted that the obligation of the parties in exh. P1 which were not included in the Memorandum and Articles of Association (exh. P2) ceased to have effect. He cited **Damodar Jinabhai & Co. vs Eustice Sisal Estates** (1967) E.A. 153 in support of the proposition that a draft agreement is not admissible as evidence. I think that that decision is wholly inapplicable to the facts of this appeal. In that case a draft agreement was held by the trial Judge to be inadmissible in evidence because (and the East African Court of Appeal agreed that) that draft agreement was really evidence of prior negotiations which is inadmissible.

Mr. Tibaijuka supported the decision of the two courts below when he argued grounds 3 and 4. He submitted that exh. P1, the evidence of P.W.1 and D.W.1 show that the respondent provided valuable consideration. He argued that promoters of a Company can enter into a binding pre-incorporation agreement. He relied on **Currie vs. Misa (1875) L.R. 10 Exch. 153; Qadasi ... vs...Qadasi (1963)** E.A. 142 for the view that there was valuable consideration.

When I discussed the first and the second grounds I discussed matters raised by grounds 3 and 4.

In his judgment in the court below, Berko, J.A., considered the issue of consideration in the following words – (page 668 of the record) –

‘A classic definition was given in the case of **Currie vs Misa**

..... where it was said

“a valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment or loss or responsibility given or suffered or undertaken by the other”.

The motive of the parties in entering in the joint venture agreement was to create legal rights and obligations by the agreement which disclosed consideration on the face of it. In the agreement of 7<sup>th</sup> December 1988 it is necessary to go no further than paragraphs 1 and 2 to see that it contains reciprocal promises. Each undertakes to take shares in the new company they have agreed to form. There are promises in the eyes of the law for each party has an interest, with financial implications, in establishing the new Company to carry on the objectives of the joint venture. There are further promises in paragraphs 4, 5, 6, and 7.’

With respect I agree with these conclusions. And see Halsbury’s Laws of England, 3<sup>rd</sup> Ed, Vol. 8, paras 198 and 199 where the definition and examples of consideration are given. Similar statement of the law on consideration is referred to by East African Court of Appeal in the case of Qadasi ... vs .. Quadasi (1963) E.A. 142 at page 145.

the duties and obligations of the parties to exh. p1 are set out in (paragraphs 1 to 7) to exh. P1. They read as follows:-

“WHEREAS

- (a) The participants hereto have hitherto carried on business in Uganda individually.
- (b) The participants hereto are desirous of jointly forming a new company for an industrial project under the name of ENDESHA INDUSTRIES LIMITED for their mutual benefits on terms and conditions hereinafter set forth.

NOW THEREFORE THIS WITNESSETH AND IT IS HEREBY AGREED as follows:-

1. The participants hereto hereby agree to form jointly anew company for an industrial project under the name of ENDESHA INDUSTRIES LTD. whose headquarters shall be at Plot 14/5 Wilson Road Kampala.

2. The Participants hereunto agree that M/S ENDESHA ENTERPRISES LTD. the second participant shall take 95% of the new company's shares and M/S SHIV CONSTRUCTION LTD. the first participant shall take 5% of the new company's shares.
3. THE participants hereunto hereby agree that SHIV CONSTRUCTION LTD. first participant shall hand over land comprised in Block ..... Plot M 477 land at Nakawa measuring 0.43 hectares to this new company and shall assist in the transfer of title into the new company's name.
4. The first participant has agreed that for the mutual benefit of both participants and for the success of the new company it will provide land, labour, machinery and tools to erect a Go-down for the new company in lieu of their 5% share contribution in the new company.
5. The second participant has agreed that for the mutual benefit of both participants and for the success of the new company it will provide building mat accessories required to erect the Go-down on the land provided by the first participant.
6. The second participant has agreed it will bring in machinery required for industry and this will then contribute its 95% share contribution to the new company.

The promises and obligations stipulated in paragraphs 4 to 7 were never put in exh. P2 which as I stated earlier in this judgment, were to be carried out by each party to the agreement until the Endesha Industry Ltd. was established. The setting up of the Industrial project (factory) has not been completed as contemplated by the parties. The parties are bound by exh. P1, a legal and binding document of their own creation.

With respect to Mr. Nangwala, I can not understand how the case of Damodar Jinabhai (supra) is relevant. In so far as it is relevant that case is authority for the proposition that generally a draft of an agreement is evidence of negotiations between the parties involved and may not except in some circumstances be admissible where the resultant agreement is a project of a legal/action between the parties to the resultant agreement.

Clearly, the facts to the Jinabhai case, the conclusions therein of the Court of Appeal for East Africa do not support Mr. Nangwala's contentions on the validity or invalidity of the pre-incorporation agreement (exh. P1) in the appeal before us. I think that grounds 3 and 4 must also fail.

Mr. Nangwala half heartedly referred to 6<sup>th</sup> ground and to the case of Jackson vs. Holiday Horizon Holidays (1975) All E.R. 92 Discussions on grounds 1 and 2 dispose this ground 6 must therefore fail. As I stated earlier these conclusions dispose of this appeal. I would dismiss the appeal with costs to the respondent here and in the Courts below.

Delivered at Mengo this 18<sup>th</sup> day of March 1999.

J.W.N. TSEKOOKO,

JUSTICE OF THE SUPREME COURT

(Delivered by Justice Kanyeihamba in presence of Rezida for Appellant and Tibaijuka for Respondent.)



**THE REPUBLIC OF UGANDA**  
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**(CORAM: ODER, J.S.C., TSEKOOKO , J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C.  
AND KANYEIHAMBA, J.S.C.)**

**CIVIL APPEAL NO. 4 OF 1998**

**BETWEEN**

**SHIV CONSTRUCTION CO. LTD .....APPELLANT**

**AND**

**ENDESHA ENTERPRISES LTD .....RESPONDENT**

**(An appeal from the judgments of the COURT OF Appeal (Manyindo, D.C.J., Berko, J.A.  
and Engwau, J.A.) dated 28<sup>th</sup> April 1998 in Court of Appeal Civil Appeal No. 43 of 1996)**

**JUDGEMENT OF ORDER, JUSTICE OF THE SUPREME COURT**

I have had the benefit of reading in draft the judgment of Tsekooko, J.S.C. I agree with his conclusions and reasons, and I have nothing useful to add.

Since Karokora, J.S.C.; Mulenga, J.S.C. and Kanyeihamba, J.S.C. agree, it is hereby ordered that the appeal be and is dismissed with costs to the respondents here, and in the court below.

Dated at Mengo this 18<sup>th</sup> day of March, 1999.

A.H.O. Oder

JUSTICE OF THE SUPREME COURT

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA**  
**AT MENGO**

**(CORAM: ODER, J.S.C., TSEKOOKO , J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C.**  
**AND KANYEIHAMBA, J.S.C.)**

**CIVIL APPEAL NO. 4 OF 1998**

**BETWEEN**

**SHIV CONSTRUCTION CO. LTD .....APPELLANT**

**AND**

**ENDESHA ENTERPRISES LTD .....RESPONDENT**

**(An appeal from the judgments of the COURT OF Appeal (Manyindo, D.C.J., Berko, J.A. and Engwau, J.A.) dated 28<sup>th</sup> April 1998 in Court of Appeal Civil Appeal No. 43 of 1996)**

**JUDGMENT OF MULENGA, J.S.C.**

I have read in draft the judgment of learned brother Tsekooko, J.S.C. I agree with his findings and proposed order. I have nothing to add.

Delivered at Mengo this 18<sup>th</sup> day of March 1999

**J.N. MULENGA**

**JUSTICE OF THE SUPREME COURT.**

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA**

**AT MENGGO**

**(CORAM: ODER, J.S.C., TSEKOOKO , J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C. AND  
KANYEIHAMBA, J.S.C.)**

**CIVIL APPEAL NO. 4 OF 1998**

**BETWEEN**

**SHIV CONSTRUCTION CO. LTD .....APPELLANT**

**VERSUS**

**ENDESHA ENTERPRISES LTD .....RESPONDENT**

**(An appeal from the judgments of the COURT OF Appeal (Manyindo, D.C.J., Berko, J.A. and  
Engwau, J.A.)**

**JUDGMENT OF KAROKORA, J.S.C.**

I have the advantage of reading in draft the judgment prepared by my learned brother the Hon.  
Mr. Justice Tsekooko, and do concur with it. I have got nothing useful to add.

Delivered at Menggo this 8<sup>th</sup> Day of March 1999.

**A.N. KAROKORA**

**JUSTICE OF THE SUPREME COURT.**

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA**

**AT MENGO**

**(CORAM: ODER, J.S.C., TSEKOOKO , J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C. AND  
KANYEIHAMBA, J.S.C.)**

**CIVIL APPEAL NO. 4 OF 1998**

**BETWEEN**

SHIV CONSTRUCTION CO. LTD .....APPELLANT

AND

ENDESHA ENTERPRISES LTD .....RESPONDENT

(An appeal from the judgments of the COURT OF Appeal (Manyindo, D.C.J., Berko, J.A. and Engwau, J.A.) dated 28<sup>th</sup> April 1998 in Court of Appeal Civil Appeal No. 43 of 1996)

**JUDGMENT OF KANYEIHAMBA, J.S.C.**

I have had the benefit of reading in draft the judgment of Tsekooko, J.S.C., and I agree with his findings and order. I have nothing further to add.

**DELIVERED AT MENGO THIS 18<sup>TH</sup> DAY OF MARCH 1999**

**G.W. KANYEIHAMBA**

**JUSTICE OF THE SUPREME COURT**