

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

COMPANIES CAUSE NO. 027 OF 2005

IN THE MATTER OF ANDALALAPO INDUSTRIES LIMITED
AND
IN THE MATTER OF AN APPLICATION TO RECTIFY THE COMPANY'S
REGISTER

1. MARK XAVIER WAMALWA }
2. MOSES OULE } APPLICANTS

VERSUS

STEPHEN AISU RESPONDENT

BEFORE: THE HON. MR. JUSTICE GEOFFREY KIRYABWIRE.

R U L I N G

This is an application by way of Notice of Motion under S. 118 of the Companies Act (Cap 110) and order 34 A rule (4) of the Civil procedure rules (S.1.65-3) for orders;

"a) That the register of M/S Andalalapo Industries Ltd (hereinafter called "the company") be rectified by the Registrar of Companies to retain the Applicants, Mark Xavier Wamalwa and Moses Oule as the only members of the company;

b) Costs of this application be provided for"

The two applicants swore affidavits in support of this application. In brief the case for the applicants is that one Mr. Aisu Stephen, Joyce Owule (it would appear the wife of the second Applicant) and Lyaa Rose Christine (R.I.P) without sufficient reason, caused themselves to be entered in the register of members of the company. I must say from the onset and point out that the application uses the terms Register as kept by the Registrar of Companies and Register of Members of the company interchangeably. Of course these two are not the same register as I shall point out later. It is the case for the Applicants that they are the only true members of the company. On the other hand, the case for the Respondent is that he is a Member/Shareholder as well as Chairman/Managing Director of the company. It is the case of the Respondent that he has been a member since 1994 as shown in the Return of Allotment filed with the company registry. The Respondent therefore contends that the attempt by the applicants to throw him out of the company is an attempt to defraud him and should not be upheld. The affidavits would suggest that Joyce Owule "agreed" to step aside as member while Lyaa Rose Christine passed away and that is why the application is only against the Respondent.

A perusal of the pleadings and the supporting company registry documents points to the following factual situation in relation to this dispute. The company was incorporated on the 24th January 1984. The original subscribers to the Memorandum and Articles of Association (Memarts) were Mark Xavier Wamalwa of Bungoma and

David Mutumba of Kampala – Uganda. I believe the address of Bungoma is in reference to the town in Western Kenya. I need to point out at this stage that the name Oule has several spellings in the documentation including Owule. Secondly being a company cause, the evidence adduced was by affidavit however the documentation relating to Mr. Wamalwa (the first Applicant) bears several different signatures. The above notwithstanding a closer look at the Memarts show the name of David Mutumba crossed out and the name Moses Oule hand inserted in pen. Each of them subscribed to 50 shares each. In the affidavit of Mr. Wamalwa dated 24th August 2005 at Para 8 it is deponed

“ 8. That an extra-ordinary meeting of the company held on the 27th day of January 1984 in Kampala Mr. David Mulumba voluntarily and willingly forfeited his shares to the company. A Photostat copy of the said resolution is attached and marked as annexure “C” ”

The said special resolution is signed by Mr. Wamalwa alone as a Director. According to Para 7 of Mr. Wamalwa's affidavit the company was incorporated with three members that is himself, David Mutumba and Moses Oule. This means with the forfeiture of shares by Mr. Mutumba the only surviving members were Wamalwa and Oule (see Para 10). It is important to point out that the printed and filed Memarts at the companies Registry do not show Oule as a subscriber but his name is handwritten onto the Memarts after crossing out Mutumba's name.

A review of the Annual Return's of the company (AR) starting with those filed on the 4th December 1985 show the members of the company and their shares as

1-	Stephen Aisu	Shares	25
2-	Moses Oule	Shares	25
3-	Joyce Owule	Shares	25
4-	Rose Christine Lyaa	Shares	25

Total 100

The same is repeated for the AR(s) of 1986, 1987, 1988, 1989, 1990, 1991, 1992 and 1993 (annextures "D" to "L" to Mr. Wamalwa's affidavit). A close look at the AR(s) above show that they were all filed at the company Registry on the same day namely 26th April 1994.

Annexture "M" is a notification of "change of Directors or Secretary" showing Stephen Aisu as Director and Joyce Owule as Secretary with effect from 1st March 1994. This notification was filed with the company registry on the 3rd March 1994. This notification appears to have occurred pursuant to annexture "N" which is a resolution to increase shares dated 21st February 1994. The said resolution refers to an ordinary meeting of the Directors of the company where the share capital was increased from 1000 to 1,000,000/= divided into 100 ordinary shares of 10,000/= each. It further states;

"1. That Mrs. Joyce Owule remains the Secretary of the company above.

2. *That Mr. Stephen Aisu remains as the Director and Mr. Moses Aburek (alias Moses Oule my note) as a Director and Miss Rose Christine Lyaa also be a shareholder of the company.*
3. *The signatories are Stephen Aisu and Mrs. Joyce Owule to the said account.*
4. *That the Registrar of companies to be notified.*

Dated at Kampala this 21st day of February, 1994.

Signed Joyce Owule

Secretary

Signed Peter Stephen Aisu

Altemate Chairman

Mr. Moses Oule depones in his affidavit in support of the application dated 24th August 2005.

- " 8. *That in late 2004 Mr. Mark Xavier Wamala and myself discovered that the company records had been tampered with and a meeting was convened in a bid to resolve the matter and the Respondent failed or refused to attend the said meeting.*

9. *That the Respondent instead lodged a complaint with the police who investigated the Respondent's claim and found it not to be genuine.*
10. *That the Respondent's presence as a member of the company has led to the continued blockage of the company's account at Tropical Africa Bank Ltd., as the Respondent has falsely alleged that he is a member of the company whereas not.*
11. *That it is imperative that the Register of members of the company be rectified so that the company can be able to conduct its business smoothly... "*

In his affidavit in reply the Respondent Steven Aisu depones that he is indeed a shareholder and director in the company. As evidence of this, he exhibits copies of Return of Allotment forms filed with the companies Register. He further depones that he actually holds the position of Chairman/Managing Director of the company. He then further depones.

- " 5. That the 2nd Applicant Moses Oule also known as Moses Aburek and his wife Joyce Owule have been actively involved together with myself in running the business as Co-Directors with Joyce Owule and myself being signatories to the company accounts at Tropical Africa Bank Ltd..."*

The Respondent denies that he is merely a signatory to the company accounts. The Respondent further depones that he was prevailed over by the second applicant and

his wife Joyce Owule to lend money to the company so that the company could buy maize to supply a tender with the World Food programme (WFP). To this end the Respondent exhibits bank statements from his Bank of Baroda account where between 20th September and 20th December 2000 he withdrew US\$ 26,230 to be used by the company to supply maize to (WFP). He also allegedly used his personal house at Plot 791 Block 29 Mulago Kampala to secure an overdraft of Shs.40,000,000/= for the company a six month period in December 2002.

The Respondent then further depones that he in August, 2004 learnt that the second applicant Mr. Oule had removed Shs. 9,000,000/= worth of maize and beans from the company stores which was paid for but the proceeds of the sale not banked. That the second applicant when asked about the money allegedly instead became hostile to the Respondent. The Respondent further depones that in December 2004 he learnt that the Applicants were trying to defraud him by passing resolutions to remove him from the company and as a signatory to the company accounts. The Respondent then wrote to the Bank not to honour documents presented without his endorsement. He then states that he has discovered that at the time the accounts were blocked the applicants had already withdrawn over Shs.17,000,000/=.

The first Respondent does not deny withdrawing Shs.17,000,000/= but depones that the withdrawal was legal to facilitate the operations of the company.

Counsel for the Applicant submitted that the Respondent is not a member of the company. He further submitted that the Respondent has not shown how, not being a

founding member of the company he legally became a member of the company using the laid down procedure in Sections 75 and 77 of the Company Act, Cap 110 and Articles 11, 12, and 13 of the Articles of Association. That being the case the Respondent had his name was without sufficient cause entered in the Register of members of the company. As a result the Respondent's name should be way of rectification under Section 118 of the Companies Act, be removed from the Register of members.

In reply Counsel for the Respondent argued that if there is a register to rectify then it is of the members of the companies and not one kept by the Registrar of Companies as implied by the application. Counsel for the Respondent submitted that no Register of members of the company was brought before Court as indeed none existed. He argued that the absence of a proper Register of members of a company is very common with companies in Uganda and so the Court should take Judicial notice of this practice. Counsel for the Respondent submitted that in the absence of a proper register there was therefore nothing to rectify.

He further argued that the Respondent even without the proper Register of members, the Return of Allotments filed with the company Registrar was prima facie evidence that the Respondent is a member of the company as his name is reflected there in as a member. He further submitted;

"It is inconceivable that the company could have entrusted a non-member and a non director to run its Bank accounts..."

I am not sure of efficacy of this argument as companies normally hire officers like Financial Controllers who also sign company cheques.

Counsel for the Respondent nonetheless finally submitted that in any event the Respondent has for over 10 years been "holding out" as a Director. He argued that in the 10 years the Respondent has done a lot for the company unchallenged and so this application is caught up by the doctrine of laches. In this regard I was referred to the case of; In Re The matter of Milton Obote Foundation and in the Matter of an Application by N.A. Abanya to rectify the register [unreported] company cause 1 of 1997.

In that case the doctrine of laches was applied where an Applicant sought to strike out a member and Governor of the Foundation after over 30 years. In that case it was held that the Applicant's failure to enforce his own rights, for over 30 years *"...can only be said to have been deliberate and without any justifiable cause..."*

I have had an opportunity to review the applications, its supporting affidavits and the submissions. The real issue as I see it is whether the Respondents name should be struck off from the Register of members having been put there without justifiable cause? This is to my mind the crux of the application to rectify the Register of members of the said company. As I observed earlier the language of the remedy sought by the application is a bit ambiguous.

Paragraph (a) of the orders prayed for the notice of motion seeks;

*"...that the Register of M/S Andaalapo Industries Ltd... **be rectified by the Registrar of companies** so as to retain the applicants... as the only members of the company;"* (emphasis mine).

On the other hand ground (i) of the Notice of Motion states;

*"...without the knowledge, permission and/or consent of the applicants, the Respondents herein, Mr. Aisu Stephen, together with Joyce Owule and Lyaa Rose Christine (now deceased) without sufficient cause caused themselves to be entered in the **Register of Members** of the company..."* (Emphasis mine).

So to my mind there are two possible remedies sought here are to rectify the company register kept by the Registrar of companies or the Register of Members which is kept by the company.

A closer look at the application however reveals that it is made under Section 118 of the Companies Act, Cap 110) and Order 34 A Rule 4 of the Civil Procedure rule (CPR).

Section 118 of the Companies Act provides in part

" (1) If-

(a) *The name of any person is, without sufficient cause, entered in or omitted from the register of members of a company or*

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to Court for rectification of the register."

It would therefore appear to me that register in question that Court is being asked to look at is that of the members as kept by the company.

I agree with Counsel for the Respondent that this register of members is the one created under Section 112 of the Companies Act. Section 120 provides that the register shall be prima facie evidence of any matter inserted into it. The starting point therefore would have been for the Court to examine what is in the register of members as suggested by Counsel for the Respondent. However no register of members was presented in Court by either party. Instead a series of Annual returns were tendered into Court. The Annual return form provides in Part 5 for a list of past and present members of a company. Such a list, is of persons holding shares or stock in the company on the 14th day after the last annual general meeting and of persons who have held shares or stock at any time since the last return was filed. However I find that such a list is not a register of members for purposes of Section 112 of the Companies Act.

Counsel for the Respondent submitted that Ugandan Private Companies are notorious for not maintaining a register of members as required by law and that this Court should take Judicial notice of this.

Counsel for the Respondent submits that in the absence of a Register of Members Court should dismiss this application. He however much makes an about turn and submits in the alternative that the absence of the Register of Members notwithstanding the return of allotment should be prima facie evidence of membership.

He submitted that Annual returns show that the Respondent was a member and Director of the company unchallenged for over 10 years.

I am of the view that Counsel for the Respondent is trying to equate the Register of Members of a company to an Annual Return filed with the Registrar of Companies.

I do not find the two to be the same and a rectification of the Register of Members of a company would not ipso facto rectify the form of Annual return. Each of the two company documents can be rectified in their own right.

Whereas I do take Judicial notice of what many private companies do not have a Register of Members I also find that in accordance with the law the Annual return can not be taken in substitution to the Register of Members. Since there is no 'register of members' I find that it is not possible for Court to rectify it. That is the de jure position.

However one in such circumstances should not just look at the de jure position but also the de facto position on the ground if any resolution is to be brought to this dispute. Section 33 of the Judicature Act (Cap 13) provides;

"...The High Court shall, in the exercise of the Jurisdiction vested in it by the constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided..."

The matter in controversy is whether Stephen Aisu is a member and Director of the company. The case for the applicant is that no sufficient cause can be shown how the Respondent became a member and Director of the company. Indeed no share transfer form or share certificate has been presented to Court as proof of membership.

However Annual returns from 1985 to 1993 show the Respondent as Member and Director. Company correspondence like Sales Agreements (on a company letter head) and resolutions show the Respondent signing as a Director. In 2005 there are a number of letters moving back and forth especially from the police and the office of the Register – General as to who should be the rightful members of the company. However annexure "T" to the affidavit of Mark Xavier Wamalwa a letter from The Ag. Registrar General Mr. Bisereko Kyomuhendo dated 7th June 2005 is quite instructive. The Ag. Registrar General gives the opinion that the parties have to go to Court to resolve the ownership question, hence this application.

I find that on the evidence presented to Court that the Respondent has been recognized by the company as its member and Director since 1985 that is over 20 years by my calculation. The evidence shows that despite failure to fully comply with the law on issues of membership, this is a small private company of 4 persons (one now deceased) and it is unbelievable that for such a long time the said 4 persons could not have known among themselves who were members and or directors.

Indeed annexure "E" to affidavit of the Respondent dated 15th November 2005 shows an agreement dated 8th May 2000 signed on behalf of company for 200 MT of dry clean maize by Aisu Steven (the Respondent) and witnessed by one Aburek Moses.

A resolution to increase shares dated 21st February 1994 (referred to supra annex "N" to affidavit of the first Applicant) could seem to suggest that a one Moses Aburek referred to as a Director of the company is the same Moses Oule the second Applicant. The Resolution was signed by one Joyce Owule as Secretary who is said to be the wife of the second Applicant. She signed the resolution with the Respondent.

I am therefore find that for all practical purposes (de facto) the Respondent was a member and Director of the company and he was so for a very long period of time unchallenged. I therefore agree with Counsel for the Respondent that the attempt by the Applicants to deny and or reverse this will be caught up by the Doctrine of Laches and so would act as a bar to this present action. The failure to maintain proper company records by the company and its officers is an act of poor corporate governance and may be a reason for this dispute among the members. Rather than

seek Court intervention to expel a member through a rectification of the Members Register these issues should be resolved through a company general meeting, and failing which a more suitable legal action instituted.

I therefore decline to grant the order sought and dismiss this application with costs.

Geoffrey Kiryabwire

JUDGE

16/06/2006

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