THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

IN THE MATTER OF THE COMPANIES ACT, 2012

COMPANY CAUSE NO. 13 OF 2020
(APPEAL ARISING FROM THE DECISION OF THE REGISTRAR IN COMPANY CAUSE No. 005 OF 2020)

1. **BRYAN XSABO STRATEGY CONSULTANTS (UGANDA) LIMITED**
2. **MOLAR SOLAR SYSTEMS (UGANDA) LIMITED**
3. **MSSXSABO POWER LIMITED ::::::::::::::::::::::::::::::::::::APPELLANTS**

VERSUS

GREAT LAKES ENERGY COMPANY N.V ::::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

This is an appeal from the decision of the Registrar General of Companies; it is brought under Section 291 & 293 of the Companies Act, 2012 & Order 38 Rule 2 & 5 (a) of the Civil Procedure Rules S.I 71-1. The company petition (No. 005 of 2020, hereinafter referred to as the Petition) appealed from had appellants as respondents and the present respondent as the applicant. The appellants are seeking orders that;

1. The decision of the Registrar of Companies in Company Cause No. 005 0f 2020(petition) dated 26th May 2020:
   (a) Be reviewed and set aside.

   (b) A Declaration that the investment agreement between the Respondent (Great Lakes Energy Company N.V Ltd) and the appellants dated 30th April 2017 is null and void.

(c) Costs be awarded to the appellant.

The main grounds for this application are set out in the application and the affidavit in support but briefly;

1. That Mss xsabo Power Limited a Ugandan Company incorporated on 30th September, 2013 with the major objective of generating solar and wind power, with the following shareholding; Bryan Xsabo Strategy Consultants (Uganda) Ltd 80 ordinary shares and Mola Solar System (Uganda) Limited 20 shares.

2. That on the 15th September, 2015 Xsabo Power Limited was granted a Generation and Sale Licence by Uganda Electricity Regulatory Authority to construct, own and operate a 20MW pilot solar PV power park at Kabulasoke-Gomba district.

3. That on the 21st December 2016 Xsabo Power Limited signed a power purchase Agreement (PPA) with Uganda Electricity Transmission Company Limited and thereafter also signed the Implimentation Agreement with Government of Uganda represented by Minister of Energy and Mineral development on 1st March 2017.

4. That in order to raise funds to finance the project, MSS Xsabo Power Limited started scouting for a partner who would provide liquidity for the project. MSS Xsabo was introduced to Mr. Humphrey Ndegwa Kariuki, a Kenyan national and beneficial owner of GL Africa Energy Ltd a company incorporated in the United Kingdom and they agreed on how to finance the project and they consequently signed a memorandum of understanding.

5. That on the 30th April 2017, MSS Xsabo Power Limited together with its shareholders Bryan Xsabo Strategy Consultants (Uganda) Limited and Mola System (Uganda) Limited and its promoters Consicara Global

Investors Limited and Dr. David Alobo signed an Investment agreement with the respondent-Great Lakes Energy Company N.V.

6. That following the signing of the investment agreement, on 6th July 2017 the shareholders of MSS Xsabo Power Ltd convened an Extra Ordinary General meeting in which they agreed to increase the share capital of MSS Xsabo Power Limited to Uganda Shs 196,000,000/= by the creation of an additional 96 ordinary shares of Uganda shillings 1,000,000/= and also authorised the directors to allot the 96 shares to Great Lakes Energy Company N.V.

7. That consequent to the above resolution, the parties to the investment agreement signed a shareholders agreement in which they recognised the allotment of the 96 ordinary shares valued at 96,000,000/= to Great Lakes Energy Company N.V thereby increasing the share capital of Xsabo Powers Limited from 100,000,000/= to 196,000,000/=

8. That contrary to the Investment Agreement, the shareholder resolution and the shareholders Agreement, Great Lakes Energy Company N.V failed to pay up the shares allotted to them.

9. That when the Great Lakes Energy Company N.V failed to come clean, Xsabo Power Limited and its shareholders and promoters, who were one party to the investment agreement and who had entered into the contract with Great Lakes Energy Company N.V decided to revoke the Investment Agreement and all subsequent agreements.

10. The Registrar erred in law when he exercised powers not conferred upon him by determining proprietary rights of the parties.

11. The Registrar erred in law when he exercised powers not vested in him when he reversed the decision of the board of directors in relation to shareholding of the 3rd respondent.

12. The registrar erred in law when he made the decision without giving the 1st and 2nd appellants a right to be heard and without any evidence of record.

13. The registrar erred in law and fact when he held that the shareholding and investment agreements were stand-alone whereas not.

The respondent Great Lakes Energy Company N.V filed the application for the rectification of the register in relation to MSS XSABO POWER LIMITED seeking the following;

(a) The board of directors' resolution dated 4th November 2019 and filed on 5th November 2019 revoking /cancelling Great Lakes Energy Company N.V's shareholding in the company be expunged from the register.

(b) The register to be rectified to restore Great Lakes Energy Company N.V as a shareholder and a member of the company with 96 fully paid-up shares; and

(c) The Registrar to issue a directive barring the board of directors or any member of Xsabo from unilaterally altering the shareholding of the Company until a formal resolution of the dispute Great Lakes Energy Company N.V, the company and shareholders Bryan Xsabo Strategy Consultants (Uganda) Limited and Mola Solar Systems (Uganda) Limited. Various aspects of the dispute will be resolved by a London-seated arbitral tribunal, the High Court of Uganda and Electricity Regulatory Authority.

On 30th April, Great Lakes Energy Company N.V concluded an Investment with Bryan Xsabo, Mola Solar, Dr David Alobo (Consicara). The Investment Agreement was entered into in connection with financing, development and operation of the ERA-Licensed 20MW solar power plant in Kabulasoke-Gomba District.

Pursuant to the terms of the Investment Agreement Great Lakes Energy Company N.V granted several loans to Xsabo to develop the project. The parties also entered into a Call Option Agreement dated 30th April 2017 by which Great Lakes Energy Company N.V was granted the contractual option to require the existing shareholders at the time of the exercise of the call option to transfer such number

of shares in the Xsabo which would result into Great Lakes Energy Company N.V holding 60% of the total issued share capital of the Company.

As consideration for the entry into and performance of Investment Agreement, Great Lakes Energy Company N.V was allotted 96 fully paid-up ordinary shares in Xsabo on 5th December 2017.

A dispute arose between Great Lakes Energy Company N.V's and Dr. David Alobo, Bryan Xsabo, Mola Solar and Consicara on the other hand. The respondent has initiated legal action before ERA and the London Court of International Arbitration to enforce its rights.

However, Dr David Alobo took an illegal unilateral action to revoke/cancel Great Lakes Energy Company N.V's shareholding in the company by filing a resolution dated 5th November 2019 following a board meeting which purportedly took place on 4th November 2019.

This is what triggered the complaint before the registrar to rectify the register.

The Registrar of Companies issued orders that:

(1) The resolution dated 4th November, 2019 and filed on 5th November, 2019 is illegal and is hereby expunged from the register.

(2) The register is rectified with the result that the Company's shareholding as of 5th December 2017 is the legal and correct shareholding of the company, that is the Petitioner with 96 Ordinary Shares, Bryan Xsabo with 80 shares and 20 ordinary shares.

The following issues were raised by the appellant for the consideration of court;

1. Whether the company registrar had the jurisdiction to entertain a matter already at the London Court of International Arbitration pursuant to an arbitration clause?
2. Whether the company registrar erred in law when he made a decision without giving the 1st and 2nd Appellants a fair hearing?
3. Whether the Company Registrar erred in law when he made a decision without any evidence on record as required by law?

4. Whether the Company Registrar erred in law and fact when he held that the shareholding and investment agreements were stand-alone whereas not?
5. Whether the Company Registrar erred in law when he failed to investigate whether the respondent had shares in the 3rd respondent?
6. Whether the Company Registrar erred in law and fact when he held that failure to give notice to GLE invalidated the Board resolution?
7. Whether the Respondent in commencing litigation before the registrar of companies waived its right to arbitrate the issues of recall of the shares and revocation of the investment agreement?
8. Whether this court has jurisdiction to rule on the Investment Agreement?
9. Whether the Investment Agreement is still in existence?
10. What remedies are available to the parties?

The appellants were represented *Mr. Makada Fred, Mr. Okecha Micheal, Mr. Mumpenje Andrew* for the appellants while the respondent was represented by *Mr. Wabwire Anthony & Ruth Auma.*

The parties filed written submissions which the court has considered in the determination of this matter.

Whether the Registrar of Companies had the jurisdiction to entertain a matter already at the London Court of International Arbitration pursuant to an arbitration clause?

The appellant's counsel submitted that the URSB registrar had no jurisdiction to entertain a matter already undergoing arbitration even if it initially fell within his realm. By the time the matter was filed at URSB, it had already been filed at the LCIA and pleadings filed there. This was even admitted by GLE at the time of raising the preliminary objection on the 26th day of February, 2020.

The matter was already at the London Court of international Arbitration, and parties had already filed pleading at the same court. Article 22.2 of the LCIA Rules, clearly stipulates that by agreeing to arbitration in an agreement, consequentially and consensually, parties are taken to have agreed not to apply to any court or legal authority for an order available from the arbitration tribunal.

Regulation 4(1) and (2) of the Companies (Powers of the Registrar) Regulations of 2016, which regulations bind the Registrar in the dispensation of his duties and mandate, it is stated that a registrar shall not hear any matter or application pending before court, which has been brought to his or her attention.

The respondent submitted that on the 6th of December 2019, the Respondent served the Appellant with a Notice of Disputes and rectification of the register was not one of the disputes. On 14th January 2020, the Respondent filed the application for rectification of the register. The Request for Arbitration was filed at the London Court of International Arbitration (LCIA) by the Respondent on the 12th day of February 2020.

According to counsel for the respondent, in his ruling of the 9th of March 2020, the Registrar was alive to the question of jurisdiction. He stated the law relating to jurisdiction, the fundamentals of arbitral proceedings, examined the nature of the application and found it to be restricted to the impugned resolution. He did not delve into the contract or investment agreement.

Similarly in his final ruling, the subject matter of this appeal, the Registrar expressly did not determine any matters relating to the contractual dispute between the parties, which were not issues before him. The ruling was concerned with or strictly confined to the specific question of the legality of the board resolution cancelling the Respondent's shareholding in MSS Xsabo Power Ltd and the effects thereof. The Registrar properly directed himself as to the question of jurisdiction and confined himself to a matter not subject to arbitration before the LCIA. The legality of the impugned resolution was not a subject of the arbitration at the LCIA.

The matters before the Registrar, which are the subject of this appeal, fell within Regulation 8(2)(a),(b),(c),(d) and (e) and were therefore within the Learned Registrar's jurisdiction.

The respondent counsel submitted therefore that with the exception of the question of rectification of the register, the other matters raised by the Appellants are subject of arbitration of the LCIA and are therefore improperly brought in this Appeal.

Analysis.

An agreement to go to arbitration is triggered by a clause in a contract, or by agreement between the parties once a dispute has arisen. Therefore, arbitration stems from an agreement to refer the dispute to arbitration. As *Lord Mance* said in ***Dallah Real Estate and Tourism Co. v Ministry of religious Affairs of the Government of Pakistan [2011] 1 AC 793*** *' Arbitration….is consensual- the manifestation of the parties'* choice to submit present and future issues between them for arbitration. Arbitrators….cannot by their own decision….create or extend the authority conferred on them.

An express arbitration clause in the underlying contract will need to be construed to determine what it requires. The range of disputes that will be covered by arbitration agreement is a matter of contractual construction to determine what the parties intended. The arbitrator can only have jurisdiction to determine matters that the parties have agreed should be referred to arbitration.

The present issue for determination was a rectification of the register by the Registrar of Companies premised on a resolution made by one of the parties taking away the rights (shares) of the respondent. This is a dispute that may not have been envisaged by the parties and it is in the same spirit the parties may never have anticipated that either party may engage in criminality of forging documents which would automatically trigger criminal sanctions. The proper office to determine the legality of documents already presented to it is the Registrar of Companies. This power is vested in a specific office under the available legal regime;

The orders sought clearly fall within the ambit of regulation 8 of The Companies (Powers of The Registrar) Regulations S.I No. 71 of 2016. Under regulation 3(i) it is provided that; *"In the exercise of the functions under the Act or any Regulations made under the Act, the registrar—; (i) may correct or amend the register;*

And Regulation 8 provides as follows:

"*8. Rectification of register.*

(1) The registrar may rectify and update the register to ensure that the register is accurate.

(2) For the purposes of this regulation, the registrar may expunge from the register, any information or document included in the register, which—

(a) is misleading;

(b) is inaccurate;

(c) is issued in error;

(d) contains an entry or endorsement made in error;

(e) contains an illegal endorsement;

(f) is illegally or wrongfully obtained; or

(g) which a court has ordered the registrar to expunge from the register."

The parties could not agree to suspend the powers of the Registrar of Companies in respect of their register for which they are the sole custodians or agree through an arbitration process to breach the law or process governing transfer of shares or illegally change ownership or management of the company in disregard of clear provisions of the law. The registrar of companies still retains the jurisdiction to correct and amend the register in case of any document or information that falls within regulation 8. The arbitration Clause or process cannot be used suspend the powers of registrar to do what the law mandates the office to do. The notification about arbitration process cannot be used to suspend or stop the Registrar from executing their duties under the law.

The respondent have submitted that the rectification of the register was not one of the disputes referred to arbitration and secondly, that by the time the matter was referred to arbitration they had already made an application for rectification of the register. This court is in agreement with this submission and the appellant's have not shown how the issue of rectification of the register is pending before the London Court of International Arbitration. The prayers sought by the appellant are clearly set out in request for arbitration (annex O) dated 12 February 2020.

In addition, the arbitration clause that the appellant is trying to use in taking away the jurisdiction of Registrar of Companies was made in a different agreement (Investment Agreement) and in my view it relates solely to disputes arising out of the same agreement and not disputes in alleged illegal change of company management and ownership. When the appellants made the necessary changes to the company register in respect of the shareholding and admitted the respondent it became a new legal order and the same could not change whimsically to the detriment of the parties or without due process. It is trite that the registrar while adjudicating upon a *lis* is obliged to pose and answer a right question as to enable it arrive at right conclusion as to whether it has jurisdiction.

The duty of the registrar of companies to rectify a Company Register is akin to that of a registrar of titles in Land Office, they cannot surrender that statutory obligation to a third party once they have established errors or mistakes in the register. The registrar could not refer a matter to the London Court of International Arbitration.

The Registrar of Companies had jurisdiction to rectify the register and was not barred by arbitration proceedings initiated at London Court of International Arbitration from ensuring that the register has no misleading documents or information to the public.

Whether the Registrar of Companies erred in law when he made a decision without giving the 3rd Appellant a fair hearing?

The appellants' counsel submitted that Articles 28, 42 and 44(c) of the Constitution of the Republic of Uganda make fair hearing a non-derogable sacrosanct right that must be respected at all times by every court or tribunal. What was before Mr. Tonny Tumukunde at URSB was not a fair trial or trial properly called but a travesty of justice. He alleges the registrar made a ruling purely on the pleadings before him without any oral or written evidence before him.

The appellants contend they made it clear that there was need for both sides to adduce oral evidence or statutory declaration evidence on the petition, make oral

or written submissions and then a ruling to ensue. MSS Xsabo Power Limited intimated in that email that it also wanted to cross examine Humphrey Kariuki a director in GLE and so there was need for evidence. Unfortunately, the Registrar chose to stay quiet.

Counsel submitted that, this procedure offended section 288 of the Companies Act which is to the effect that the registrar must take evidence by statutory declaration, viva voce or a combination of both. In our facts, no single evidence was given at URSB. The registrar chose to accept the version of GLE and disbelieve the averments of MSS Xsabo Power Limited.

Counsel cited the case of **Luitingh Lafras & Anor vs Special Services Ltd, High Court Company Cause No. 11 of 2019,** in support of his submission that the Registrar did not give conduct a proper hearing before arriving at the decision and relied on pleadings to make a decision.

The appellants counsel also submitted that the 1st and 2nd appellants were deprived of the shares that they had acquired on the 4th day of November, 2019 by virtue of the ruling of the 26th day of June 2020. You cannot deprive one of property without a hearing. Article 26 of the Constitution of the Republic of Uganda, which guarantees a right to property, clearly bars such a deprivation. By not inviting them, they were deprived of their right to property without according them a fair hearing.

The respondent's counsel submitted that Section 288 of the Companies Act provides for the taking of evidence by way of statutory declaration. The section gives the Registrar the discretion to take evidence viva voce in lieu of or in addition to evidence by declaration. The Respondent filed a detailed answer to the petition numbering 7(seven) pages. This answer was detailed.

Counsel contended that a registrar is not required to take evidence in a manner that a court does and also cited the case of **LUITINGH LAFRAS & ANOR vs SPECIAL SERVICES LTD High Court Company Cause No. 11 of 2019** "*registrar is bound to follow norms of natural justice at some stage of their decisional process. But this is in* ***a minimal manner and may not observe a detailed and elaborate procedure like taking testimony under oath or following strict rules of evidence****." .*

The respondent submitted that by receiving pleadings, inviting submissions and critically reviewing the impugned resolution, the Registrar adhered to acceptable minimum standards in the procedure for determining the matter before him.

Analysis

The powers of the registrar under the Companies Act are quasi-judicial since it involves taking decisions as provided under the Act. Where a statutory authority is empowered under a statute to do any act, which would prejudicially affect the subject, although there is *lis* or contending parties and the contest is between the authority and the subject or the subject and the statutory authority is required to act judicially under the statute, the decision of the statutory authority is quasi-judicial.

The exercise of power by the registrar contemplates the adjudication of rival claims of the persons by an act of the mind or judgment upon the proposed cause of official action as to an object of the corporate power vested under the Companies Act. They decide both questions of fact as well as of law, and determine a variety of applications, claims, controversies and disputes.

A registrar exercises a quasi-judicial function in executing their function and this implies that a hearing is inevitable. A quasi-judicial hearing presupposes that the proceeding in question is somewhat similar to, but not exactly, judicial in nature.

Any person or body having legal authority to determine questions affecting rights of subjects and having the duty to act judicially; acts in a *quasi*-judicial manner. The statutes hardly ever say in so many words that the authority is required to act judicially. Therefore it becomes a matter of implication or inference for the courts to decide, after reading a statute, whether the concerned authority is to act judicially or not. In the case of ***Luitingh Lafras & Anor vs Special Services Ltd, High Court Company Cause No. 11 of 2019*** this court set out basic standard required of a hearing before the Registrar of Companies in some aspects as thus;

"It is trite that the registrar while adjudicating upon a lis is obliged to pose and answer a right question as to enable it arrive at right conclusion as to whether it

has jurisdiction in the matter or not and also whether it has sufficient facts or evidence to determine the dispute between the parties...

The registrar is bound to follow norms of natural justice at some stage of their decisional process. But this is in a minimal manner and may not observe a detailed and elaborate procedure like taking testimony under oath or following strict rules of evidence. The nature of the order given by the registrar is one which ought to have invited detailed examination of evidence and consequences of the decision since it involved deprivation of shares which is violation of the right to property.

In addition, the consequences of the decision made in a summary manner without sufficient facts and evidence, had to be cautiously taken even though the registrar is vested with the power to take such a decision. The decision must be taken on cogence of evidence and not on assumptions and conjecture of the registrar."

In the present case, the respondent filed a complaint (Petition) before the registrar and the appellants filed an extensive '***Answer to the petition'*** and the respondent filed a '***Petitioner rejoinder to the Respondent's answer to petition***'.

The Registrar in a communication dated 23rd January 2020 notified the parties through a letter as follows; '*Be informed that the parties shall be heard on their own evidence in regards to this matter on 27th day of January, 2019 (2020) at 9:00am in URSB Business Registration Boardroom'.*

Tumukunde Tony (Registrar of Companies)

The Registrar in another communication titled; *NOTICE OF EXTENSION AND/ OR ADJOURNMENT OF HEARING* stated*; ALL Parties, be notified that due to the presidential directives on the pandemic corona virus (COVID-19), the hearing that was to take place on the 26th day of March, 2020 will not happen.*

By this notice, this matter has henceforth been fixed for hearing on the 22nd day of April, 2020 at 10:00am.

Tumukunde Tony (Registrar of Companies)

The Registrar in an email and noted as follows;"*…….Unfortunately, due to health concern and national guidance as outlined by government, we shall not be able to host the parties physically.*

Accordingly, I shall consider the correspondences generated by both parties in form of petition, replies, rejoinder and deliver my ruling, in any case not later than 6th April, 2020. Parties shall be kept in the know.'

Tumukunde Tony (Registrar of Companies)

It is clear from the documents or communications on record that the Registrar never conducted a hearing within the meaning of the Companies Act. The directives given by the Registrar where below the minimum standard of a quasi-judicial body like URSB/Registrar of Companies. The registrar envisaged a hearing of the parties from the beginning but due to lockdown he changed directives and decided that he will consider the petition, replies and rejoinder to make a ruling. This was very erroneous since it is contrary to the Companies Act.

Section 288 of the Companies Act provides;

Mode of giving evidence in proceedings before the registrar

(1) In any proceeding under this Act before the registrar, the evidence shall be given by statutory declaration in the absence of directions to the contrary, but, in any case in which the registrar thinks it right so to do, he or she may take evidence viva voce in lieu of or in addition to evidence by declaration. Any such statutory declaration may in case of appeal be used for the court in lieu of evidence by affidavit, but if so used shall have all the incidents and consequences of evidence by affidavit.

The registrar did not have any statutory declaration on record as the evidence supporting the complaint (petition or answer to the Petition) this was a procedural irregularity which is contrary to the above provision of the companies Act. The registrar could not act without clear evidence under statutory declaration or evidence taken viva voce.

The registrar should have directed the parties to file their evidence and proceeded to determine the matter with some evidence on record. As a quasi-judicial body, the registrar had a duty to act judicially and evaluate the evidence against the complaint made in accordance with the Companies Act.

This ground of review succeeds. The order of Registrar is set aside. The registrar is directed to re-hear the complaint before a different person (registrar).

The application is allowed with no order as to costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
7th July 2021