

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**  
**COMPANY CAUSE No. 18 of 2016**

**AMIN MOHAMMED ALLIBHAI:.....PETITIONER**

**VERSUS**

- 1. BUGERERE PROPERTIES LIMITED**
- 2. MADATALLY ALLIBHAI POPAT**
- 3. MADATALLY ALLIBHAI ASHIFA**
- 4. GLADYS GULSHAN ALLIBHAI:.....RESPONDENTS**

**BEFORE; HON. JUSTICE SSEKAANA MUSA**

**JUDGMENT**

This petition was brought under Article 28 of the Constitution, Sections 125, 248 and 250 of the Companies Act, seeking the following declarations;

1. The petitioner is a shareholder and director of the company, that the affairs of the company were conducted by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents in a manner oppressive to the petitioner and the company.
2. A declaration that the alienation of the company property without any consideration amounted to fraud on the company and against the petitioner as a minority shareholder as a minority shareholder.
3. The petitioner sought that an order be issued for the holding of a board meeting to streamline the affairs of the company in the presence of all shareholders including the petitioner.
4. That the register be rectified to confirm that the petitioner owns 20% of the shares of the company, an order of the company be issued to the registrar of companies to rectify the register.

5. A permanent injunction be issued to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents restrain them from further oppressing the petitioner and from acting unlawfully.

The petitioner alleged that he was a director and shareholder of the 1<sup>st</sup> respondent company having been appointed as such by resolution dated 10<sup>th</sup> March 1997 and allotted shares as evidenced by the return of allotment dated 25<sup>th</sup> March 1997 respectively, share transfer form dated 17<sup>th</sup> April 1999. That the 1<sup>st</sup> respondent owned a property comprised in LRV 635 Folio 23 – Plot 66, Kira road Kampala. That the 2<sup>nd</sup> and 4<sup>th</sup> respondents purportedly passed a resolution without the knowledge of the petitioner wherein they transferred the company property into the names of Madatally Allibhai Popat Ashifa, Shelina Allibhai and Allibhai Salim, all children of the 2<sup>nd</sup> and 4<sup>th</sup> respondents. It was alleged by the petitioner that the actions of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, the 1<sup>st</sup> respondent was deprived of its prime property.

That the actions were ultra vires of the objects of the company and were done in isolation of the petitioner as a shareholder in the 1<sup>st</sup> respondent company.

The petitioner was represented by *Counsel Richard Masereje* and *Counsel Humphrey Tumwesigye* and the Respondents were represented by *Counsel Paul Kuteesa*

While at the scheduling conference, the following issues were framed for determination by the court;

1. *Whether the petitioner was allotted shares in the 1<sup>st</sup> respondent company?*
2. *If so whether such allotment was done in accordance with the law and the memorandum and articles of association of the first respondent company.*
3. *Whether the petitioner was appointed a director of the first respondent company?*
4. *Whether the affairs of the company are being conducted by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents in a manner oppressive to the petitioner?*
5. *Whether the alienation of the company property without any consideration amounted to fraud on the company and against the petitioner as a minority member.*
6. *What remedies are available to the parties?*

The parties were directed to file final written submissions that were considered by this court.

In submissions, counsel for the respondent raised two preliminary points.

Counsel submitted that issue 5 raised by the petitioner should not be determined in the current proceedings. This was premised on the fact that there were other two suits between the parties that concerned the same subject matter as the matter that the issue in question wished to address. That the trial judge agreed and decided that it be excluded from the trial of the petition and it would be limited to the determination of the issue of alleged shareholding and directorship of the petitioner in the first respondent company.

Counsel for the petitioner submitted that the issue was framed and agreed to by both parties at scheduling. Counsel submitted that in the alternative but without prejudice, the petitioner had submitted on issue 4 and 5 together since they related to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents' oppressive actions against the petitioner.

The petitioner doesn't refute the respondents' assertion that issue 5 was disregarded by the parties and court. Issue 5 was directly in issue in the suits pending before the *High Court Land Division vide HCCS No. 238 of 2014 Bugerere Properties Ltd v Amin Allibhai & 4 others* as well as *Bugerere Properties Ltd vs Madatally Alibhai Popat Ashifa & Anor*. It is just and fair that the issue be left for the court in the above suits to determine.

I therefore concur with the respondents' counsel that the submissions on issue 5 ought to be disregarded.

***Whether the petition is res judicata in respect of the question of directorship and shareholding of the petitioner in 1<sup>st</sup> respondent?***

The second preliminary issue was the question of the directorship and shareholding of the petitioner in the first respondent company. Counsel submitted that the same had already been considered and a decision made in two previous matters.

In *HCMA No. 23 of 2016 Madatally Allibhai Popat Ashifa vs The Commissioner Land Registration* Justice Nyanzi considered the question of shareholding and directorship of the petitioner held as follows;

*"I further directed that the applicant files an additional affidavit to produce a copy of the contested special certificate of title and the Articles and Memorandum for Bugerere Properties Limited. The reason I so directed was to enable this court to trace and know what kind of interest Amin Mohammed had in this property. The applicant still complied with the order and availed that information.*

*...I also concluded from the supplementary affidavit of the applicant that Amin Muhammed did not have any connection or interest in the subject property. He is not connected to Bugerere Properties Limited..."*

Further in *HCMA No. 1654 of 2016 Bugerere Properties Limited vs M/S Kaggwa & Kaggwa Advocates*, Justice Rugadya Nkonge while determining whether the petitioner had a right to instruct the respondent law firm on behalf of the company held that *the issue of whether or not Mr. Amin Mohammed was director in the company had already been determined by this court and thus agreed with the decision of Justice Nyanzi in HCMA No. 23 of 2016 Madatally Allibhai Popat Ashifa vs The Commissioner Land Registration.*

Counsel submitted that from the two decisions of this court above that the court has previously considered the issue as to the shareholding and directorship of the petitioner in the first respondent and a decision was made. The court found that the petitioner is not a director or shareholder of the respondent company. The two decisions have never been appealed or challenged by the petitioner. Counsel invited the court to follow the persuasive decisions and find that the petitioner is not a shareholder and/or a director of the first respondent and thus dismiss the petition.

The petitioner submitted that the decisions above did not determine the issue of directorship and shareholding. The court in both cases was not faced with the overwhelming evidence as it is before this court.

Counsel for the petitioner submitted that HCMA No. 23 of 2016 was a judicial review application. Counsel submitted that it is trite law that judicial review does not concern itself with the merits of a case but rather the decision-making process of a public entity whereas in HCMA No. 1654 of 2016, court was invited to determine if the respondent firm had instructions to institute a suit on behalf of the company. Nowhere was the court presented with the evidence as presented before this court to determine the issue of directorship or shareholding.

Counsel submitted that it would therefore be premature for this court to dismiss this petition that seeks to determine the issue of the petitioner's directorship and shareholding on the basis of the two decisions that were not presented with the evidence as is before this court.

### ***Analysis***

The petitioner's counsel seems to argue that there was no evidence and now that he overwhelming evidence he is at liberty to re-litigate the matter. The principle of *res judicata* bars re-litigating matter already determined by a competent court.

Section 7 the Civil Procedure Act Cap 71 provides that: -

*“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that Court.”*

In the case of *Ganatra -v- Ganatra [2007]1 EA at P.82* Justice Nyamu held that;

*“... for res judicata to be established, three conditions have to be fulfilled. Firstly, that there was a former suit or proceedings in which the same parties as in the subsequent suit or proceedings was litigated. Secondly, that the matter in issue in the later suit must have been directly answered substantially in issue in the former suit. Thirdly, that a Court competent to try it had heard and finally decided the matters in controversy between the parties in the former suit...”*

The rule of *res judicata* is based on considerations of public policy. The rule envisages that finality should attach to the binding decisions pronounced by courts of competent jurisdiction, and that it is in public interest that individuals should not be made to face the same litigation twice. In the absence of any such rule, there is every likelihood of multiplicity of litigation without any end thus involving the rights of a person in endless confusion which would cause great injustice to him under the cover of law. *Jabbe Pascal Osinde Osudo v AG & CAA HCMA No. 271 of 2021*

The court in HCMA No. 23 of 2016 and HCMA No. 1654 of 2016 briefly discussed the question of the petitioner’s shareholding and directorship in the respondent company. The questions in those suits were determined and the question pertaining the petitioner’s shareholding and directorship came up as well. *Nyanzi Yasin J*, in HCMA No. 23 of 2016 while determining the alleged illegal decision by the Chief Registrar of Titles to cancel the company’s duplicate certificate of title held that the applicant did not have any connection or interest in the suit property and was also not connected to Bugerere Properties Limited. *Alexandra Nkonge Rugadya J*, in HCMA No. 1654 of 2016 reiterated the court’s decision in HCMA No. 23 of 2016 that petitioner was not a director in the company.

Justice Nyanzi Yasin considered the question of shareholding and directorship of the petitioner held as follows;

*“I further directed that the applicant files an additional affidavit to produce a copy of the contested special certificate of title and the Articles and Memorandum for Bugerere Properties Limited. The reason I so directed was to enable this court to trace and know*

*what kind of interest Amin Mohammed had in this property. The applicant still complied with the order and availed that information.*

*...I also concluded from the supplementary affidavit of the applicant that Amin Muhammed did not have any connection or interest in the subject property. He is not connected to Bugerere Properties Limited..."*

The court must determine whether a matter in respect of which relief claimed in an earlier suit is said to be generally a matter "directly and substantially" in issue but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or it may not be. It is possible that it was "directly and substantially" in issue and it may also be possible it was only collaterally or incidentally in issue, depending on upon the facts of the case.

The court sought to know the status of the present petitioner in the company and specifically determine his interest in the company. The petitioner failed to present sufficient evidence for court to make a pronouncement on the issue in his favour. The court made a decision. The same decision was confirmed by another Judge in a matter related or incidental to the company-Bugerere properties Limited.

This goes to show this court that the already pronounced itself on the question of the petitioner's directorship. Therefore this court can proceed to determine the question relating to the shareholding status of the petitioner alone.

I will then proceed to determine this matter.

The parties submitted on issue 1 and 2 jointly.

- 1. Whether the petitioner was allotted shares in the 1<sup>st</sup> respondent company?***
- 2. If so whether such allotment was done in accordance with the law and the memorandum and articles of association of the first respondent company?***

The petitioner's counsel in their submissions referred this court to annexure C petition (a return of allotment) of the petitioner's affidavit in support that was presented for filing to the Registrar of Companies by Mukasa & Co Advocates. Counsel submitted that in the additional affidavit in support of the petition deponed by Justice (Rtd) Lameck Mukasa, among the documents proving that he participated in the incorporation of the 1<sup>st</sup> respondent was a return of allotment wherein the petitioner was allotted shares in the 1<sup>st</sup> respondent company.

Counsel submitted that the petitioner reaffirmed the 10 shares as per the return of allotment and this evidence as well as that of Justice (Rtd) Lameck Mukasa remained unchallenged.

On the other hand, counsel for the respondents submitted that the petitioner had never been allotted any shares in the 1<sup>st</sup> respondent company. Counsel submitted that there was no resolution of the board of directors of the 1<sup>st</sup> respondent company that was adduced to prove that there was any decision of the company that authorized allotment of shares to the petitioner. That in absence of a board of directors' resolution the petitioner cannot claim that he was allotted shares in the company.

Counsel submitted that the return of allotment relied on by the petitioner does not form part of exhibit "company file" which is the complete company file for the first respondent company that was exhibited in court by the registrar of companies.

Counsel submitted that return of allotment must be rejected since it did not form part of the company file and the petitioner failed to also prove that it was signed by any known officer of the company.

In the alternative, counsel submitted that even if the return of allotment was valid; the petitioner did not adduce any evidence to prove that he paid for the shares that were purportedly allotted to him or that he agreed to take the shares. Counsel submitted that mere allotment by itself did not vest the petitioner with shares, the petitioner had to demonstrate that he accepted the offer to allot to him shares and that he paid for the shares. Counsel cited the cases of *Mathew Rukikaire vs Incafex Ltd SCCA No. 03 of 2015* and *Cliff Masagazi vs Afriland First Bank Uganda Company Cause No. 08 of 2020*.

Counsel further noted that if the petitioner was already a shareholder of the company, he would not have signed the memorandum of understanding to take up shares in the company upon payment of USD 250,000.

Counsel concluded that there was no evidence that the petitioner was allotted any shares in the company and asked the court to answer both issues one and two in the negative.

In rejoinder, counsel for the petitioner submitted that there was sufficient evidence on record to shift the balance of probability in favor of the petitioner. Counsel submitted that the duty to call for a board meeting and consequently pass resolutions did not lay with the petitioner hence it was improper to place the burden of proving whether there was a board resolution onto the petitioner who had no control over such a process.

Counsel submitted that the petitioner who dealt with the 2<sup>nd</sup> respondent in good faith and who was a director of the 1<sup>st</sup> respondent company at the time was precluded from inquiring into the internal procedures of the company.

Counsel cited the case of *Royal British Bank vs Turquand* (1856) 6 E&B 327 and *CTM Uganda Ltd & 2 Ors v Allmuss Properties Uganda & 3 Ors* (Miscellaneous Application-2015/904) [2017] in support of his submission.

Further that, in cross examination the 4<sup>th</sup> respondent who was the 1<sup>st</sup> respondent's company secretary at the time of filing the return of allotment did indicate that no resolutions were ever drafted and filed.

Counsel rejoined the respondents' submission that the return of allotment was not among the documents exhibited in the company file submitting that the duty to ensure that documents filed in the companies registry are not dislodged or misplaced does not lie with the petitioner. That the petitioner presented to court documents within his possession to prove a fact and placing any further burden would be to require too much of the petitioner.

Counsel submitted that the petitioner led evidence to prove that a return of allotment was filed which was further fortified by the evidence of Justice (Rtd) Lameck Mukasa who affirmed the existence and authenticity of the return of allotment. That the return of allotment was certified and endorsed by Humphrey Mugoya, a Registrar of Companies on 04/05/2001 and that the petitioner while on oath in cross examination stated that he had paid for the allotted shares.

Counsel further submitted that the meeting held in Montreal, Canada on 10 February 2010 resulting in a mutual understanding agreement was an attempt to streamline the affairs of the company and did not in any case undo a valid allotment.

### *Analysis*

The word allotment was not defined in the Companies Act Cap 110. However, **Section 54 of the said Companies Act** required a company to file a return of the allotment of its shares with the company Registrar within 60 days of the making of the allotment. **Chitty Jin Re Florence Land and Public Works Company (1885) L.R.29 Ch. D 421** stated: *What is termed allotment is generally neither more nor less than the acceptance by the company of the offer to take shares.... The offer is to take a certain number of shares, or such a less number of shares as may be allotted.*



Upon allotment, **Section 112 of the Companies Act** requires a company to register the allotments which is a return of allotment. The petitioner heavily relied on the return of allotment and the evidence of Rtd Justice Lameck Mukasa. The respondents called into question the authenticity of the return of allotment on grounds that it was not one of the documents that formed part of the company file. The respondents also submitted that there was no board resolution to prove that there was any decision of the company to allot shares to the petitioner.

Indeed, for an allotment to be effective, it must be made at a duly constituted meeting of the board of directors although the allotment which is irregular because of improper constitution of the board may be effective by reason of a provision in the articles of association or by the rule in *Royal British Bank v Turquand [1856] 6 E & B 327*. Also a properly constituted board of directors may ratify an allotment by improperly constituted board.

According to the Memorandum and Articles of association, the company had 1000 shares with each share at one thousand shillings with two shareholders each holding one share. The petitioner adduced the return of allotment allegedly showing that he was allotted 20% of the total share capital. The evidence by Rtd Justice Lameck Mukasa shows that the petitioner was sold and transferred 23 ordinary shares by the 2<sup>nd</sup> respondent.

During cross examination the petitioner stated that the 10 shares as seen on the return of allotment were allotted and paid for. He also stated that the 2<sup>nd</sup> respondent had transferred 23 shares to him. The respondent prayed that the witness produced receipts proving payment for the shares however the petitioner never did. There is no proof whatsoever on record that the petitioner was ever transferred the 23 shares.

The authenticity of the return of allotment is questionable owing to the fact that it was never recognized by the Director and Company Secretary of the company and it never formed part of the company file from Uganda Registration Services Bureau. If a limited company with share capital allots its shares, it must comply with the Companies Act that requires registration after allotment with the Registrar of companies. The absence of the copies of allotment of shares from the Registrar of Companies made the whole transaction questionable and this left this court in total doubt. It could not be safe to rely on the allotment in the hands of the petitioner which was vehemently denied by the respondents.

Furthermore, a meeting was convened on 10<sup>th</sup> Feb 2010 to streamline the affairs of the company and it was agreed that 20% of the shares would belong to each shareholder.

The petitioner was to make an initial investment of \$200,000. There is no proof of payment of the same. Payment for shares is critical to membership of a company. Even subscribers to the memorandum must pay for the shares subscribed or have them forfeited. A person does not become a shareholder by a mere allotment of shares. He must have paid for the shares. *Cliff Masagazi vs Afriland First Bank Uganda Company Cause No. 08 of 2020. Oilfield Supply Centre Ltd Johnson [1987] NSCC 725 at 738; [1987] 2 NWLR (pt. 58), 625*

An allottee merely has an equitable interest in the allotted shares and does not become a shareholder of the company until he has paid for shares and has had his name entered in the register of members. The consideration for the shares allotted to a member must be in cash or with the company's consent, in kind. In absence of any proof of payment for the alleged shares allotted to the petitioner would leave the claim to be recognized a shareholder devoid of any merit.

I concur with the respondent's submission that if at all the shares were already distributed to the 10 different people according to the return of allotment, the petitioner would not have agreed to enter into an agreement purporting to allot shares to 5 different other people and for him to take up 20% of the shares in the company yet he had already been allotted and paid up for 33 shares.

In the absence of satisfactory evidence, it cannot be affirmed that the petitioner was ever allotted any shares in the company or that he ever became a shareholder in the 1<sup>st</sup> respondent.

**Whether the affairs of the company are being conducted by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents in a manner oppressive to the petitioner.**

With due regard to my findings on issue 1 and 2, this issue ought to fail since the petitioner was found not to be a shareholder in the company and can therefore not bring a claim for oppression against the majority shareholders.

The petitioner is denied the remedies sought and this petition is dismissed with costs. It is so ordered.

**SSEKAANA MUSA**  
**JUDGE**  
*15<sup>th</sup> August 2022*