THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO. 743 OF 2016

MATANDA PHARES :: PLAINTIFF

VERSUS

1. **OLIVE ZAITUNI KIGONGO ::::::::::::::::::::::::::::::::::::DEFENDANTS**
2. **EZRA RUBANDA**
3. **UGANDA NATIONAL CHAMBER OF COMMERCE AND INDUSTRY**

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff filed this suit against the defendants seeking for orders for;

a) *A declaration that the 1st and 2nd defendants together with the executive are illegally occupying offices of the 3rd defendant.*

b) *A declaration that all acts and/ or omissions of the defendants done during the illegal occupation of the offices of the 3rd defendant are null and void and of no legal consequence.*

c) *A declaration that the intended annual general meeting and election of office bearers of the 3rd defendant scheduled for 16/12/2016 is illegal.*

d) *An order directing the 1st and 2nd together with their executive committee to vacate their respective offices of the 3rd defendant with immediate effect.*

e) *A permanent injunction restraining the defendants, their agents, servants or other persons acting under them from convening any annual or other meeting of the 3rd defendants and/ or holding any elections of office bearers of the 3rd defendant, in any way.*

f) *An order that a committee comprising the founding members and the board of trustees of the 3rd defendant be allowed to conduct elections for purposes*

of freely and fairly electing officers and/ or the executive of the 3rd defendant.

g) *An order directing the 1st and 2nd defendant, together with their executive committee to account for all the funds and properties of the 3rd defendant handled during the tenure in office.*

h) *An order directing the 1st and 2nd defendants, together with their executive committee to account for all the funds and properties of the 3rd defendants handled during their tenure in office.*

i) *An order directing the 1st and 2nd defendants, together with their executive committee to pay back and/ or refund all the monies and properties of the 3rd defendant that they fail to account for.*

j) *An order for general damages.*

k) *An interest on the general damages above at a rate of 25 p.a from the date of judgement till payment in full.*

l) *An order for costs of the suit.*

The plaintiff alleges that he is a founding member of the 3rd defendant and was also a member of the 1st board of directors as by 29/03/ 1988. Sometime in or around 1997, discontentment arose among some of the members in the election of office bearers and the general running of the affairs of the 3rd defendant culminating into Civil Suit No. 500 of 1997 which was concluded by consent wherein elections for office bearers of the 3rd defendant was to be held after an elections committee is constituted in accordance with the 3rd defendant.

The plaintiff alleges that elections were held without any court decree and the 1st defendant became the president. During her presidency, the 1st defendant and her executive committed made/ or caused to be made, several amendments to the 3rd defendant's constitution illegally among other reasons entrenching the 1st defendant in leadership. The 1st and 2nd defendants are the defacto president and general secretary and together with their executive committee have since outlived their period as per the constitution.

The plaintiff further alleges that the 1st and 2nd defendants together with their executive committee do not have any mandate for their continued occupation of the respective offices in the 3rd defendant. They scheduled an annual general meeting on the 16/12/2016 and intend to hold elections not in accordance with the constitution despite several warnings. The plaintiff alleges that the 1st and 2nd defendants with the executive committee have been illegally running the affairs of the 3rd defendant, disposing off its properties and using proceeds for their own benefits to the detriment of the members of the defendant.

The defendants jointly filed their written statement of defence wherein they denied the plaintiff's claims and raised preliminary objections that the plaintiff has no *locus standi* to file this suit. The defendants contended that the suit discloses no cause of action against the 1st and 2nd defendants and it is barred by limitation and cannot be sustained.

The defendants further contend that the constitution of the 3rd defendant was amended on the 18th October, 2010 and duly registered following due process. It is from this constitution that they derive authority and their power to convene the annual general meetings and exercise the functions of their offices as specified therein.

The 1st and 2nd defendants further contend that they were duly elected in accordance with the memorandum and articles of association in 2011 and continue to occupy their offices in accordance them. They further aver that in their capacities as the 3rd defendant's officials, they are conducting the affairs of the company in a legal manner and have consistently reported and given an account of the 3rd defendant's affair to the board of directors and the annual general meeting on a yearly basis.

The 1st and 2nd defendants contend that the plaintiff's interests have not been prejudiced in any way as alleged and that he is free to participate in the affairs of the 3rd defendant in accordance with the provisions of the constitution. The plaintiff has not shown how the 1st and 2nd defendants have personally benefitted from occupation of the defendant's offices in which they were dully elected. The 1st and 2nd defendants therefore contend that the plaintiff is not entitled to any orders sought in the plaint and prayed that the suit be dismissed with costs.
The parties filed a joint scheduling memorandum dated 25th February-2020:

Agreed Facts

Uganda National Chamber of Commerce and Industry is governed in accordance with its Constitution.

Agreed issues

1. ***Whether the 1st and 2nd defendants are validly occupying their offices and if so whether the actions carried out while the 1st and 2nd defendants were occupying their offices are legally valid.***

2. ***What remedies are available to the parties?***

The plaintiff was represented by ***Mr. Daniel Lubogo*** whereas the defendants were represented by *Mr. Mwebesa Raymond.*

The parties were ordered to file written submissions which was done. Both parties' submissions were considered by this court.

DETERMINATION OF ISSUES

Before delving into the merits of this case, it is important for this court to first resolve the preliminary objections that have been raised by the defendants these being;

Whether the plaintiff has locus standi to institute this suit against the defendants and whether the suit as presented before this court is time barred.

Defendants' submissions

Counsel submitted that the plaintiff lacks locus standi to institute this suit. He stated that locus standi is defined in the case of ***King's College Budo Staff Savings Scheme Limited vs Lukango Bosco & Another HCCS No. 26 of 2020*** as a right to appear in court and be heard in a specified proceeding. He stated that a perusal of the remedies sought leaves no doubt that it is clearly a company cause that is; alleged wrongs done to the company by its officers. It is trite that the proper plaintiff in an action against a wrong done to the company, is the company itself.

Counsel cited ***Ms. Fang Min vs Uganda Hui Neng Mining Limited & Ors HCCS No. 318 of 2016*** to state that by way of exception, it is also trite that a derivative

action is the alternative recourse to be brought by a shareholder of the company where the wrongdoers are in control and prevent the company itself from suing.

Counsel submitted that the plaintiff is not the company but rather an alleged member. He further stated that the plaintiff appears as a subscriber and that he testified that he was paying annual membership subscription fees until 2009 and once again in 2016. It was submitted that the plaintiff instead sued the company as the 3rd defendant.

Counsel also submitted that the plaintiff has not instituted this suit as a derivative action. Counsel relied on ***Kagurusi Remmy Nowiitu & Anor vs Baguma Begumanya & Ors HCCS No. 392 of 2014*** that a derivative action can only be said to have been lawfully instituted if it meets all the legal requirements such as; a minority shareholder is suing on behalf of the company and other members, the action is brought by a member where it is impractical for the company to do so, the wrong complained about must be in form of a fraud which cannot be waived by the majority vote of members, the wrong doers control the company and that the directors were asked to commence an action but refused to do so and have controlling votes. He stated that a perusal of the pleadings indicates that none of the elements are disclosed by the plaintiff and as such, he lacks that locus to sue the defendants.

Counsel therefore submitted that the plaintiff has no cause of action against the defendants in the suit because the suit is a nullity notwithstanding that the plaintiff's claim is clearly well laid out in the plaint.

The defendants counsel submitted that the claims propagated under the plaint relate to alleged oppressive and prejudicial behavior by officer managing the 3rd Defendant company, according to section 257 and 258 of the Companies Act, 2012 which governing this suit, legal recourse ought to have first been made to registrar of companies and thereafter, if not satisfied, the court ***(Edward Senteza & Anor vs Donnie Company Limited & Anor HCT-00-CV-CI-0005-2016)***.

Counsel further submitted that the suit barred by the law of limitation. He stated that the plaintiff was a member of the 3rd defendant until 2009 when he last paid subscription fees. It is more than six years since the plaintiff's cause of action arose under section 3 (1) and (2) of the Limitation Act. He further stated that it

took 15 years for the plaintiff to institute this suit and thus out of time. Counsel relied in ***FX Miramago vs Attorney General [1979] HCB 24***, where it was held that time begins to run from the date when the cause of action occurred up to the time when the suit is filed. The cause of action occurred in 2001 which was 15 years ago when the plaintiff was still a member of the plaintiff.

Counsel further submitted that the plaintiff's suit should be dismissed since he lacks locus to institute this suit. He noted that the plaint shows that this is suit instituted by a member seeking reliefs against the 3rd defendant in its corporate capacity as well as the 1st defendant in her capacity as president of the 3rd defendant. Counsel further submitted that the suit is primarily premised on the memorandum and article of association of the 3rd defendant and thus cited clause 7 (c) which states that a member ceases to be a member of the 3rd defendant if he does not pay his annual subscription fees as required under clauses 13 to 15 of the articles. He further stated that clause 13 makes subscription fee mandatory.

Counsel submitted that the plaintiff admitted that he last paid subscription fees in 2009. The plaintiff cited clause 9 of the memorandum of which states that no member can exercise any of the membership rights and privileges if the member's subscription remains unpaid for more than two months after its due. He therefore submitted that after 2009, the plaintiff next paid his subscription on 2nd November, 2016 albeit without evidence of such payment being produced in court. In the circumstances, counsel submitted that the plaintiff lacks locus to institute this suit as it is an exercise of the rights and privileges attached to membership.

Plaintiff's submissions

On the locus to file this suit, counsel for the plaintiff submitted that the rule that only a company can file an action when there is wrong occasioned to it as was laid down in the case of Foss vs Harbottle has numerous exceptions. It is the position of the plaintiff that where the respondents complained of are the ones in charge of the organs of the company and it is impractical for them to bring actions against their own deed, courts have allowed actions to be brought by a member of a company against the illegal deeds of those controlling the company.

He relied on the case of ***Soon Production Limited vs Soon Yeong & Anor Misc. Applic. No. 190 of 2008*** where court observed that personality cannot be used as

a cloak for improper conduct. He further relied on the case of ***Joel Odong Amen & Anor vs Drocero Andrew & Anor*** where the court cited *Gower's principle of Modern Company Law* observing the exception to the rule in Foss vs Harbottle to include; a) where its claimed that the company acted ultra vires, b) when the act complained of though not ultra vires could be effectively resolved by more than simple majority vote say where an extra ordinary resolution is required and it is alleged that it has not been validly passed, c) it is alleged that the personal rights of the minority have been infringed or are about to be infringed at any rate if the wrong is not rectified, d) the controllers perpetrated a fraud on the minority and any other case where the interests of justice require that the general rule be disregarded.

The plaintiff submits that the acts complained of constituting the cause of action fall within the exceptions to the rule in Foss since he contends that the defendants are occupying their offices illegally outside their mandated tenure and using their position to amend the constitution of the 3rd defendant to entrench their tenure illegally. The plaintiff further stated that the defendants have disposed off properties of the 3rd defendant without sanction or ratification of the membership at the annual general meeting and continue to run the company ultra vires their powers and its objectives.

Counsel therefore submitted that the facts constituting the cause of action fall with the exceptions to the rule in Foss vs Harbottle and prayed that this objection is dismissed.

In regards to the suit being premature, time barred and the plaintiff not being a member of the 3rd defendant, the plaintiff submitted while relying on ***Edward Sentenza & Anor vs Donnie Co. Ltd & Anor HCT-00-CV-CI-005-2016*** that provisions of section 247 and 248 give a member liberty to petition either court if the complaint is that the affairs of the company are being handled in a manner prejudicial to the interests of the company or to petition the registrar of companies if the complaint is that they are being oppressed as members. Counsel therefore submitted that the court disregards that the defendants' submission that the case is prematurely before this court.

The plaintiff relied on the case of ***David Nahurira vs Bauman Cyprian Begumanya & Ors HCCS No. 392 of 2014*** where court held that a member of a company is a

person who is bound by the memorandum and articles of the company. Counsel further relied on section 47 of the Companies Act which provides that the subscribers to the memorandum of shall be taken to have agreed to become members of company and on its registration shall be entered as entered as members in the company register of members.

The plaintiff led evidence to the fact that the plaintiff was registered with the 3rd defendant as a subscriber to its memorandum on 29th April, 1988. Counsel therefore submitted that once the plaintiff registered with the 3rd defendant in 1988, he is taken to have agreed to become its member until when such memorandum is amended through the proper process. He submitted that it would be disastrous for this court to hold otherwise in respect of the company under the exceptions to the principles laid down in the case of *Foss vs Harbottle.*

Analysis

Where the issues of *locus standi* and limitation are raised in defence of an action, it is only proper that the issues should be addressed first, as it makes no sense to decide the merit of a matter where a party does not have *locus standi* before the court and the action is statute barred. In the event of a successful plea of limitation law against a plaintiff's right of action, the action becomes extinguished and unmaintainable at law.

Locus standi

I have gone through the pleadings and evidence on record. I have also carefully followed the submissions. The defendants submit that the plaintiff does not have *locus standi* to commence this suit and hence no cause of action against them. It is therefore important to understand whether the plaintiff indeed has the locus standi before this court.

This court in the case of ***Dima Domnic Poro vs Inyani Godfrey and Apiku Martin Civil Appeal No. 17 of 2016*** defined "*locus standi"* as a place of standing. It means a right to appear in court, and conversely, to say that a person has no *locus standi* means that he has no right to appear or be heard in a specified proceeding. A person who has no *locus standi* cannot be heard, even on whether or not he has a case worth listening to.

To have *locus standi*, such person must have "sufficient interest" in respect of the subject matter of a suit, which is constituted by having; an adequate interest, not merely a technical one in the subject matter of the suit. As stated by Madrama J (as he then was) in ***Abdul Kantuntu and Another v MTN (U) Ltd and 6 others H.C.C.S No. 248 of 2012,*** the law starts from the position that remedies are correlated with rights. The first premises are that those whose rights are at stake are the only ones to file an action for the remedy.

The plaintiff contends that he commenced this suit as a member of the 3rd defendant, who was entered onto the company register on the 20th of April, 1988. The fact that the plaintiff was entered onto the company register as a member of the 3rd defendant was not controverted by the plaintiff. However, the defendants allege that the plaintiff is no longer a member of the 3rd defendant having ceased to be one under clause 7 (c), 9, 13-15 for failure to pay the mandatory annual subscription fees which was last paid in 2009. For context, I will regurgitate clause 7(c), 9, 13-15 of the Articles of Association below.

Clause 7 of the articles of association provides;

7. A member of the Chamber shall cease to be a member thereof if;

a) he resigns by giving one month's notice in writing;

b) he becomes of unsound mind;

c)he fails to pay his subscriptions as provided for under the Articles;

d)his membership is terminated under the provisions of Article 8;

e) he is adjudged bankrupt, goes into liquidation or compounds with his creditors;

Provided that any member who ceases to be a member shall remain liable in terms of the memorandum and articles of association for all contributions and subscriptions falling due within the year in which he ceased to be a member of the Chamber.

Clause 9 provides that;

No member shall exercise any of the rights and privileges of membership if his subscription remains unpaid for more than two months after it is due and if the same remains unpaid for more than four months, then the membership committee may terminate his membership.

During cross examination, the PW1; the plaintiff herein testified that subscription fees are mandatory and that he last paid subscription fees up to 2009. He further testified that he never ceased being a member when he stopped paying subscription fees. During re-examination, PW1 testified that he last paid subscription on the 2nd November, 2016.

However, I should note that no evidence of payment receipts was advanced by the plaintiff to assert these facts in which he appears to have a contradiction. Be as that may, it is apparent from the articles of association that upon failure of the plaintiff to pay subscription fees under clause 7 in 2009, he ceased being a member of the 3rd defendant and as such, could not exercise any rights and privileges of membership.

In the case of ***Nahurira vs Baguma & 2 Ors Civil Suit No. 392 of 2014***, this Court noted that a member of a company is a person who is bound by the memorandum and articles of the company. The court also held that the memorandum and articles of association of the company constitute the contract between the member/subscribers.

Furthermore, **Section 21 of the Companies Act** provides for the effect of the memorandum and articles where it provides that when registered, bind the company and the members of the company to the same extent as if they had been signed and sealed by each member to observe all the provisions of the memorandum and articles.

Can it therefore be said that the plaintiff is bound by the memorandum and articles of association? I would think so, he contends that he is a subscriber having been entered on the memorandum and articles of association in 1988. As such, the plaintiff was bound to follow the provisions therein to which, clause 7 provided for when a member shall cease to be; which is upon failure to pay subscription fees.

I find that the plaintiff ceased being a member of the 3rd defendant in 2009 when he last paid the annual subscription fees and from then on, he could not exercise any rights and privileges of membership as provided for under clause 7 and 9 of the memorandum and articles of association.

Can he then be said to have the right to commence this suit? From the reading of the plaint, it is clear that the plaintiff seeks remedies to protect and safeguard his rights under the 3rd defendant that he alleges have been violated by the 1st and 2nd defendants. As such, a derivative action is the cause of action averred in the plaint. So the question that remains is whether the plaintiff has *locus standi* to commence the suit as a derivative action and for the same reasons whether the plaint discloses a cause of action against the defendants.

It is true that a derivative action is an action commenced by a shareholder and is an exception to the general rule laid out in ***Foss vs Harbottle (1843)2 Hare 461***. *Indeed, L.C.B Gower in Gower's Principles of Modern Company Law 4th Edition at page 647* discusses the exceptions to the rule in Foss vs Harbottle and provides circumstances where an action is brought by a member where it is impracticable for the company to do so. It must be shown that the wrongdoers control the company. Thus under certain exceptions, a member may sue in his own right on in the interest of the company in a derivative action. The derivative action is a class action brought in a representative form in respect of a wrong that is done to the company. The representative form of action makes it binding on all shareholders. See ***Hoskin v Price Waterhouse Ltd (1982) 136 (3d) 553 Ont Div Ct***

It is clear from the language of the provisions of the Act that a derivative action is available only for the remedying of wrongs done to the company. It is not available for the enforcement of rights of individual shareholders or class of shareholders and is therefore to be distinguished from personal and representative actions. The action is 'derivative' because it 'derives' from the shareholder being a member of the company which is wronged and not because of any wrong done to the shareholder *per se. See* ***Goldex Mines Ltd v Revill (1974) 54 DLR (3d) 672 Ont CA***

Mere irregularity in internal running of a company cannot be a basis for one to bring a derivative action or suit since such can be rectified by a vote/resolution at the company's meeting and if a shareholder contemplates using a personal claim of infringement of his rights then a derivative suit will not avail as the relief must be for the benefit of the company. The plaintiff's claims are purely intended for his benefits and not for the company. The company could make resolutions to amend the Articles of Associations in the best interests of the company.

It can be deduced from above that a derivative action can only be brought by a member of the company. The conduct complained about must be oppressive to the plaintiff as a member of the company and not to him in some other capacity. It is essential that the plaint must disclose that the plaintiff has been oppressed in his rights as a member in that wrong doing has been occasioned to the company. From the above discussion however, I find that the plaintiff ceased to be a member of the 3rd defendant in 2009 when he last paid his annual subscription as provided for under clause 7 of the articles of association. He cannot not be said to be a member of the 3rd defendant and cannot commence this action.

As far as the law is concerned, it is now settled that for a plaintiff to file an action, he must have *locus standi* which in the circumstance, the plaintiff lacks. In the premises, the defendant's objection is sustained. I therefore find that the plaintiff does not have *locus standi* to bring a derivative action against the defendants as he is not a member of the 3rd defendant.

Time Limitation

The defendants also contend that the plaintiff's suit is time barred. In the circumstances, it is important to note that **Order 7, Rule 11 (d) of the Civil Procedure Rules** provides for instances where a plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law.

In the case of ***Departed Asian Property Custodian Board vs Dr. J.M Masambis Civil Appeal No. 04 of 2004***, the court noted with emphasis that the enforcement of provision of a statute is mandatory. It has been held in the case of ***Iga –vs- Makerere University [1972] E.A 65*** that a plaint which is barred by limitation is a plaint barred by law. A litigant puts himself or herself within the limitation period by showing grounds upon which he or she could claim exemption, failure of which the suit is time-barred and the court cannot grant the remedy or relief sought but must reject the claim.

This court in its decision in ***Dr. Arinaitwe Raphael & 37 Others vs the Attorney General; HCCS No. 21/2012*** quoting ***Hilton versus Sultan Steam Laundry (1964) 161, 81 per Lord Greene*** noted that;

"The statute of limitation is not concerned with merits, once the axe falls, it falls and a Defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled of course to insist on his strict rights".

Once the time period limited by the Limitation Act expires, the plaintiff's right of action will be extinguished and becomes unenforceable against a defendant. It will be referred to as having become statute barred. The purpose of limitations, like equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through revival of claims that have been allowed to slumber. Once the action is stale and statute barred, no matter how well it is conducted and determined all the efforts put in it comes to naught and the court has no jurisdiction to deal with it.

This court should not aid the plaintiff to resuscitate such a claim which is time barred. The essence of a limitation law is that the legal right to enforce an action is not a perpetual right but a right generally limited by statute. A statute of limitation is designed to stop or avoid a situation where a plaintiff can commence action anytime he feels like doing so, even where human memory would normally have faded and therefore failed. Put in another language, by statute of limitation, a plaintiff has no freedom to sleep or slumber and wake up at his own time to commence an action against a defendant. The different statutes of limitation, which are essentially founded on the principle of equity and fair play, will not aid such a slumbering plaintiff. See ***Sulgrave Holdings Inc. v F.G.N (2012) 17 NWLR p. 309 (SC); Odyeki Alex & Anor v Gena Yokonani & 4 Others Civil Appeal No. 9 of 2017.***

If an action succeeds on a plea of statute limitation, the court should not proceed to determine the merits of the case, irrespective of the evidence.

The defendants raised an objection that the plaintiff's suit is barred by limitation and in support of this, counsel submitted that the plaintiff's claim against the defendants first arose in 2001 when the 1st and 2nd defendants assumed office and then 2003 when the amendments complained of were made. He contended that it took about 15 years to institute this suit thus being out of time.

In the case of ***Madhivani International S.A vs. Attorney General CACA No. 48 of 2004***, it was held that in considering whether a suit is barred by any law court looks at the pleadings only, and no evidence is required. A look at the pleadings and evidence to the suit indicates that the allegations made as against the 1st and 2nd defendant arose in 2001 upon their election to the office and later 2003 when the amendments were made. The plaint also indicates that this suit was filed

before this court on the 16th of December, 2016 this being 15 years from the accrual of the cause of action.

The **Limitation Act under section 3 (a)** provides that actions founded on a contract or tort shall not be brought after the expiration of six years from the date on which the cause of action arose. As observed by this court in the case of **Nahurira (supra)** the memorandum and articles of association of the company constitute the contract between the member/subscribers. I would say that the memorandum and articles of association also constitute the contract between the 1st and 2nd defendants. As such, the limitation period within which one can commence a suit founded on a contract shall be six years from the date on which the action arose which in the circumstances is 2003 when the amendment was made. The suit was instituted more than 10 years after the cause of action arose against the plaintiff and thus cannot be said to be within time.

The defendants' objection as to the plaintiff's action being statute barred is accordingly sustained by this court and the plaintiff's claim is dismissed.

This suit is therefore dismissed with costs to the defendants.

I so Order.

SSEKAANA MUSA
JUDGE
15th September 2023