

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

**CIVIL SUIT NO. 350 OF 2021**

**FORMERLY CIVIL SUIT NO. 235 OF 2015**

**ELIM PENTECOSTAL CHURCH LIMITED :::PLAINTIFF**

**VERSUS**

- 1. JAMINE MUWAYI LUKE**
- 2. KAKAIRE HANNINGTON**
- 3. NJOROGE DAVID KIRAGU**
- 4. WANAMBWA ROBERT :::DEFENDANTS**
- 5. MALISA RONALD**
- 6. SEMYALO JOSEPH**
- 7. WABWIRE JULIET**

***BEFORE: HON. JUSTICE SSEKAANA MUSA***

**JUDGEMENT**

The plaintiff sued the defendants for trespass and malicious damage to property, compensation for the destroyed property, special damages, permanent injunction, eviction, general damages, costs and interest thereto.

The facts of the case are that on the 16<sup>th</sup> May 1986, the plaintiff was incorporated as an unlimited company by guarantee with the membership of Daniel Katabalwa (R.I.P), Vincent Kashaija, Beatrice Nakabugo, Maritha Kabura (R.I.P), Dorokasi Wangui (R.I.P), Godfrey Simwogerere and Pam Maitum. On the 21<sup>st</sup> August 1998, the plaintiff was registered as a Non-Governmental Organisation (NGO). The case against the defendants is that following allegations of misconduct against the 1<sup>st</sup>

Defendant who had been appointed Director and Pastor in the Plaintiff company, the members of the company resolved on the 10<sup>th</sup> May 2014 to remove the 1<sup>st</sup> defendant from being Director of the plaintiff and by the same resolution registered on the 1<sup>st</sup> of August, appointed Edith Katabalwa as his replacement. The plaintiff further requested the 1<sup>st</sup> defendant through M/s Nyombi & Co Advocates by letter dated 21<sup>st</sup> September 2014, to stop intermeddling with the affairs of the plaintiff and to vacate the premises but the same was ignored. On the 23<sup>rd</sup> day of June 2015, the defendants led by the 1<sup>st</sup> defendant and in the company of several other persons descended upon the property of the plaintiff and demolished some buildings at the premises and illegally took over the property and administration of the affairs of the plaintiff. The Plaintiff commenced this suit against the defendants on the 25<sup>th</sup> day of August 2015, jointly together with a one Katabalwa Daniel (now R.I.P) who was its founder member and the Chief Executive Officer, against the defendants jointly and severally for trespass, malicious damage to property, compensation for destroyed property, special damages, permanent injunction, eviction of the defendants, general damages and costs of the suit.

In their defence, the defendants contended that the incorporation of the 1<sup>st</sup> plaintiff was fraudulently done by the purported subscribers without the consent of the members of the church. The defendants however conceded that the plaintiff was a Non-Governmental Organization. They further contended that the plaintiff is an NGO which entirely belongs to the community (church members) and not the individuals alleged to be the members. The Defendants also contended that the removal of the 1<sup>st</sup> defendant from being the Pastor of the plaintiff was ineffectual and invalid as it was done without the consent of the general assembly which is the supreme decision-making body as per the constitution of the plaintiff.

At scheduling, the following issues were agreed upon by the parties for determination by this court;

- 1. Whether the plaintiff was validly registered;*
- 2. Whether the Defendants are members of the 1<sup>st</sup> plaintiff;*
- 3. Whether the destruction of the 2<sup>nd</sup> plaintiff's hostel was by the Defendants.*

The plaintiff was represented by *Counsel Pius Olaki* while the defendants were represented by *Counsel Wassanyi Sepi*

At trial, the plaintiff's led evidence of two witnesses that is Simwogerere Godfrey (PW1) and Kinene Edward (PW2), the defendants also led two witnesses that is Akochil Zadok (DW1) and Johnson Mivule (DW2).

Counsel for both parties made written submissions which I will consider resolving the controversy between the parties.

When the matter came up for hearing, the parties wished to further narrow down the issues for trial to only focus on the administration of the affairs of the plaintiff, thus the parties proposed and the court agreed on the issue of; *Whether the takeover of the management of the affairs of the plaintiff by the defendants was legal?*

### ***Determination***

#### ***Whether the takeover of the management of the affairs of the plaintiff by the defendants was legal?***

Counsel for the plaintiff submitted that from the exhibits tendered in court and in particular PEX 1, the Memorandum and Articles of Association and certificate of incorporation, which are also part of the exhibits of the defendants DEX3. It is common ground that the plaintiff is a company incorporated under the laws of Uganda, and that it is operating as a church-NGO.

Counsel further submitted that he finds the pleadings and the evidence adduced by the defendants to be very contradictory in terms. While the case for the defendants is that they were not aware of the registration of the plaintiff as a company and that the registration of the plaintiff as a company was fraudulent and illegal. Counsel for the plaintiff stated that no evidence of fraud or illegality was produced by either of the defendants' witnesses. Counsel stated that their being ignorant of the process undertaken by the promoters and the subscribers to the memorandum and articles of association of the plaintiff did not make the process or the incorporation of the plaintiff fraudulent or illegal.

That the defendants themselves to-date have taken no step to challenge the registration and incorporation of the plaintiff which they allege to be fraudulent and illegal, and contrary to all their pleadings and arguments, the defendants illegally took over and continue to run, mismanage and intermeddle with the affairs of the plaintiff which at the same time they claim to have been illegally and fraudulently incorporated. Counsel for the Plaintiff relied on ***Civil Appeal No. 93 of 2020 [arising from the Tribunal Ruling dated 22<sup>nd</sup> October 2020 in Application No. 10 of 2020] Mbarara University of Science & Technology vs Public Procurement and Disposal of Public Assets Authority & M/s Steam Investments (U) Ltd***, that the well-known principle of equity that one cannot approbate and reprobate all at the same time. that the principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that “a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then, turn around and say it is void for the purpose of securing some other advantage.”

That the defendants in this case cannot on one hand say that the incorporation and registration of the plaintiff was fraudulent and illegal and that the plaintiff is a community NGO, and at the same time continue to run, manage and benefit from the affairs of the plaintiff who they claim to be illegal and fraudulently incorporated.

That on the other hand, the law –the Companies Act gives the definition of who a member of a company is, Particularly **Section 47(1)** states...” the subscriber to the memorandum of a company shall be taken to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.” **Section 47(2)** further states that ...”A person who agrees to become a member of a company, and whose name is entered in its register of member. That from the evidence adduced, the defendants are not subscribers to the memorandum and articles of association and also they are not persons who have agreed to become members of the company and their names have not been entered in the register of members.

That in the amended Articles, the members of the company entitled to constitute the General Assembly and the Management team of the plaintiff are; David Katabalwa (now R.I.P), Beatrice Nakabugo, Maritha Kabura, Dorokasi Wangu and Godfrey Simwogerere. The Directors of the plaintiff company are indicated in PEX 8 which is the Form of Annual Returns filed with the Company Registry on the 1<sup>st</sup> August 2014 as; Kefa Sekayizi, Jimmy Kizito and David Ssemyalo. Counsel for the plaintiff further submitted that clearly there is confusion on the part of the defendants in terms of differentiating between being followers/ the faithful of the plaintiff, and the members entitled to manage the affairs of the plaintiff and the reason the defendants purported to constitute themselves into a General Assembly and to take decisions including the forceful takeover of the Administration of the affairs of the plaintiff.

In response, counsel for the defendants submitted that upon incorporation, the plaintiff church adopted Articles of Association which would regulate specific operations such as the roles of the general meeting (Article 11), the registration of members (Article 4), termination of membership (Article 9), removal (Article 30) and replacement/ appointment of directors (Article 34), inter alia. Under Article 5 and 27, the aforesaid initial members were constituted into the initial Board of Directors of the plaintiff Church. On the 10<sup>th</sup> day of May 2014, a Board Resolution was purportedly passed removing Pastor Jamine Muwayi Luke from being a director to the Board. According to the aforesaid Articles 30, his removal did not fall under any of the circumstances stated there under. That the said purported Board Resolution was endorsed by 3, namely Daniel Katabalwa, Maritha Odouri and Godfrey Ssimwogerere.

Under Article 27, the subscribers to the memorandum of Association of the plaintiff church were constituted into the Board of Directors. These were seven numbers and under Article 32, the quorum necessary for transaction of the business is 2/3 of the number of members which is 4.6 in other words which is 5. Counsel for the defendant additionally submitted that Pastor Jamine Muwayi Luke's removal from office of member to the Board of Directors was irregular and unlawful for lack of both grounds and capacity (quorum) to do so. Counsel invited court to find that for

all intents and purposes, the 1<sup>st</sup> defendant is still a member of the Board of Directors of the plaintiff church.

Counsel for the defendants further submitted that the appointment of Edith Katabalwa to the Board of Directors vide the same resolution which lacked the requisite quorum of 5 was equally irregular and unlawful. Counsel also stated that the removal of Nakabugo Beatrice from the Board of Directors and appointing Kefa Ssekayizi, Jimmy Kizito and David Ssemyalo vide Board Resolution on the 28<sup>th</sup> day of January 2013, also had no basis.

Counsel for the defendants summed up by stating that it is not true that the church members are seven (7) and that it is not true that the defendants are strangers in the church administration/ management. But rather it is the defendants who have managed the affairs of the plaintiff to this day briefly; that on the 6<sup>th</sup> day of October 2014, they applied for extension of the lease which had expired in 2014, that they have also been paying and are continuing to pay annual ground rent and that they have gone ahead as required by the Regulatory Authority renewed the Plaintiff's NGO permit. On that note he prayed that court orders that the directors who were illegally appointed be dropped and that the directors who were irregularly removed be reinstated as they are the ones participating in the management of the plaintiff company/church.

### **Analysis**

Every association must have rules that regulate the association or organisation. The rules must at the minimum establish governance system for the association or organization by indicating who can act for or exercise powers on behalf of the association or organization. The Companies Act regulates the companies in Uganda, and requires every company in Uganda to have a constitution that complements the law in regulating the affairs of the company.

The constitution of the company is a fundamental document or charter of the company. To the extent permitted by the Companies Act, the constitution contains the rules that regulate the rights, powers, duties and obligations of the company, the board, each director and each shareholder, members of the company.

The constitution or the Articles of Association set up the details of the governance system applicable to the company as an artificial person. The governance system must however be in accordance with the companies Act. The constitution provides for the organs that act on behalf of the company and allocate powers to the various organs. It, thus, has rules that regulate the internal administration and management of the company. It is also deemed to be a contract binding on the company, each director and each member or shareholder. In sum therefore, the constitution is the document that now plays the role the role of the memorandum of association, which governs the relationship between the company and outsiders, and the articles of association which provides for internal matters of the company.

On the 21<sup>st</sup> day of August 1998, the plaintiff was registered as an NGO and on the 19<sup>th</sup> day of May 1998, the plaintiff amended its memorandum and Articles of Association to reflect the changes in the membership of the company to wit; Daniel Katabalwa (R.I.P), Beatrice Nakabugo, Maritha Kabura, Dorokasi Wangui and Godfrey Simwogerere remained as members.

In Uganda NGO's are governed by the Non-Governmental Organizations Act, 2016, however before an NGO is registered by the Non-Governmental Registration Bureau, it ought to have first incorporated a company limited by guarantee under section 4(2)(b) of the Companies Act, 2012 for purposes of conferring upon the NGO a corporate status. A Non-Governmental Organization is a non-profit organization that operates independently of any government, typically one whose purpose is to address a social or political issue.

It is evident that the plaintiff was incorporated as a company limited by guarantee and subsequently filed a constitution and other requirements in order to be registered as an NGO. The plaintiff's constitution provides for membership under Article 5 which mirrors its Memorandum and Articles of Association. At the time, the plaintiff had four members who had subscribed to its constitution. These founder members constituted its General Assembly and there are no other members that were admitted to the membership of the plaintiff. In the case of ***Mathew Rukikaire versus Incafex Ltd No. 3 of 2015***, together with **Section 47(1) of the Companies Act, 2012**, a member of a company is a subscriber to the

memorandum and articles of association who are then entered on the register of members or anyone who is entered on the register of members is a member. **Sections 4(1) & 8 of the Companies Act, 2012**, a subscriber of a company is one whose name appears on the memorandum and articles before registration of the company.

The subscribers are the first persons who indicate their intention to become members of the company when incorporated. They are the founding or original members of the company. By subscribing to the constitution, subscribers give an indication to become members of the company when the company is incorporated. The subscribers must, therefore, after incorporation have their names entered on the register of members as members of the company. Therefore, subscription to the regulations of a company confers a special legal status on the subscriber, making him or her a member of the company from the moment of its incorporation. See *DuPaul Wood Treatment v Asare [2005-2006] SCGLR 667*

For a company limited by guarantee, a person will be a shareholder by subscription when the person's particulars are submitted as particulars and the person subscribes to the constitution. The person may also provide to undertake to contribute the assets of the company in the event of winding up towards the satisfaction of the liabilities of the company.

In the plaintiff's amended articles, they specifically provide for membership, clearly stating that no person shall be admitted to membership of the company unless he subscribes to the statement of faith of the company and has fulfilled whatever conditions that the company may prescribe. It further goes ahead to provide that all members shall have their names and address entered on the roll of membership. On that note, the defendants cannot claim to be members of the plaintiff as their names are not entered on the roll of membership hence they are rather followers'/ church members but not members of the NGO/Company unless and until they are entered the roll can they claim to have any rights that accrue to members of the company/NGO.

The membership of a company entitles members to rights associated to such membership and in case of a company limited by guarantee, they have control and



direct the affairs of the company since they only undertake some charitable activities or public good without the need to obtain returns in the form of profit.

Alternatively, the General Assembly of the plaintiff is constituted by the founder members and not the general community as the defendants are claiming, thus only members of the company/NGO are entitled to manage the affairs of the church. Well as the defendants claim that the 1<sup>st</sup> defendant removal as a director vide a Board Resolution passed on the 10<sup>th</sup> day of May 2014, did not fall under any of the circumstances stated under Article 30 of the plaintiff's constitution thus it was unlawful and lacked both grounds and the capacity to do so. They further submitted that the appointment of Edith Katabalwa to the Board of Directors vide the same resolution was equally irregular and unlawful. The same goes for the Board Resolution purportedly passed on the 28<sup>th</sup> day of January 2013, removing Beatrice Nakabugo and appointing Kefa Ssekayizi, Jimmy Kizito and David Ssemyalo as members of the Board of Directors.

**Section 2 of the Companies Act, 2012**, defines a Director as someone occupying the position of director by whatever name called and includes shadow directors. **Section 132(5) supra**, states that any person in accordance with those directions or instruments the director of the company is accustomed to act. However, it should be noted that a company director can be appointed at any time after incorporation, and maybe removed from office or resign at will at any time provided such actions are in compliance with the Companies act, the articles of association of the company or the director's service agreement. Therefore, the power of appointment or removal of the director is conferred or granted in the constitution and can only be enforce by such person or organ so provided.

The process of appointment of a director is either by appointment by shareholders which is done at the annual general meeting and in extreme cases at an extra ordinary general meeting of the company and also appointment by the board of directors. In regards to removal, a company may by ordinary resolution remove a director from office before the expiration of his or her period of service, notwithstanding anything in its articles of association or any agreement between the company and the director.

The defendants' actions only amounted to a '*company coup*' ('*Church coup*') when they took over the management of the church in an illegal meeting not constituted by members. For an act to be deemed to be of a company per the Companies Act, the act must be an act of members or shareholders in a general meeting. For purposes of holding the company to be liable, the person taking decision the decision or acting must therefore be members or shareholders. In addition, the members must be duly acting in a duly convened and validly held general meeting. The meeting in which decisions of the company are taken is a general meeting of the company and any acts and decisions of members in a general meeting are deemed to be acts or decisions of the company.

On that note, I find that the plaintiff is an NGO which is supposed to be run by the company members and not the church followers as the defendants claim. In regards to the removal and appointment of the directors, that the defendants stated to be irregular, was not, since it was done within the powers of the directors and if they wanted to address the same issue, they ought to have filed a counterclaim challenging the registration of the company/NGO.

I therefore order the defendants to hand over the church management back to the plaintiff's members and to as well vacate the said premises unless when the plaintiff admits them as members by entering their names on the roll.

In the interest of creating harmony between the plaintiff and the defendants for the future of the church and its faithfuls, each party shall bear its costs.

I so order

***Ssekaana Musa***

***Judge***

***15<sup>th</sup> December 2023***