

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 392 OF 2014
KAGURUSI REMMY NOWIITU}**

DAVID NAHURIRA}.....PLAINTIFFS

VS

- 1. BAGUMA CYPRIAN BEGUMANYA}**
- 2. BWIRUKA JANE FRIDA}**
- 3. GROUP COMBINE EFFORTS PROPERTIES LTD}.....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Defendants applied to have the suit dismissed on a preliminary objection. The preliminary objection is that the Plaintiffs do not have locus standi to commence the suit on their own behalf or on behalf of members of the third Defendant Company Messrs Group Combine Efforts Properties Ltd. The Third Defendant Messrs Group Combine Efforts Properties Ltd is a private limited liability company. Secondly the Defendants object to the suit on the ground that the plaint does not disclose any cause of action against them and lastly that the claim of the Plaintiffs is misconceived in law and as such is an abuse of the process of court.

In support of the preliminary objections the Defendant's Counsels submitted that the plaintiff filed this suit against the Defendants jointly and severally on behalf of other members of the third Defendant in a derivative action to protect and safeguard their rights and on behalf of the third Defendant to protect its interests. The Plaintiffs seek orders for the conduct of an audit, a declaration that the first and second Defendants mismanaged the third Defendant, an injunction to issue

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against the first and second Defendants from withdrawing funds without approval of the new board.

The Defendants in their written statement of defence denied the allegations set out in the plaint and reserved the right to raise preliminary objections on points of law to the effect that the plaintiff's suit is barred in law and misconceived and incompetently brought before the court and further that it is an abuse of the process of court. The Plaintiffs alleged in paragraph 1 of the plaint that they are fully paid-up members of the third Defendant Company, a fact which is substantially wrong and is misconceived.

As far as the law is concerned the Defendants submit that it is now settled law that for a plaintiff to file an action, he must have locus standi. The Defendant contends that underlying fact is that the Plaintiffs have never been members of the third Defendant Company and are aliens to it. As such they cannot purport to be members merely because they know some of the members of the company. With reference to the memorandum and articles of association of the third Defendant Company, there are five registered members of the third Defendant Company and none of them is a plaintiff. The Defendants Counsel further submitted that in the circumstances the plaint discloses no cause of action against the Defendants according to the definition of a cause of action in the case of **Auto Garage and Another versus Motokov [1971] EA 515**. In **Auto Garage and another vs. Motokov** (supra) it was held that for a plaint to disclose a cause of action, it should be demonstrated that the plaintiff enjoyed a right, that the right has been violated and thirdly that the Defendant is liable. If one of the essential ingredients of a cause of action is missing, the plaint is a nullity and no amendment can be made to it.

From the premises that the pleadings do not disclose that the Plaintiffs are members or appointees or proxies with special powers of attorney or having a company resolution bestowing upon them such rights, they cannot be regarded as minorities to sustain a derivative or representative action against the Defendants. The Defendants Counsel proceeded to submit that there are three

types of action which a shareholder may bring in law. These are derivative actions, personal actions and representative actions.

A derivative action is brought by a member of the company where the wrongdoers are in control and prevented the company itself from suing. The Plaintiffs are not members or shareholders in the third Defendant company to sustain a derivative action and therefore the action is misconceived and a nullity. Even if the Plaintiffs were allowed to proceed with a claim against the Defendants, they would still fall short of the exceptions laid down in the case of **Foss versus Harbottle (1843) to Hare 461**. The exceptions to the general rule are detailed in the case of **Salim Jamal versus Uganda Oxygen Ltd Civil Appeal No. 64 of 1995** where justice Oder JSC quoting Lord Denning said:

It is a fundamental principle of law that a company is a legal person with its own corporate entity, separate and distinct from its directors or shareholders and with its own property rights and interests which it is alone entitled to.

Where the company is defrauded by a wrongdoer, the company itself is the proper person to sue for the damage.

To address the injustices that would otherwise ensure (where the miscreant majority refused to sue).

A suit would be brought by individual 'corporators' in their private characters, and asking in such character the protection of rights to which in their corporate character they were entitled.

The Defendants Counsel contends that the Plaintiffs are not a minority in order to fall within the exceptions in **Foss versus Harbottle** (supra). Secondly the general rule is that the proper plaintiff in an action against the wrong done is the company or association. The rule is to the effect that where the wrong done is a wrong to the company, it is the company alone to decide to sue and that decision is made by the majority. In the present case the Plaintiffs are not even a minority and as such cannot sustain a derivative action. Thirdly the Defendants Counsel contended that there is no resolution or appointment of the plaintiff to sue on

behalf of the company either from the third Defendant or the mother company where they are members. Furthermore the two companies are different entities with different legal personalities. Lastly Counsel submitted that it is only proper that the suit is dismissed with costs to the plaintiff for lack of locus standi to sustain the action and secondly the plaint discloses no cause of action against the Defendant and the preliminary objection should be upheld.

In reply the plaintiff's Counsel submitted that the inclusion of the statement in paragraph 1 of the plaint that the Plaintiffs are fully paid-up members of the third Defendant is an error occasioned by a mix up of facts applying to the parent company of the third Defendant and against whom the same Plaintiffs have a pending suit. It was therefore correct to say that the Plaintiffs are not members of the third Defendant.

Additionally the plaintiff's Counsel submitted that the third Defendant is a subsidiary of CEDA Financial Services Ltd (the parent company) which has 96% ownership according to the memorandum and articles of Association annexure "A". Ipso facto, the controlling authority of the third Defendant resides in the parent company and any shareholder in the parent company has locus to sue for mismanagement in the subsidiary.

Secondly the two companies though separate legal entities, are managed almost interchangeably. That is to say the managing director of the parent company acts as the managing director of the subsidiary and influences most decisions. Secondly all the shareholders of the subsidiary are shareholders in the parent company. The company secretary of the subsidiary is a shareholder of the parent company. The company secretary of the parent company (the first plaintiff) is a director in the subsidiary representing the parent company according to annexure "B". There are two suits by the same Plaintiffs. One suit was filed against the directors of the parent company and another against the directors of the subsidiary. In both cases the cause of action is basically mismanagement and the prayers in the two suits are almost the same. In both cases the companies are nominal Defendants.

In addition a forensic audit is ongoing according to the court interim order of 12 September 2014 and a board resolution of 9 October 2014 and the results are bound to lead to a multiplicity of suits if this suit is not heard on the merits and disposed of. The plaintiff's Counsel further submitted that in light of the facts, it is a glaring fact that the members interest criss-cross the two companies.

In reply to the preliminary objection the first plaintiff is the elected representative of the parent company on the board of the third Defendant in accordance with article 36 of the articles of association of the third Defendant. Ordinarily the parent company would sue in its own name as a shareholder of the subsidiary. However the first respondent being the managing director of the company, together with the majority shareholders cannot pass a resolution to that effect as the first respondent has been frustrating the independent functioning of the boards of the two companies including disputing of their legitimacy according to the correspondence annexure "E" and "F". Consequently the first plaintiff being a representative of the parent company on the board of the subsidiary took it upon himself to sue in his name for the interests of the parent company.

Secondly the second Defendant is the shareholder in the parent company which has a controlling interest in the third Defendant. Ipso facto, the interests of the second plaintiff in the parent company would be lost if the third Defendant is mismanaged. Considering that the threat to the interests of the parent company in its subsidiary directly affects his personal interests in the parent company, he was joined as a party to the instant suit.

The plaintiff's Counsel agrees that in some instances the company can sue in its own name or in the name of someone the law authorises to be its representative. Since the first plaintiff is a representative of the parent company in the subsidiary, is the proper person to sue in that behalf and in his name. Furthermore the directors of the company are agents of the company as held in the case of **Re-Faure Eldrick Accumulators Company (1888 40 CHD 141)** quoted in the **Law of Business Organisations in East and Central Africa by JW Katende**. In modern times it is increasingly becoming necessary that the veil of incorporation is lifted to look at the interests of the persons behind the veil. The law would create an

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absurdity if the shareholder of the parent company, which is covered by the veil of incorporation in subsidiary, were to turn a blind eye on the decimation of its interests therein.

The plaintiff's Counsel submitted that the rule in **Foss versus Harbottle** may be useful but is not adequate to offer a solution in the facts of the case. The rule has been watered down in the development of the Ugandan system of law which seeks to avoid technicalities in the dispensation of justice. Counsel relies on article 126 (2) (e) of the Constitution of the Republic of Uganda which provides that there should not be any undue regard to technicalities and substantive justice should be administered without undue regard to technicalities. He submitted that the plaintiff is a director of the board of the third Defendant (the subsidiary company) as a representative of the parent company which would not sue in its name owing to the control and influence of the first and second Defendants to strip the first plaintiff from the right to sue in its name, a majority shareholder in the subsidiary company (the third Defendant) would be to sustain a mere technicality contrary to article 126 (supra).

The plaintiff's Counsel further submitted that in the circumstances of this case, there is a company which is being mismanaged to the detriment of the member's interests and the wrong doing directors have been brought to court by fellow directors and people whose interests are at risk. It is a technicality to raise the issue of locus standi. The court ought to look at the issues which have been brought. The Plaintiffs have higher stake than amicus curiae in fending for their own interests however indirect the interest may be. The shareholding owned by the shareholders of the parent company is for all intents and purposes property. It is the property that the parent company has invested in the subsidiary for the ultimate benefit of its members. To shut the doors of court against the shareholders of the parent companies seeking to enforce their rights over the property in the subsidiary would be to unlawfully deprive them of the property contrary to article 26 of the Constitution the Republic of Uganda.

In the premises Counsel contended that it would be absurd to rely on the rule in Foss versus Harbottle which was developed in the 19th century. In the

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circumstances he contended that the plaintiff has locus standi to bring this suit and prayed that the matter proceeds so that all matters are heard on the merits.

In the alternative the plaintiff's Counsel applied to substitute/add parties under Order 1 rule 10 of the Civil Procedure Rules, section 98 of the Civil Procedure Act and section 33 of the Judicature Act since the two persons namely Namatovu Rose and Asiimwe Doreen Nahurira sought to be added by the application are shareholders of the third Defendant who are willing, illegible and have lodged an application to be added as Plaintiffs to litigate this case and avoid a multiplicity of suits.

The plaintiff wrote this suit with the honest belief that they are entitled as shareholders/or directors in the parent company and by extension in the subsidiary. If they are substituted or parties added, any illegality will be cured and any possible miscarriage of justice avoided. This suit is about the interests of many people who have invested in the company and it is in the interest of justice that the real matters in dispute are determined. The plaintiff's Counsel contended that the court has discretion on its own to order for joining or removal of a party to the suit and prayed that this honourable court be pleased to exercise that jurisdiction.

Ruling

The gist of the objection to the suit of the plaintiff is that it is or purports to be a derivative action to protect and safeguard the rights of the Plaintiffs and other shareholders but the Plaintiffs are not shareholders of the third Defendant. The third Defendant is Group Combined Efforts Properties Ltd. The crux of the objection is that a derivative action can only be brought by a shareholder of the company named as the nominal and 3rd Defendant.

In paragraph 1 of the plaint it is averred that the first and second Plaintiffs are male adult Ugandans of sound mind and fully paid-up members of the third Defendant and at the same time the first plaintiff is a director of the third Defendant. In paragraph 5 of the plaint, the plaintiff's action against the Defendants jointly and/or severally is on their behalf and on behalf of other

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members of the third Defendant in a derivative action to protect and safeguard their rights and on behalf of the third Defendant Company to protect its interests. The declarations and orders sought in the action flow from the premises of the alleged need to protect and safeguard the rights of the members and interest of the third Defendant Company.

In the submissions of the plaintiff's Counsel in reply to the objection, it is admitted that the averment in paragraph 1 of the plaint that the Plaintiffs are fully paid-up members of the third Defendant is an error. To quote the submissions, the plaintiff's Counsel in part states as follows:

It is therefore correct to say that the Plaintiffs are not members of the third Defendant.

The question that remains is whether in the circumstances the Plaintiffs have 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. In the plaint it is averred that the Plaintiffs are fully paid-up members and the question of the plaint disclosing no cause of action on the basis of the bare pleading does not arise in terms of the submission that the Plaintiffs are not members. It is averred in the plaint that the Plaintiffs are fully paid up shareholders of the third Defendant. The question is whether in light of the admission by the plaintiff's Counsel that the Plaintiffs are not members of the third Defendant; the action can be sustained as a derivative action. It is a submission that only a shareholder can commence a derivative action (whatever the merits of the action).

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** that a company is the only proper plaintiff to sue for wrongs done to it. Secondly the Court will not ordinarily intervene in a matter which the company can settle through its internal mechanism i.e. in case of an irregularity it can ratify or condone the matter through its internal mechanism. Where it is alleged that a wrong has been done to a company, prima facie the only proper plaintiff is the

company itself. Members/shareholders of a company have a limited right to bring a derivative action on the Plaintiffs own behalf and on behalf of the company.

According to **L.C.B Gower in Gower's Principles of Modern Company Law Fourth Edition at page 647**, there is confusion generated by a failure to draw a distinction between two kinds of rights in which a minority shareholder's action is possible. The first right arises in a situation where a wrong is done to the company and action is brought to restrain its continuance, or to recover the company's property or claim damages or compensation due to it. In such an action the company is the only true plaintiff. In such cases the dispute is not internal and is a dispute between the company and third parties even if the third parties are directors who are majority shareholders. The minority shareholder sues on behalf of the company and other members. The action is brought by a member where it is impracticable for the company to do so. The wrong complained about must be in the form of a fraud which cannot be waived by a majority vote of members. It may involve expropriation of company property or that of members. Secondly it may involve director's breach of duty. It must be shown that the wrongdoers control the company. It must further be shown that the directors were asked to commence an action but refused to do so, and that they have controlling votes. The other kind of action is where the member's rights have been prejudiced by the wrongdoers.

In **Rai and Others v Rai and Others [2002] 2 EA page 537** Shah J.A. held that shareholders have a limited right to bring an action for wrongs done to the company and at page 551 set out the rule in **Foss vs. Harbottle** which rule is expounded in **Edwards v Halliwell [1950] 2 ALL ER 1064 - 1067** that firstly the proper plaintiff in an action in respect of a wrong alleged to be done to the company is the company itself. Secondly where the alleged wrong is a transaction which might be made binding on the corporation and on its' members by a simple majority of the members, no individual member of the corporation is allowed to bring an action in respect of that matter, because, if the majority challenge the transaction, there is no reason why the company should not sue:

“(3) There is no room for the operation of the rule if the alleged wrong complained of is *ultra vires* the corporation, because the majority members cannot confirm the transaction (4) There is also no room for the operation of the rule if the transaction complained of could be validly sanctioned only by a special resolution or the like because a simple majority cannot confront a transaction which requires the concurrence of a greater majority (5) There is an exception to the rule where what has been done amounts to fraud and the wrong doers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrong doers themselves, being in control, would not allow the company to sue.”

The basis for the doctrine is apparently the principle of democracy in the company that advances the principle that the person or persons with majority shareholding have a proportionate voting power by which they can outvote any minority on any issue subjected to a vote and therefore have control over the company. Where the majority have made a decision the minority should not challenge it except under grounds which are exceptions to the general rule. A derivative action is essentially an action of the minority. It is a rule that gives remedies to minorities against the oppression of the majority on exceptional grounds.

So far the doctrine is that it is a minority shareholder of a company who may sue in a derivative action and for that purpose the question of who is a member needs to be explored. On the other hand a majority shareholder can always move the company to do so.

A member of a company is a person who is bound by the memorandum and articles of association of the company and not a non member who is not bound. Who is a member? The 3rd Defendant was incorporated under the repealed Companies Act cap 110 laws of Uganda on the 9th of August 2011 according to annexure “A” to the plaint. Some returns relied upon in the written submissions

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were filed in 2011 before enactment of the Companies Act, Act 1 of 2012. Under the repealed Companies Act cap 110 section 15 thereof, upon the registration of the memorandum of the company, the subscribers to the memorandum together with such other persons as may from time to time become members of the company shall become a body corporate. The memorandum and articles of association of the company constitute the contract between the members/subscribers. Specifically the Companies Act cap 110 (repealed) defines a member under section 27 thereof as a subscriber to the memorandum of the company who is deemed to have agreed to become member of the company. Therefore under section 27 (2) it is provided as follows:

"Every other person who agrees to become a member of the company, and whose name is entered in the register of members, shall be a member of the company."

As far as holding companies are concerned section 28 (1) provided that a body corporate cannot be a member of the company which is its holding company. The third Defendant is a subsidiary company and the holding company can be a member. According to the memorandum of association of the 3rd Defendant, the holding company holding 96% shares in the 3rd Defendant is CEDA Financial Services Ltd. CEDA Financial Services Ltd is not a plaintiff. Furthermore section 21 of the repealed Companies Act cap 110 provides that the memorandum and articles shall, when registered, bind the company and members of the company to the same extent as if they respectively had signed and sealed the same and it contains, covenants on the part of each member to be bound by all the provisions of the memorandum and of the articles. This provision is repeated in the Companies Act of 2012 which provides under section 21 thereof as follows:

"21. Effect of memorandum and articles.

(1) Subject to this Act, the memorandum and articles shall, 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 and

contained covenants on the part of each member to observe all the provisions of the memorandum and articles.”

The beginning and purpose of the inquiry is of course to establish whether the Plaintiffs are members. The short answer to the question is that by all definitions the Plaintiffs are not members of the third Defendant.

The memorandum and articles of association should be perused to establish whether it authorises the Plaintiffs or enables them to commence the current action. The plaintiff’s Counsel relied on article 36 of the articles of association of the 3rd Defendant for the submission that the plaintiff is a representative of the parent company on the board. The articles of association are not in dispute and were referred to by the plaintiff’s Counsel though they are attached to the written statement of defence of the Defendants. Article 36 provides as follows:

“Without prejudice to any provisions relating to the appointment of directors, the Holding Company shall appoint three persons to be directors in the subsidiary company in the Annual General Meeting of the said Holding Company and the said three directors shall be ex-officials to foresee the activities of the subsidiary company and shall report to the members of the Holding Company.”

Before concluding the issue on a perusal of the articles of association and statutory law on the matter, a derivative action is the cause of action averred in the plaint and the plaint purports to seek redress for violation of the rights of minority shareholders under the common law and statutory law. For that purpose I have considered the expression “Oppression of the Minority.” The phrase “oppression of the minority” is directly related to shareholding in terms of who has voting power in practical terms and who may steer the course of the corporation. It applies to situations where some members hold the majority shareholding and the minority shareholders cannot carry on any issue subjected to a vote. That is democracy. Under certain exceptions a member may sue in his or her own right or in the interest of the company in a derivative action. In a derivative action the conduct complained about must be oppressive to the

Petitioner or Plaintiff as the case may be as a member of the company and not to him or her in some other capacity, such as a director according to **Halsbury's Laws of England 3rd Edition Volume 6 paragraph 1044** thereof. This reflected interpretation of section 210 of the UK Companies Act 1948 which is in *pari materia* with section 211 of the repealed Ugandan Companies Act cap 110. Even after amendment of the UK Companies Act, the position under the UK Companies Act 1980 is discussed in **Halsbury's Laws of England Volume 7 (2) Reissue paragraph 1408** thereof where what amounts to prejudicial acts affecting the interest of a member as envisaged by section 75 of the UK Companies Act 1980 is discussed.

Section 75 of the UK Companies Act 1980 provides:

“(1) Any member of a company may apply to the court by petition for an order under this section on the ground that the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial ...”

Section 248 (1) of the Ugandan Companies Act 2012 is in *pari materia* with the UK provision and provides:

“248. Protection of members against prejudicial conduct.

(1) A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members including at least himself or herself or that any actual or proposed act or omission of the company including an act or omission on its behalf is or would be so prejudicial.

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or

transmitted by operation of law as those provisions apply to a member of the company and references to a member or members are to be construed accordingly.”

According to **Halsbury’s Laws of England Volume 7 (2) Reissue paragraph 1408** thereof the conduct complained of in a derivative action must be unfairly prejudicial to the interests of the petitioner in his capacity as a member of the company as opposed to any other interests which he may possess. This was the holding in **Re a company [1983] 2 All ER 36** per Lord Grantchester QC at page 44

“It is not difficult to envisage an act or omission on the part of a company rendering an asset of a shareholder, other than his shares, of lesser value. In my judgment s 75 is to be construed as confined to ‘unfair prejudice’ of a petitioner ‘qua member’; or, put in another way, the word ‘interests’ in s 75 is confined to ‘interests of the petitioner as a member’”

I agree that even under the statutory law the plaintiff must be prejudiced in his capacity as a member. The plaintiff maintains that any shareholder of the holding company which has 96% of the shareholding can sue in a derivative action. I do not agree and I am persuaded by the interpretation of the provision by the UK Court quoted above. There is no connection between the rights of the plaintiff to sue in a derivative action in the holding company and the rights of the holding company which is a majority shareholder in the 3rd Defendant under the doctrine of derivative actions. It is an elementary principle of company law that a company is a separate and distinct entity from its members. More so the company acts through its directors except with certain exceptions where a simple majority or significant majority vote in a general meeting. The first plaintiff is stated to be an ex officio director of the 3rd Defendant in his capacity as a representative of the holding company. As a representative, the first plaintiff together with two other ex officio directors, wield the might of the holding company only and he cannot purport to wield powers and have rights of a minority shareholder in his individual capacity. As a director he is subject to the democracy of the board and it has not been averred how it was impossible for the 3rd Defendant to sue for any wrong done to the company (3rd Defendant) or for oppression of the minority. It

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has further not been shown how it was impossible for the holding company to have a say in the affairs of the 3rd Defendant. It is a majority shareholder and the only member who could be aggrieved. The Plaintiffs are just members of the holding company. Where there is oppression of the minority there are statutory rights to bring an action either for winding up or for any other just remedy formerly under section 211 of the repealed Companies Act cap 110 and now under sections 247 or 248 of the Companies Act 2012. The provisions protect minority rights and give both the forum and grounds for filing an action. Under section 247 of the Companies Act 2012, the matter is handled by the Registrar General who is moved by Petition for an order of winding up or any other remedy. Under section 248 of the Companies Act 2012 the plaintiff may petition court for protection against prejudicial conduct of the Defendants in managing the affairs of the company.

In the case of **Re: Five Minute Car Wash Service Ltd [1966] 1 ALL ER 242** Buckley J at page 246 defines the terms “oppression” under section 210 of the Companies Act 1948 of UK and the meaning of “oppression” between pages 246 – 247:

“To succeed in obtaining relief under s 210 of the Companies Act, 1948, a member of a company must have established that at the time when his petition was presented the affairs of the company were being conducted in a manner oppressive of himself, or of a part of the members including himself, and unless a petitioner in his petition alleges facts capable of establishing that the company’s affairs are being conducted in such a manner, the petitioner will disclose no ground for granting any relief and will be dismissed in limine as being demurrable. *First the matters complained of must affect the person or persons alleged to have been oppressed in his or their character as a member or members of the company. Harsh or unfair treatment of the petitioner in some other capacity, as for instance a director or a creditor of the company, or as a person doing business or having dealings with the company, or in relation to his personal affairs apart from the company, cannot entitle him to any relief under s 210.* (Emphasis added).

The statutory provisions support the rule in *Foss vs. Harbottle* (Supra) and are consistent with the Companies Act 2012. Matters to which the Plaintiffs are capable of suing should have affected them in their character as members of the 3rd Defendant. However they are members of CEDA Financial Services Ltd and not the third Defendant. CEDA Financial Services is a shareholder and subject to the memorandum and articles of association of the third Defendant. It is essential that the plaint must disclose that the plaintiff has been oppressed in his rights as a member or that wrong doing has been occasioned to the company. Such rights accrued from the time the Plaintiffs became members. In this case they are not members and the doctrine does not apply. Secondly the allegation of mismanagement is an allegation against the majority which allegation could be handled in a General Meeting of the company. Yet the first plaintiff represents the majority shareholder. The Plaintiffs cannot in their individual character even cause a general meeting to be held or vote.

A suit filed in a representative character shall disclose in the plaint under which character the suit is brought. In the plaint the Plaintiffs have sued in their own right and on behalf of the 3rd Defendant company (see Para 5 of the plaint). The plaint offends Order 7 rule 4 of the Civil Procedure Rules which provides that:

“Where the plaintiff sues in a representative character the plaint shall not only show that he or she has an actual existing interest in the subject matter but that he or she has taken the steps, if any, necessary to enable him or her to institute a suit concerning it”.

The first Defendant is not a shareholder and ought to show the steps taken to bring the action in a representative character. As a director the steps he has taken to remedy the alleged wrong is not disclosed. The right of the second plaintiff to institute the action is not shown. Last but not least both Plaintiffs purport to be fully paid up members when they are in law strangers to the 3rd Defendant Company.

A derivative action plaint should aver the steps taken to bring the action in the name of the company and which steps failed on account of majority action. It was

held by Harman J in **Birch v Sullivan and Another [1958] 1 All ER 56 at page 58 - 59** that:

“It would be necessary to allege, as well as thereafter to prove, that the plaintiff could not, by reason of the first Defendant’s opposition, obtain the name of the company to issue proceedings: that he was in the position in which the minority shareholders were in the comparatively rare cases where such actions have been allowed.”

In other words the grounds making it impossible to sue in the names of the company should be averred.

Coming to the facts of this case, the Plaintiffs are not shareholders of the 3rd Defendant Company. The first plaintiff is a director of the 3rd Defendant Company in his capacity as a representative of the holding company. The second plaintiff is a shareholder of the holding company. The first plaintiff can only represent the holding company and his standing in the 3rd Defendant is in his character as a representative of the holding company as a director in the 3rd Defendant and not in his individual character. The holding company has 96% shares in the 3rd Defendant. The first plaintiff cannot purport to exercise rights of a shareholder or member. Secondly the holding company is governed by a different memorandum and articles of association from the subsidiary. The two companies are separate and distinct legal entities and their management or shareholding cannot be mixed.

I therefore do not agree that the first plaintiff can institute a derivative action which rights resides in the members of the 3rd Defendant. He has not standing to do so. Secondly the second plaintiff is merely a shareholder of the holding company. Both Plaintiffs can only bring an action against the parent company in case they have a cause of action for acts which are alleged to be fraudulent, ultra vires or oppressive of the minority. In the premises the matters advanced by the Defendants are not mere technicalities but affect the very rights of the parties and article 126 of the Constitution though relevant was quoted out of context. It applies the principle that substantial justice shall be administered without undue

regard to technicalities but also subject to law. What is the substantive law? The law is that the Plaintiffs are strangers to the 3rd Defendant Company and they cannot exercise rights of members. The issue of rights of shareholders is of substantive law and not a mere technicality.

In the premises the Defendant's objection to the suit is sustained. The Plaintiffs have not locus standi to bring a derivative action and the objection of the Defendant is sustained. The plaintiff's action is accordingly struck out with costs.

Ruling delivered on the 30th of April 2015 in open court

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Kagurusi Remy first plaintiff in court

David Nahurira second plaintiff in court

Plaintiffs' Counsel is absent.

Baguma Cyprian first Defendant in court

Bwiruka Jane Frieda absent,

Defendants Counsel not in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

30/04/2015

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