

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
IN THE MATTER OF THE COMPANIES ACT, 2012
COMPANY CAUSE NO. 13 OF 2022
(ARISING FROM COMPANY PETITION NO. 5 OF 2020 BEFORE THE
COMPANY REGISTRAR)
MSS XSABO POWER LIMITED ::::::::::::::: APPLICANT/APELLANT
VERSUS
GREAT LAKES ENERGY COMPANY NV ::::::::::::::: RESPONDENT
BEFORE: HON. JUSTICE BONIFACE WAMALA
RULING

Introduction

[1] Being dissatisfied with the decision of Ms. Angella Nyesiga, a Registrar of Companies dated 7th July 2022, the Appellant/ Applicant brought this appeal by Notice of Motion under Sections 291 and 292 of the Companies Act 2012, Order 38 rule 5(d) and Order 52 rules 1 and 3 of the CPR seeking orders that;

- a) The Court sets aside the ruling of the Company Registrar on amendment of the answer to the petition in Company Petition No. 5 of 2021 dated 8th July 2022.
- b) The Court allows the amendment of the answer to the petition in Company Petition No. 5 of 2021 that was improperly denied by the Company Registrar.
- c) Costs of the application be provided for.

[2] The grounds upon which the application is based are summarized in the Notice of Motion and also set out in the affidavit sworn in support of the application by **Bernads Okello**, the General Manager of the Appellant company. Briefly, the grounds are that the Appellant is a respondent in company petition No. 5 of 2021 that is before the Company Registrar in which the petitioner (now Respondent) is challenging the revocation of its shares in the Appellant company. It is stated that before the hearing of the petition, the Appellant applied for leave to file an amendment to its answer to the petition

which was opposed by the Respondent (petitioner). On 8th July 2022, the Company Registrar delivered a ruling declining the request to amend the answer to the petition on account that the amendment would change the cause of action, cause a multiplicity of suits and would prejudice the petitioner. It is stated by the deponent that the intended amendment was not replacing the grounds of revocation of the shares but merely expounding on the original grounds of defence. The deponent also stated that the Company Registrar unilaterally framed issues to be resolved which do not reflect the real dispute between the parties. He concluded that because of those errors of law and or fact, the appeal should be allowed and the orders of the Registrar overturned.

[3] The Respondent opposed the appeal through an affidavit in reply deposed by **Michael Kearns**, a British national and Director of the Respondent. He stated that the application does not demonstrate any failure by the Registrar to exercise a judicious discretion upon which this court can interfere with the Registrar's decision and that the Registrar correctly refused to grant the amendment and her decision was based on sound reason. The deponent stated that the proceedings before the Registrar strictly concerned the legality of the impugned 4th November 2019 board resolution and rectification of the register and not the adjudication of substantive rights of the parties arising from the investment agreement; which matters were already the subject of arbitration between the parties. He further stated that the legality of the board resolution suspending the investment agreement and directing rectification of the register were matters already before the Registrar who had already ruled that they were within the exercise of the Registrar's power. The deponent concluded that the Registrar rightfully exercised her discretionary powers under the law and rightly disallowed the Appellant's application for amendment.

Representation and Hearing

[4] At the hearing, the Appellant was represented by **Mr. Brian Opolot** and **Mr. Mumpenje Andrew** from M/s Makada & Partners Advocates & Solicitors while the Respondent was represented by **Mr. Hussein Kashillingi** and **Miss Auma Ruth** from M/s Kashillingi, Rugaba & Associates. The parties agreed that the hearing proceeds by way of written submissions which were duly filed by both counsel and have been considered in the determination of the matter before Court.

Preliminary Objection

[5] In their written submissions, Counsel for the Respondent raised a preliminary objection regarding the jurisdiction of this Court to determine the current application/ appeal. I will first deal with the objection.

Submissions by Counsel for the Respondent

[6] Counsel for the Respondent cited the provisions under Sections 291 and 292 of the Companies Act, upon which the current application was based, and submitted that an application requiring the exercise of the court's jurisdiction to intervene in a matter determined by the registrar must emanate and relate to the exercise of power to review a decision of a registrar relating to an entry or correction to rectify the register and that since the instant application is not relating to an entry or correction made in rectification of the register, the court lacks jurisdiction to entertain the same. Counsel further argued that where special jurisdiction is established by statute, the court cannot exercise general jurisdiction. Counsel prayed that the application should fail on account of lack of jurisdiction on the part of the court.

Submissions by Counsel for the Applicant /Appellant

[7] In response, Counsel for the Appellant submitted that Section 92 of the Companies Act is very clear to the effect that appeals to the High Court are not only limited to rectification of the register but the court has such wide powers as to cover instances where the Registrar has dismissed an application to amend the answer to the petition. Counsel submitted that there is nothing in Section 292 of the Companies Act that states that the section is exclusively on rectification of the register. Counsel argued that the court should therefore guard its jurisdiction and determine this matter on its merits.

Determination by the Court

[8] The position of that law is that the High Court is vested with original unlimited jurisdiction in all matters and such appellate jurisdiction as may be conferred by the Constitution or such other law. See: *Article 139 of the Constitution of Uganda*. It is further the law that for a provision of a statute to oust the jurisdiction of the High Court, it must state so expressly or by clear implication; the ouster cannot be presumed. See: *David Kayondo v The Co-operative Bank (U) Limited CACA No. 1091 of 1992; Kameke Growers Cooperative Society Limited v North Bukedi Cooperative Union, SCCA No. 8 of 1994; and Uganda Revenue Authority v Rabbo Enterprises (U) Limited & Anor [2017] UGSC 20*.

[9] The contention before the Court is based on Sections 291 and 292 of the Companies Act, 2012. Section 291 of the Companies Act provides as follows;

“Court’s power to review registrar’s decision.

The Court in dealing with any question of the rectification of the register shall have power to review any decision of the registrar relating to the entry in question or the correction sought to be made”.

[10] On the other hand, Section 292 of the Act provides as follows;

“Discretion of court in appeals.

In any appeal from the decision of the registrar to the court under this Act, the court shall have and exercise the same discretionary powers as under this Act are conferred upon the registrar”.

[11] It was argued by Counsel for the Respondent that the two above cited provisions of the law are to be read together and that the power on appeal referred to under Section 292 is restricted to the subject matter in Section 291, namely, the court’s power to review a decision of the registrar on rectification of the register. This argument by learned Counsel for the Respondent is flawed. A look at the context of the two cited provisions renders a different interpretation. To begin with, the two provisions appear under Part X of the Act titled “General” and under the sub-title “Legal Proceedings”. The connotation is that Part X makes provision for general matters under the Act; and that the provisions under the sub-title “Legal Proceedings” are in respect to all matters pertaining to legal proceedings under the Act.

[12] It is clear to me that while Section 291 is specific on the power of the court to review a decision of the registrar on the subject of rectification of the register, Section 292 deals with the power of the court on appeal from the decisions of the registrar. Section 292 clearly makes reference to *“the decision of the registrar to the court under this Act”* and to the *“discretionary powers as under this Act”*. This means the provision is made in regard to the exercise of that power in respect to any matter provided for under the Act, where applicable. If the provision under Section 292 was made in relation to the matter provided for under Section 291 only, the statute would have made reference to that section and not to the entire Act. That, in my considered view, is the natural construction of the two cited provisions.

[13] It is, therefore, incorrect for Counsel for the Respondent to argue that Section 292 of the Act could not be used by the Appellant to bring this application in absence of a decision by the registrar concerning rectification of the register. The preliminary objection was, therefore, based on a wrong construction of the relevant provisions of the law. There is nothing that affects the jurisdiction of the Court in determining the present matter. The objection is without merit and is overruled.

Issues for Determination by the Court

[14] Two issues are up for determination by the Court, namely;

a) Whether the Company Registrar properly applied the law on amendment of pleadings?

b) What remedies are available to the parties?

Resolution of the Issues

Issue 1: Whether the Company Registrar properly applied the law on amendment of pleadings?

Submissions by Counsel for the Applicant/Appellant

[15] Counsel for the Appellant laid down the principles that govern applications for amendment of pleadings, relying on the Supreme Court decision in *Crane Bank in Liquidation v Sudhir Ruparelia & Another SCCA No. 2 of 2021*. Counsel submitted that the issue in controversy in the matter before the court is whether the board resolution of 4th November 2019 was legal. Counsel pointed out that the argument by the Respondent (petitioner) is that the board resolution was illegal since the shares were fully paid up and the Respondent had not breached the investment agreement. Counsel argued that in view of such facts, the amendment to rely on the investment agreement was intended to assist the tribunal to adjudicate upon the issues in controversy; which included whether the shares were fully paid for and whether the revocation was valid. Counsel argued that such amendment would not prejudice the

Respondent who had pleaded that the shares were already paid up. Counsel also submitted that the amendment was sought early in the proceedings and the Respondent would be entitled to a rejoinder if they wished to make one.

[16] Counsel for the Appellant further submitted that the proposed amendment would avoid a multiplicity of suits since the Appellant will not need to file another suit over a matter that could be resolved under this same proceeding. Counsel also submitted that the amendment was just expounding on the answer to the petition on matters that are already on record and the idea of introducing a new cause of action is out of the question.

Submissions by Counsel for the Respondent

[17] In response, it was submitted by Counsel for the Respondent that the registrar correctly refused to grant the amendment. Counsel argued that the registrar reminded herself about the applicable principles of the law on amendment of pleadings in line with the provision under Order 6 rule 19 of the CPR and on decided cases and correctly found that the intended amendment purported to introduce new issues which would result in an injustice to the Respondent and would further result in a multiplicity of proceedings. Counsel stated that the Appellant was introducing the issue of payment for shares which matter was not in contention in the petition which dwelt solely on determination of the legality of the board resolution of 4th November 2019.

[18] Counsel also argued that the issues concerning the investment agreement were not and have never been the subject of the petition but, rather, are subject of an ongoing arbitration between the parties at the London Court of International Arbitration where the arbitral tribunal made a partial award declaring that the investment agreement is valid. Counsel argued that determining matters concerning the investment agreement which have been

determined by another forum chosen by the parties would be contrary to public policy and would likely result in contradicting or parallel proceedings.

Determination by the Court

[19] Order 6 rule 19 of the CPR empowers the court to grant leave to a party to amend their pleadings at any stage of the proceedings. It provides that;

“The court may, at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties”.

[20] The principles that have been recognized by the courts as governing the exercise of discretion to allow or disallow amendment of pleadings have been summarized in a number of decided cases and can be stated as below;

- a) Amendments are allowed by the courts so that the real question in controversy between the parties is determined and justice is administered without undue regard to technicalities.
- b) An amendment should not work an injustice to the other side. An injury that can be compensated by an award of damages is not treated as an injustice.
- c) Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed.
- d) An application that is made malafide should not be granted.
- e) No amendments should be allowed where it is expressly or impliedly prohibited by any law.
- f) The Court shall not exercise its discretion to allow an amendment which has the effect of substituting one distinctive cause of action for another.

See: *Gasco Transport Services (Bus) Ltd v Obene* (1990-1994) EA 88; *Mulwooza & Brothers Ltd v Shah & Co. Ltd*, SCCA No. 26 of 2010; and

Nicholas Serunkuma Ssewagudde & 2 Others v Namasole Namusoke Namatovu Veronica HCMA No. 1307 of 2016.

[21] In *Crane Bank Limited (In Liquidation) v Sudhir Ruparelia & Another*, SCCA No. 2 of 2021, it was held by the Supreme Court that if a proposed amendment introduces a new case or new ground of defence, it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action. As such, it is not every time a proposed amendment introduces a new matter that the amendment should be refused. The test set out above must be applied.

[22] On the case before me, the allegation in the petition before the Registrar of Companies was principally that the revocation of the petitioner's (now Respondent's) shareholding was done unlawfully or improperly. In response, it was stated by the Appellant (then Respondent) that the revocation was lawful because it was based on a board resolution that was approved by the members of the company. The Appellant further explained that the revocation was occasioned by the fact that the petitioner had gotten involved in fraud, deceit, misrepresentation and cunning perversion of truth, contrary to the terms of the investment agreement that introduced the petitioner into the company, and also contrary to the Company's Articles of Association. The Appellant claims that in the proposed amendment, they seek to reinforce the answers above by adducing facts intended to do two things; one, to rebut the allegation that the shareholding was unlawfully revoked; and two, to show the how and why the decision was not illegally reached.

[23] It was alleged by the Respondent (then petitioner) and agreed to by the learned Registrar that the intended amendment had the effect of introducing a new cause of action or line of defence for the Appellant. In my considered view, in as far as the facts sought to be adduced by the Appellant are in answer to

allegations raised in the petition and do not contradict the facts set out in the earlier answer, it cannot justifiably be said that the Respondent is introducing a new line of defence that may have the effect of substantially changing the character of the action before the Registrar. I do not see how the petitioner (now Respondent) would be prejudiced by the inclusion of evidential aspects on matters that are already before the Registrar. One aspect that was highlighted as introducing a new line of defence is the claim by the Appellant that one of the reasons for revocation of the shareholding was the fact that the Respondent had not paid for the shares. It was claimed by the Respondent's counsel that such an averment was not contained in the earlier answer to the petition and that its introduction by way of amendment constituted substitution of one distinct cause of action for another. The learned Registrar agreed with the Respondent's counsel on the point and went on to hold that such amendment would prejudice the Respondent (petitioner).

[24] The learned Registrar in her ruling directed that the main issue for determination before her was "*Whether the board of directors' resolution dated 4th November 2019 filed and registered with URSB on 5th November 2019 is lawful?*" In my considered view, to determine the lawfulness of the resolution, one would have to look at the procedure that was followed in its making and the reason or justification for its making. The materials sought to be introduced by way of amendment appear to me to be speaking to the above aspects of the procedure and basis of making the resolution revoking the Respondent's shareholding. I do not see how such materials are divergent to the earlier answer to the petition; or how they constitute a new cause of action or line of defence; or how they are prejudicial to the Respondent herein.

[25] It is also clear to me that a large part of the objection by the Respondent (petitioner) touched more on the veracity of the facts sought to be adduced in the amendment rather than their admissibility in principle. Looking at the

reply to the application for amendment, Counsel for the Respondent labored to indicate why the matters sought to be introduced through the amendment had no evidential value. In my view, such is a matter for consideration by the Registrar of Companies at trial and cannot be a basis for rejection of an amendment.

[26] I am alive to the aspect that the facts before the Registrar also formed the basis of the concurrent proceedings in the London Court of International Arbitration (LCIA) Tribunal. It was the understanding of both parties that the two proceedings would go on concurrently. Both the Registrar and the Arbitral Tribunal were also aware of the existence of the concurrent proceedings. That being the case, the Appellant cannot be denied an opportunity to rely on facts which also happened to be part of the concurrent arbitral proceedings. The question, therefore, is not whether the facts sought to be adduced in the amendment were also traversed in the arbitral proceedings. Rather, the correct question is whether the facts are relevant and are being adduced in support of the Appellant's case before the Registrar of Companies. It is expected that the arbitral tribunal would steer clear of matters that are a preserve of the Registrar of Companies. Similarly, the Registrar of Companies is also expected to steer clear of matters that were the subject of the arbitral proceedings or of any potential court action. In my view, such is the principle and approach that ought to have been applied by the learned Registrar of Companies.

[27] As a matter of fact, I am aware that the Arbitral Tribunal rendered its Final Award on 11th September 2023. The present Appellant with 4 others preferred an application before the Commercial Division of the High Court vide Arbitral Cause No. 014 of 2024 seeking an order refusing the recognition and enforcement in Uganda, of the Final Arbitral Award of the London Court of International Arbitration (LCIA). Earlier on, the present Respondent vide Arbitration Cause No. 075 of 2023 had lodged an application before the

Commercial Court seeking an order recognizing as enforceable in Uganda, the said Final Arbitral Award; and for leave of the Court to enforce the same. The two applications were consolidated and determined by Hon. Justice Stephen Mubiru in a decision dated 18th April 2024. It is, therefore, now clear on record which matters have been subject of pronouncement by the Arbitral Tribunal on the one hand and the Court on the other in applications subsequent to the Arbitral Award. The Registrar of Companies is therefore well placed to, while relying on the same or related facts, hear and determine matters that are within the confine of her jurisdiction.

[28] In those circumstances, my finding is that the learned Registrar erred in law and fact in rejecting the amendment of the answer to the petition in the particulars sought by the Respondent. I neither find a new cause or line of defence introduced that is distinct from the one that was before the Registrar nor any possibility of real prejudice or injustice that may be occasioned to the Respondent. Any inconvenience that may be occasioned by the amendment can be adequately remedied by an order as to costs. In the premises, the application/appeal succeeds and is allowed with orders that the decision by the learned Registrar refusing the amendment is set aside, the amendment is allowed and each party shall bear their own costs of this proceeding. The Registrar of Companies shall give further directions regarding the time within which to file the amendment and any other subsequent pleadings and processes before him/her. It is so ordered.

Dated, signed and delivered by email this 25th day of April, 2024.



Boniface Wamala

JUDGE