

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NUMBER 67 OF 2010

INCAFEX LIMITED..... APPELLANT

VERSUS

MATHEW RUKIKAIRE..... RESPONDENT

(An appeal arising from the decision and orders of the High Court/ Commercial Court Division (Kiryabwire G.) in Company Cause No 3. Of 2004 dated 18.8.2008)

Coram: Hon. Justice Remmy Kasule, JA
Hon. Justice Eldad Mwangusya, JA
Hon. Lady Justice Faith E. Mwendha, JA

JUDGMENT

A petition by **MATHEW RUKIKAIRE** (now Respondent) was filed against **INCAFEX LIMITED** (now Appellant) at the Commercial Court Division of the High Court of Uganda. The petition alleged that the Appellant Company was being run in a manner oppressive to some of the members including the respondent. The Respondent thus prayed for an Order to bring to an end the matters complained of as being oppressive to some members, an Order to audit the Company's accounts and, in the alternative an Order that the company be wound up.

The petition was a culmination of an exchange of correspondences between the petitioner and James Musinguzi, the Managing Director of the Appellant Company, during which the respondent was raising a number of issues

pertaining to the manner in which the company was being run. James Musinguzi on the other hand was contending that the petitioner had no say in the Company affairs because although he had been allotted shares in the company, he had not paid for them. The issue of the payment for the shares featured prominently at the hearing both at the High Court at trial and also in this Court on appeal because of the Appellant's contention that since the Respondent did not pay for the shares issued to him in the company he has no say in the affairs of the Company and thus had no locus Standi to file the petition, let alone to pursue this appeal.

The background to the dispute is that the Appellant Company was on 23rd June, 1982 incorporated under the Companies Act of Uganda as a Company Limited by Shares with a Capital of Shs.1,000,000/= divided into 1000 shares of Shs.1,000/= each. The Petitioner/Respondent was allotted 450 of these shares and according to him the consideration thereon was fully settled as shown by the return of allotment of shares to the Companies Registry. He did not actively participate in the running of the Company affairs because he was in Government Service. Upon retirement from Government Service he made all effort to get involved in the running of the affairs of the Company but all his efforts were frustrated by Mr. James Musinguzi, the Managing Director.

The Respondent raised a number of issues to illustrate how the Company was being mismanaged and how his efforts to get actively involved and have the Company affairs streamlined were frustrated by Mr. Musinguzi. The Respondent demanded of the Company Managing Director the holding of an Annual General meeting or extraordinary meeting of the Company, but his demands were ignored. Instead in December, 2003 and January 2004 the Managing Director convened extra ordinary meeting of the Directors of the Company without any notification to the Respondent.

Respondent expressed his disquiet as to how the accounts of the Company were being run and one of the sticking issues was the way compensation for the Company ranches that had been taken over by Government was being handled. He was denied participation in the negotiations between Government and the Company and there was a lack of transparency and accountability for the compensation funds that were being disbursed by Government. The Respondent thus resorted to the High Court by lodging the petition praying for the Orders already set out above.

In the High Court the petition was opposed by the Appellant Company through Affidavits sworn by James Musinguzi Managing Director and Mr. Henry Nganwa, a Director of the Company and the two were emphatic that although the petitioner had been allotted shares in the Company he had not paid for them. He, therefore, cannot have an interest in the Company. In other words that he did not have any Locus Standi to bring the petition.

On the other hand, the petitioner supported by one AMRIK SINGH Chairman of the Company by the name of Multiple HAULIERS Limited that had invested in the Appellant Company in the 1980s asserted that the shares allotted to the Respondent in the Appellant Company had been paid for. An allotment of shares filed in the Company Registry was produced by the Petitioner and AMRIK SINGH as evidence of payments allegedly made to the Appellant Company to support the claim that there was Consideration for the shares allotted to the Petitioner/Respondent. CBM
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After evaluation of the evidence for and against the petition judgment was delivered before the High Court, in favour of the Petitioner/Respondent against the Appellant and it was decreed as follows:-

1. A special audit shall be carried out by any of the following reputable audit firms, Pricewaterhouse Coopers, Earnest and Young, Deloitte and

Touché, KPMG or PKF Uganda to be jointly appointed by the Petitioner and the Respondent within 30 days of this Judgment.

2. The Petitioner and the Respondent Company shall share the costs of the audit in the proportions of 1/3 for the Petitioner and 2/3 for the Respondent Company.
3. The preliminary findings of the special audit shall be made available to the parties within 45 days of the appointment for comments which comments shall be made within 14 days of receipt by them of the preliminary report.
4. A final report shall be made to Court and the parties within another 14 days.
5. The final report shall be binding upon the parties
6. The special audit shall address the following issues:-
 - (a) Based on the letter of M/s Agaba & Co Advocates to Mr. James Musinguzi dated 15th December 2003 whether the 45 % foreign shareholders represented by the Petitioner of M/s Incafex Ltd withdrew and were compensated for their shares. Precise details as to minutes, dates and payment amounts are to be provided by the parties.
 - (b) If the said foreign shareholders were not compensated for their shares what would be their fair value for their compensation.
 - (c) To establish whether the Respondent has been preparing and maintaining annual audited accounts, and if not, make appropriate recommendation to Court.

(d) To establish whether the Respondent Company has been holding regular meetings of the Company and if not to make appropriate recommendations to Court.

(e) To make such other recommendations to Court to ensure good corporate governance within the Respondent Company.

7. Following the filing of the report, the parties may move Court by motion to make consequential orders to this judgment.

The above decree was received signed and sealed by the High Court on 3rd September 2008 following which an appeal was lodged in this Court. A Memorandum of Appeal filed on 20.8.2010 raises the following grounds:-

1. The Learned Trial Judge erred in Law and fact in holding that the Petitioner was a shareholder in Incafex Ltd.

2. The Learned Trial Judge erred in law and fact in allowing the petition when there was no evidence to prove that:-

(a) There has been oppression of some members of the Company including the Petitioner.

(b) The facts justify a winding up on grounds that it is just and equitable to do so.

(c) The winding up will prejudice the oppressed members of the Petitioner.

3. The Learned Trial Judge erred in Law and Fact to make the orders for the benefit of foreign shareholders who were not party to the petition and in absence of any prayers to that effect.

The appellant prayed for orders:-

1. That the Appeal be allowed.

2. That the orders of the High Court be set aside.
3. That the Petition in the High Court be dismissed.
4. That the costs of this Appeal and in the High Court be granted to the Appellant.

At the hearing of this appeal the appellant was represented by Mr. Walubiri Peter while the Respondent was represented by Dr. J.B. Byamugisha and Mr. Didas Nkuruziza.

On ground one, Counsel for the Appellant referred Court to the trial Judge's Judgment where the following findings were made:-

"I have read the petition and perused the evidence for and against it. It is quite evident from the evidence adduced in Court that the Respondent Company does not maintain the elaborate records required of it by the Company's Act. That brings its corporate governance into question. An issue has been raised as to whether the Petitioner is a member of the Company. The Petitioner did not produce a share Certificate nor did the Respondent Company produce a register of members of the Company for that matter. The Respondents regard the petitioner as a mere allottee of shares whether for himself or in trust for M/s Multiple Hauliers Ltd which were not paid for. The evidence of the Petitioner in this regard is not particularly useful. During cross examination he was clear on only one thing and that is; he held the 450 shares in the Respondent Company on behalf of foreigners (who I took inter alia to be M/s Multiple Hauliers Ltd of Kenya). He testified that he did not personally pay for the shares but that said foreigner made the payment. He testified that

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[Signature]

money was provided so that the Company could acquire the ranches it owned. He does not know exactly how much money was used by his principal in the purchase of the ranches. He does not have receipts for the payments. He testified that he was not involved in the management of the Company. All he has are a set of return of allotment forms showing that he had been allotted 450 shares for a consideration in cash. Mr. Amrik Singh on behalf of M/s Multiple Hauliers Ltd swore a statutory declaration stating that the Petitioner held shares on their behalf. Amrik Singh depones that he made payments amounting to US\$799,540.25 and shs7,000,000/=. The evidence of this payment is amazing. It comprises a handwritten schedule of payments for various items including "James Musinguzi," "Henry Nganwa," "Transport to Kampala Joseph" and Range Rovers (No. KTS 819 and KRN 323). It also has a list of shipment of beer, soap, sugar and salt with a few supporting customs entries in the names of the Respondent company.

If this is to be considered as evidence of payment of the 450 shares, then, the return of allotment (annex 'D' to the petition) cannot be accurate showing that the number of shares allotted for a consideration other than cash was "NIL". During cross examination Mr. Amrik Singh explained this away stating that:

"... The business was on trust ..." and that he did not have records covering the 26 years when all this happened."

We agree with the trial Judge's assessment of the evidence regarding the issue as to whether or not the allotted shares had been paid for by the petitioner or the foreigners as he claimed. It left a lot to be desired.

During the trial both the respondent and Amrik Singh were cross examined on the consideration for the allotted shares and although they promised to produce documents and an adjournment was granted for the purpose, none of them did. We shall revert to this issue because upon the failure to adduce evidence of consideration, the trial judge relied on a letter written by the Secretary of the appellant, in which mention is made of compensation made to the foreign investors which Amrik Singh never mentioned in his affidavit or his testimony in Court. As will be shown, it is not clear as to whether the compensation was for the shares or investments, an element of the petition that seems to be at the heart of the dispute.

The petitioner was cross-examined on the assets of the Respondent and this is what he stated:-

"The assets, I am not sure, but they were ranches, houses and buildings. They were acquired at different times after 1987. I dont recall the dates or Considerations for acquisitions. The Capital is (U) Shs1m. It could not have acquired all the assets the Company has. The other foreigners Amrik Singh (of Multiple Haulers) and Mohan Singh provided the money to acquire the assets"

During the petitioner's cross examination, his Counsel promised that they would provide the documents as to investments in Incafex. These documents were not provided as promised and one would have expected the foreign investors as they were referred to by the petitioner to produce evidence of the money they provided for acquisition of the assets including the ranches but none was produced.

An adjournment was granted to the Respondent for the purpose of producing documents to support his testimony but Amrik Singh, apart from the evidence which the trial Judge described as amazing only produced separate transit entries for 330 tons sugar. These entries were for sugar imported in 1985, the same year he claims to have bought shares. Amrik Singh testified that the Appellant's accounts were audited annually contrary to what the Respondent was claiming. This is what Amrik Singh stated:-

"Incafex keeps accounts which are audited annually. We have big accounts staff about 20. We pay taxed regularly. I prepared the schedule to the affidavit. It was not prepared by my accounts staff."

The above testimony contradicts the respondent's assertion that the appellants' accounts were not being properly run. His principals had no disquiet about them. From these accounts the foreign investors should have produced cogent evidence not only about their subscription for the shares but also for their investments.

If they failed to produce the evidence, as the Judge found, we do not see any basis for the trial Judge's "limited finding" that the respondent did hold shares in the Company. We reproduce the said "limited finding" of the trial Judge:-

"Out of all this Court can only make a limited finding to the effect that the petitioner did hold shares in the Respondent Company but that there is no evidence as to whether he still holds those shares or he was compensated for them. The onus to show compensation was made lies with the Respondent Company and until then the Court on the evidence before it must find that the Petitioner is a shareholder/member of the Respondent Company."

The basis for the above finding was a letter by the Company Secretary whose clarification about the status of the Respondent was sought and the letter which Mr. Agaba Maguru wrote and was reproduced in the Judgment is as follows:-

“At a Board of Directors meeting held on the 16th November 1993, it was agreed that 45% of the shares in Incafex Ltd. Which were wholly owned by foreigners be allotted and held by Mr. Mathew Rukikaire in trust for the said foreigners. This allotment was not done immediately. It was registered on 7th February 1995 following a meeting that had been held the previous day.

Subsequently one of the major foreign shareholders namely Multiple Hauliers Ltd. insisted on pulling out of Incafex altogether. At a meeting held at Plot 28 Kampala Road, this was agreed and appropriate compensation arranged. In a further meeting, it was agreed that Garuga Properties Ltd compensates the remaining shareholders and the 45% shares held in trust by Mr. Mathew Rukikaire be transferred thereafter to Garuga properties Ltd. or any of its nominees. This transaction had not been complete only because some shareholders had not been compensated.

Our records indicate that as of now all of the foreign shareholders have been compensated. This means therefore that the foreigners no longer own shares in Incafex as of today and Mr. Rukikaire who was a trustee for the said foreigners therefore owns Nil shares. This position is yet to be registered at the Company registry.

The issue of Ranch No. 34 should however be handled separately as our records do not indicate that it had been given to the Company as equity contribution towards shareholding. It was and has remained. Mr. Mathew Rukikaire's ranch.

The above letter which was dated 15th December, 2003 drew the following response from M/s Mulenga & Kalemara, Advocates, representing the Respondent.

"We act for Mr. Mathew Rukikaire of P. O. Box 22756 Kampala who has placed your letter of 15th inst, addressed to Mr. James Musinguzi and copied to our client, in our hand with instructions to write to you as follows:-



Our client regrets to note that your attempt to "put the record straight especially as regards the shareholding structure" has, to say the least, fallen far below the mark. As far as our client is concerned, and as is reflected by the record at the Registry of Companies, our client is the registered holder of 450 ordinary shares in the above Company. Our client has never executed any share transfers in respect to those shares nor agreed to do so and therefore the issue of registering a "position" at the Company registry, as stated in your letter simply cannot arise.

Indeed, as Company Secretary, you are no doubt aware that section 119 of the Companies Act prohibits the entry on the register of any notice of any trust, whether express, implied or constructive, and the same is not receivable by the registrar. This position is well established in the law and your Company

**"Can only look to the man whose name is on the register"
(see attached extract from Palmer's Company Law for ease of
reference).**

**Our client does not recall being invited to, nor attending the
two meetings referred to in your letter and requests that you
forward to us minutes thereof for his perusal. Be that as it
may, the issue of Multiple Hauliers Limited is one between
that Company and our client. As far as our client is aware
the said Company has never been a registered shareholder
and our client is not aware of the compensation referred to.
In any event it is its difficult to perceive how;**

- 1. Such compensation would be paid to a party in respect of
shares ~~it~~ does not legally hold,**
- 2. Such compensation would be paid without the sanction of a
formal Board or Shareholders meeting.**
- 3. Such compensation/payment for these "shares" would be
carried out in contravention of the Articles of Association of
the Company.**

**The Return of Allotment signed and filed by you on 7th
February 1995 is clear and unequivocal. Our client is the
registered shareholder of 450 ordinary shares in the
Company and therefore your conclusion that our client hold
"Nil" shares is untenable to say the least.**

**Our instructions therefore are to demand that you formally
retract the contents of your said letter and instead, prepare
to arrange for a general meeting of the members of the
Company to be held in accordance with the law.**

Please be advised that if you do not do so forthwith and, in any event by Thursday 18th December 2003, our client will have no alternative but to commence the necessary legal proceedings to safeguard his rights as a holder of a substantial number of shares in the said Company at your risk of costs.

After a finding by the trial judge that the evidence produced by the respondent and his principals was wanting we do not see how the letter from the Secretary of the appellant Company cures the deficiency. The question as to whether the Respondent paid for his allotted shares or made any investment in the ranches from which he claims an interest remained unanswered. He did not participate in the activities of the Company while in Government Service but his Principals did. They too, failed to prove that they had paid for the allotted shares and according to the finding of the trial Judge they had no idea about the ranches that belonged to the Company. Our understanding of Mr. Agaba Maguru's letter was that Multiple Hauliers Ltd on whose behalf the Respondent was allotted 450 shares pulled out of Incafex altogether and were fully compensated. The testimony of the Respondent during cross examination was that:-

“The other foreigners, Amrik Singh (of Multiple Hauliers) and Mohan Singh provided the money to acquire the assets”

He had also testified that he did not recall the Consideration for the acquisitions. But if the Respondent had no idea about the Consideration and Acquisitions of the assets, the foreigners must have known, because while the Respondent was inactive while in government service the foreign investors were participating in the running of the Company and were satisfied with the Accounting System as already stated in this judgment. They are the ones who invested in the Company and if according to Mr. Agaba Maguru they decided to

pull out and were fully compensated we do not see how the issue of the compensation arises especially when it was no raised by Amrik Singh whose testimony was described as amazing by the trial Judge. He did not shed any light as to what their contributions to the assets of the Company including the ranches were. The letter from the Appellant's Company Secretary indicating that the foreigners had been fully compensated, which letter and whose contents were within the knowledge of the Respondent and therefore his counsel was never put to Amrik Singh. So if the letter alleges that the foreigners ^{wanted} ~~wanted~~ out of the Company and they were fully compensated, we do not see how the Respondent, instead of the foreigners who had made the contributions, would make any claims on the assets of the Company.

The main thrust of Dr. Byamugisha argument in respect of the shareholding was that once an allotment is made, accepted and registered the allottee becomes liable to pay for those shares on the winding up of the Company. The evidence of the allotment of the shares by the Company is provided by paragraphs 4 and 5 of the Petition which we reproduce hereunder.

"4. The above said 1000 shares were during the period July 1987 and July 1995 allotted as follows:-

- a) Twinomukunzi Charles100 ordinary**
- b) Musinguzi James100 ordinary**
- c) Nganwa Henry100 ordinary**
- d) Rukikaire Mathew450 ordinary**
- e) Garuga Properties Ltd250 ordinary**

and by the last Annual Return of the Company filed on the 3rd September 1987 the registered directors of the Company were;

- a) *Charles Twinomukunzi (now deceased)*
- b) *James Musinguzi*
- c) *Ernest Kakwano*
- d) *Mathew Rukikaire*
- e) *Henry Nganwa*
- f) *Amrik Singh*
- g) *Mohan Singh*
- h) *Tumusime Mutebire*

(See copy of the said Annual Return annexed hereto and marked "C")

The said James Musinguzi was, and to date has been the Managing Director for and together with Henry Nganwa, has been in day to day control of the affairs of the Company.

5. The said 450 ordinary shares were taken up by the Petitioner and the Consideration therefore was fully settled making your Petitioner in effect a 45% shareholder in the Company. (See copy of the Return of Allotment filed on the 7th February 1995 of the Companies registry annexed hereto and marked "D")

This evidence of the Petitioner shows that there were two steps to be taken for acquisition of the four hundred and fifty shares. Paragraph 4 refers to the allotment while in Paragraph 5 he avers that all the 450 shares were taken up and "**the consideration thereof was fully settled.**" We understand this to mean allotment is but one step in the acquisition of shares and this must be followed by purchase of the shares which the averment that the Consideration

was fully settled implies. During the trial the petitioner, now respondent, insisted that he would produce evidence of the Consideration which was paid but as was observed by the trial Judge the evidence of the petitioner in this regard was not particularly useful and neither was that Amrik Singh. So the question of the Consideration which the petitioner insists was settled was never resolved and the letter by of Mr. Agaba Maguru could not have been a substitute for this evidence which was crucial to determine that the allotted shares were subscribed to as claimed by the Petitioner/Respondent.

As to the issue of the ranches the Petitioner/Respondent had acquired his own ranch for which he was entitled to compensation and he did not prove what ^{EBN} interest he had in the other ranches where he had not invested, and his ^{Am} principals who participated in the running of the Company up to the time they pulled out, did not dispute that they had been fully compensated for their investments in Incafex Ltd, which investments Amrik Singh failed to specify. As already pointed out, Amrik Singh who testified on behalf of the Petitioner/Respondent was never asked about Mr. Agaba Maguru's letter of 15.12.2003 and if he still had any claim in the affairs of the Company Incafex Ltd. he would have raised it.

Therefore, in respect of the first ground our conclusion is that after the trial Judge had found that the Respondent had failed to prove that he had subscribed to the shares that had been allotted to him in Incafex there was no basis for making a partial finding that he was a shareholder. We accordingly allow the ground 1 of Appeal.

On the third ground of Appeal Amrik Singh was called as a witness to support the petitioners contention that the foreign investors had paid for the shares and made investments in the Company, including the ranches. He too, failed to adduce any credible evidence of their contributions and or/investments in the Company. As rightly pointed out by Counsel for the Appellant, these

no basis for orders relating to their compensation if they never raised it. Ground number 3 of the appeal is therefore allowed.


As to ground number 2 of the appeal, our having held that, at the material time, the respondent did not hold shares in the Appellant Company, he could not therefore, on the evidence before the Court, claim to have been oppressed by the Appellant Company. There was no credible evidence on any other member of the said company being offended. There was also so evidence adduced to justify winding up of the Appellant Company. The Appellant therefore, also succeeds on ground 2 of the appeal.


In view of the above, on the first, second and third grounds of appeal being successful, this appeal is allowed. The judgment and orders of the High Court are hereby set aside. They are substituted by an order that the petition in companies cause No. 3 of 2004 be and stands dismissed by reason of having not been proved by the petitioner, now respondent to the appeal.

The appellant is awarded the costs of the appeal and those in the Court below

Dated at Kampala this^{17th}..... day of December 2014
_{22nd}


Hon. Justice Remmy Kasule,
JUSTICE COURT OF APPEAL


Hon. Justice Eldad Mwangusya
JUSTICE COURT OF APPEAL


Hon. Lady Justice Faith E. Mwendha
JUSTICE COURT OF APPEAL