THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - CS - 365 - 2007

1. Eng. YASHWANT SIDPRA
2. HON. J.J. OKELLO OKELLO ::::::::::::::::::::: PLAINTIFFS

VERSUS

1. SAM NGUDE ODAKA
2. J.R.O. ELANGOT
3. IGNATIUS B.N. BARUNGI
4. CELESTINO. D. MINDRA
5. THE MILTON OBOTE FOUNDATION ::::::::::::::::: DEFENDANTS

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

R U L I N G:

This ruling arises out of seven preliminary objections (actually there are ten in total as some objections have in them sub-objections) raised by the defendants against the case filed against them by the Plaintiffs. The Defendants had in paragraph 3 of their defence made it clear that they would object to suit as being bad in law and seek its dismissal against each and every one of Defendants jointly and severally with costs.

The Defendants objections are largely grounded on the Plaintiffs not having complied with the prescribed procedure for the commencement of proceedings by members of a company with respect to the remedies the said members want court to grant them. That being the case the Defendants submit that such non compliance renders the suit incompetent.

The preliminary objections being points of law, were set down as issues for hearing and determination.

These are the agreed issues/objections:-

1) Whether the suit is incompetent for non compliance with the prescribed procedure namely;
    a) Whether the Plaintiff's suit for rectification of the register is compliant with Section 118 and 115 of the Companies Act, Order 38 rules 2, rule 4 CPR, Order 38 rule 5 (d) CPR.
    b) Whether the Plaintiff's suit in relation to the annual general meeting is in compliance with Section 135 (1) of the Companies Act cap 110 and Order 38 rule 6 (h) CPR.
    c) Whether the Plaintiff's suit to inspect minutes of a meeting are compliant with Section 146 (4) of the Companies Act and Order 38 rule 6 (j) CPR.

d) Whether the Plaintiff's suit to enforce duties of a company to carry out any action/duty prescribed by the Companies Act is compliant with Section 358 and 389 of the Companies Act and Order 38 rule 6 (s) CPR.

2) Without prejudice to the above whether the Plaintiff's suit in a representative character is incompetent under Order 17 rules 14 and 9 (2) CPR, Order 1 rule 8 CPR.

3) Without prejudice whether the Plaintiff's suit in the character of a derivative action does not fall within the exceptions to the rule in **Foss V Harbottle** and is therefore incompetent.

4) In the alternative but without prejudice whether the Plaintiff's action is an action under Section 211 of the Companies Act but is incompetent for want of procedure.

5) Without prejudice whether the Plaintiff's action in relation to the property of the fifth Defendant is incompetent for want of consent of the Attorney General under Section 63 of the Civil Procedure Act and the law.

6) Without prejudice whether the suit is statute barred in respect to the Plaintiff's action for accounts tort and contract.

7) The Plaintiff's suit is frivolous and vexatious and an abuse of court process.

Mr. Christopher Madrama and Samuel Serwanga appeared for the Defendants/Objectors while Mr. Peter Walubiri and Mr. Richard Mulema Mukasa were for the Plaintiffs.

Considering the vast number of preliminary objections raised, I think it is important to review what the law is in relation to such objections is generally; before I address them one by one. This I believe will give greater clarity to the law, the role of counsel and that of the Judge in such matters which may be lost while dealing with the web of objections themselves.

A preliminary objection (some times popularly referred to as a *"PO"* at the bar) at common law is in substance an *"objection in point of law"*. Objections in points of law are extensively discussed by the learned authors in the book "ODGERS' Principles of Pleadings and Practice in Civil Actions in The High Court of Justice". I in particular shall refer to the first Indian reprint 2000 12th Ed by Universal Law Publishing Co. Pvt. Ltd. which discusses principles and practice of civil actions in India on which the Ugandan law is modeled. According to Odgers (supra) at P. 147

"…Either party may object to the pleadings of the opposite party on the ground that it does not set forth a sufficient ground of action, defence or reply as the case may be…"

Under English law this is what was formerly called a *"demurrer"* (from the French word demorrer *"to wait or stay"* a practice abolished in England in 1883) but now called "an objection in point of law". The authors in Odgers (supra P.147) point out that an objection in point of law was preserved largely so that parties might not incur great expense in trying issues of fact which, when decided, would not determine their rights. The learned authors in Odgers (supra P. 148) also make the point that as a general rule

"…It is best not to apply to have any point of law argued before the trial, unless the objection is one which will dispose of the whole action…"

The rationale for this is also well stated by the said learned authors.

The first reason is this as they rightly observe

"…If the Defendant succeeds, the Plaintiff obtains leave, on paying the costs of the argument, to amend his statement of claim, and it is better for the Defendant that the Plaintiff should be driven to such amendment at the trial…"

Secondly, not raising the objection at the beginning of the trial is not fatal. The learned authors further write

> *"…You need not be afraid that, by omitting to apply, you are throwing away chances of success – that the objection, if not taken at once, cannot be taken afterwards…"*

Two English cases well illustrate this point. The first is the judgment of **Sir Edward Coke** in the case of The Lord Cromwell's Case (1581) 4 Rep at P.14 (reproduced in Odgers supra P. 148 – 149) where he held

> *"…when the matter in fact will clearly serve your client although your opinion is that the Plaintiff has no cause of action, yet take heed that you do not hazard the matter upon a demurrer, in which, upon the pleading and otherwise, more perhaps will arise than you thought of; but first take advantage of the matters of fact, ad ultimum, and never at first demur in law when, after the trial of the matters in fact, the matters in law (as in this case it was) will be saved to you…"* (emphasis added).

In other words, if the facts are in your favour it is best practice to take advantage of them first as the law in any event will ultimately support you. This wisdom of Sir Edward Coke is 427 years old but is still valid today.

The second case is that of

Stokes V Grant (1878) 4 C.P.D at P. 28 where the celebrated Lindley J. (as he then was) had this to say

> *"…if the Defendant wants to avail himself of his point of law in a summary way, he must demur; but if he does not demur, he does not waive the objection and may say at the trial that the claim is bad on the face of it…"*

The nature of a preliminary objection was also extensively discussed in our own East African Jurisdiction in the Court of Appeal decision of

> **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd** [1969] EA 696
>
> **Sir Charles Newbold** (President of the Court as he then was) at P. 701 held
>
> *"…A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion…"* (emphasis mine).

In the lead opinion of **Law** (J.A as he then was) at P. 700 he observed

> "…so for as I am aware, preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. *Examples are an objection to the jurisdiction of the court, or a plea in limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration…*"

The position in the Mukisa Buiscuits case (supra) on preliminary objections was upheld with approve by The East African Court of Justice in the case of

James Katabazi and 21 Others V The Secretary General of The East African Community and The Attorney General of The Republic of Uganda Reference No. 1 of 2007 (unreported).

This expose an objection in point of law is very instructive to this case and I agree with it. A preliminary objection should be made if the party so raising it is convenienced that when raised the objection so raised will dispose of the whole claim and thus save the parties expense and embarrassment in trying facts that will not determine the rights of the parties. Where an objection can be cured by the amendment with adequate provisions as to

costs, then it is a more efficient use of the court's time that amendment be secured at the earliest opportunity. Indeed in Odgers (supra P. 153)

It is written

> *"…It is customary at the common law Bar before advising an application to be made (i.e. to strike out a pleading)… to communicate with your opponent so that he may have an opportunity of amending his pleadings…"*

The authors in Odgers (supra P. 153) are actually more bold and write

> *"…though you may think that your opponent's pleadings discloses no reasonable cause of action or defence to your claim, it by no means follows that you should at once apply to have it struck out or amended. So long as the statement of claim or the particulars served under it disclose some cause of action, or raise some question fit to be decided by trial, the mere fact that a case is weak or not likely to succeed is no ground for sinking it out…"*

Again I agree with the learned authors of Odgers in this regard. With this background to the law I shall now address the preliminary objections as raised by the Plaintiffs.

Issue/Objection No. 1: <u>The law on prescribed procedure for commencement of actions by members of a company.</u>

Counsel for the Defendant has faulted the procedure used by the Plaintiff in coming before his court. In particular he has argued that *"the vehicle"* used of a plaint to institute the suit is not the prescribed procedure by law and therefore violates Section 19 of the Civil Procedure Act (CPA Cap 71 Revised Laws of Uganda 2000). Section 19 reads

> *"…every suit <u>shall</u> be instituted in such manner as may be prescribed…"* (emphasis added)

He submits that the use of the word *"shall"* in Section 19 makes any prescribed procedure to be mandatory. In this particular case counsel submitted that the Plaintiffs based on the plaint filed, cannot institute a derivative action when the Companies Act (Cap 110 Laws of Uganda) affords them remedies and actions as individual members of the company.

In other words it is the objection of the Defendants that orders and declarations sought under the plaint are largely grievances by the Plaintiffs for which the law (specifically the Companies Act and Civil Procedure Rules) provides specific remedies. That being the case each of the specific remedies provided for by the law can only be granted by court, if at all,

when instituted though the prescribed procedure. In this regard the Defendants further breakdown this procedural objection into four other sub-objections as follows:-

a) Whether the Plaintiff's suit for rectification of the register is complaint with Sections 118 and 115 of the Companies Act, Order 38 rules 2 and 4 and 5(d) of the CPR.

The objection by counsel for the Defendant in this respect is fairly straight forward. It is since the Plaintiffs seek an order for rectification of the register of members then under Order 38 rule 4 the application should have been made by motion or summons in chambers and therefore not by plaint. That being the case it is the position of the Defendants that the paragraphs in the plaint that deal with rectification of the register (i.e. para 5,7,9,10 and 12) should be dismissed and/or struck out with costs.

Counsel for the Plaintiff in reply chose to respond to the objections as to procedure at two levels. First with a general argument that cuts across all the procedural objections and secondly with specific arguments as to each procedural objection. I shall review the specific arguments as to procedure first and leave the general ones to the end.

In specific response to the first objection as to rectification of the register, counsel for the Plaintiff submitted that their prayer for rectification was part of their wider quest to correct the alleged frauds committed against the 5th Defendant company through a derivative action. He therefore submitted that the issue of rectification should be looked at together with the rest of the issues in the suit and that this would enhance the delivery of substantive justice and avoid a multiplicity of suits. He therefore sees no reason for the cited paragraphs in the plaint to be struck out.

b) Whether the Plaintiff's suit in relation to the annual general meetings is in compliance with Sections 135(1) of the Companies Act Cap 110 and Order 38 rule 6(h).

The Defendants argument under this objection is also straight forward and that is like in the objection (a) above the wrong procedure of institution of a suit by plaint was used. The correct procedure according to the Defendant should have been under Order 38 rule 6(h) which is by summons in chambers. In the view of counsel for the Defendant the following paragraphs of the plaint are infected with the wrong procedure namely para 3(b) and (h); 5 (vi), (vii), (viii) and (x), 6, 8, 9, 10, 11, 12; and 16 (a), (b), (c), (d), (e), (f), (g) and (h) and should be struck out.

In reply counsel for the Plaintiff submits that it is not the Plaintiffs case that it is impracticable to hold company meetings but rather than the first to the fourth Defendants are using their dominant positions in the company to commit frauds against it. it is therefore their contention that the suit in this respect is properly instituted.

c) Whether the Plaintiff's suit to inspect minutes of the meetings are complaint with Sections 146(4) of The Companies Act and Order 38 rule 6(j) of the CPR.

The Defendants also argue as before that to benefit from this remedy the correct procedure for the Plaintiff's would have been by summons under Order 38 rule 6(j) of the CPR which is not what was done.

The response of the Plaintiff's is similar to the rest in that their case against Defendants is a holistic one involving the need to make various discoveries in order to prove a fraud committed on the company and thus the suit is properly before court.

d) Whether the Plaintiff's suit to enforce duties of a company to carry out any action/duty prescribed by The Companies Act is complaint with Sections 358 and 389 of The Companies Act and Order 38 rule 6(s) of the CPR.

The Defendants submit that with reference to the remaining prayers under paragraph 16(e) and (f) of the plaint which compel the performance of duties of a company as prescribed by law the correct procedure is by summons under Order 38 rule 6(s) and this has not been followed by the Plaintiff.

Counsel for the Plaintiffs submit that Section 358 is irrelevant to their case Section 358 refers to duties of *"Receivers and managers"* under part VII of the Act which is not applicable to the case at hand. On the other hand Section 389 refers to a duty to make returns to the Registrar of Companies.

Counsel for the Plaintiff submits that they do not seek to enforce the filing of returns to the Registrar but rather to show that the company has not been filing returns as required by law.

Counsel for the Defendants also seeks to rely on case law to buttress their objection on the procedure used. I was referred to the judgment of **Sir Udo Udoma** (CJ as he then was) in

Salume Namukasa V Yozefu Bukya [1966] EA 433

for the proposition that the rules of this court were not made in vain and due regard should be paid to them by counsel.

I was also referred to the judgment of **Ntabgoba** (PJ as he then was) in the case of

Tarloghan Singh V Jaspal Phaguda & Ors [1997-2001] UCLR 408

for the proposition that applications to rectify the Register of Companies under Sections 118 of The Companies Act should be made under rule 4 of Order 34 A (now rule 4 of Order 38) of the CPR.

I was so referred to two judgment of the Supreme Court on Article 126 (2) (e) which provides *"substantive justice shall be administered without undue regard to technicalities..."* The first case is

Utex Industries V Attorney General S.C.C.A No. 52 of 1995 (unreported).

In that case the Supreme Court refused to hear an appeal out of time under Article 126(2) (e) of the Constitution of Uganda 1995 where no formal application seeking leave to appeal out of time was made.

Counsel for the Defendants submitted that this case showed that Article 126(2) (e) of the Constitution was not intended to do away with rules of procedure.

I was also referred to another decision of the Supreme Court in **Kasirye Byaruhanga & Co. Advocates V UDB** S.C.C.A No. 2 of 1997 (unreported).

where it was held that

> *"…a litigant who relied on the provisions of article 126(2) (e) must satisfy the court that in circumstances of the particular case before the court it was not desirable to have undue regard to a relevant technicality."*

In reply to these general arguments counsel for the Plaintiff generally agreed with the import of Section 19 of the CPA as to following the prescribed procedure in instituting a suit in court. Counsel for the Plaintiff however submitted that Section 19 of the CPA should be read together with Section 33 of the Judicature Act (Cap 13) which provides

> *"…The high Court shall in the exercise of the jurisdiction vested in it by the constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and*

finally determined and all multiplicities of legal proceedings concerning any of those matters avoided."

Counsel for the Plaintiff submitted that Section 33 of the Judicature Act provides that the court should provide all remedies as the parties require while at the same time avoiding a multiplicity of legal proceedings. He submitted that it is for that reason that Order 2 rule 1 of the CPR provides that every suit shall include the whole claim that the Plaintiff is entitled to and Order 2 rule 4 also allows for joinder of causes of action. Counsel for the Plaintiff submitted that the Plaintiff's claim is about a fraud on the company and the mechanisms employed to perpetuate, defend and perfect the said fraud.

He further submitted that the only way to challenge this was by one holistic suit by way of a plaint otherwise the alternative would be a multiplicity of suits based on several procedures.

Counsel for the Plaintiff also submitted that this present suit was an important one and of considerable difficulty which cannot be best disposed of by affidavit evidence but rather by a full trial.

As to the application of substantive justice within the meaning of articles 126(2) (e) of The Constitution of Uganda 1995, Counsel for the Plaintiff

submitted that a far more liberal test as to technicalities is now in place as compared to cases decided prior to 1995. He referred me to the judgment of **Mulenga** (JSC) in the case of

General Parts (U) Ltd & Anor V NPART Civil Appeal No. 9 of 2005 (unreported)

In that matter a suit was instituted by Notice of Motion instead of by originating summons and **Mulenga** (JSC) held

> *"…despite the wrong procedure the appellants could have moved court to have a full trial or to examine deponents of affidavits as witnesses, to ensure trial of all issues. They chose not to do so. In my opinion they were not prejudiced and no miscarriage of justice was occasioned. In the circumstances I think it was appropriate to invoke… Article 126(2) (e) of the constitution that substantive justice should not be unduly impeded by technicalities…"*

Counsel inter alia highlighted the test of the absence of prejudice or miscarriage of justice.

I have considered the arguments of both counsel on the issue of procedure. The arguments are indeed quite spirited.

The Defendants have raised objections in points of law and in particular as to procedure. Counsel for the Defendants has gone to great length to show what procedure the Plaintiffs should have used; but did not. I agree with counsel for the Plaintiff's identification of the procedure to be followed for the remedies sought except for sub issue (d) of issue 1 relating to Sections 358 of the Companies Act. With regard to Section 358 of the Companies Act I agree with counsel for the Plaintiff that it is totally irrelevant to this case as the company is not under receivership. That not withstanding the Plaintiffs chose in their wisdom not to follow the procedure as Counsel for the Defendants would have wanted it. The question is whether this is fatal to the present case, as the Defendants would have it?

To my mind procedure has several functions one of which is *"the vehicle"* by which a litigant approaches and gets audience to court. Procedure has also been referred to as hand maidens of the law. As pointed out by **Sir Udo Udoma** (CJ as he then was) in the case of Salume Namukasa (supra) rules of court are intended to regulate the practice of the court and to provide for orderliness. It is therefore important that counsel instituting proceedings in this court should pay due regard to the said rules. To that extent I do agree. Have the Plaintiffs in this case then not paid due attention to rules of this court? I think not.

Counsel for the Plaintiff in reply has gone to great length to show why the Plaintiffs chose an alternative procedure, that is to file a plaint under the same rules, and not to apply by summons in chambers or motion as the case may be. He has referred court to alternative provisions of the law which he believes are equally applicable to the matters before this court. He has argued that a suit is necessary in order to provide completeness on all the issues for trial which he considers to be diverse, important and of considerable difficulty. He submits that pursuant to Section 33 of The Judicature Act and Order 2 rules 2 and 4 it would be best that this suit proceed by way of plaint. Counsel for the Defendant had submitted that if the Plaintiffs wanted to bring a blanket and all embracing action then they should have done so by motion under Order 38 rules (5) (d) of the same CPR. Of course the Plaintiffs feels that the present dispute cannot be best disposed of by affidavit evidence. Looking at the file as a whole I am inclined to agree with counsel for the Plaintiff that the issues for consideration by court cannot be best disposed of by affidavit evidence which is what would happen if the application was made by summons or motion. In this respect I draw analogy from Order 37 rule 1 CPR which provides for actions by way of originating summons (supported by affidavit). However, Order 37 rule 11 CPR provides that on hearing the summons, the court can if it finds that the relief cannot be dispose of in a summary

manner, order that the parties file an ordinary suit i.e. by plaint. Section 33 of the Judicature Act gives this court very wide powers to manage as it sees fit any legal or equitable matter brought before it. I find that the Plaintiff has raised legal issues for determination before this court by way of a plaint. Does this objection in point of law regarding the procedure on the legal authorities dispose of the whole action before this court? I say no. The objection merely seeks to have the pleadings done differently a technicality in my view that does not allow for the expeditious and inexpensive use of the court's time. If there is an error in procedure, which I think there is not, then the procedure used in this case is the perfect candidate for the substantive justice rule in Article 126 (2) (e) of The Constitution of Uganda. In any event I am unable to see any prejudice or miscarriage of justice that has been occasioned by proceeding by way of plaint. I accordingly overrule the first objection in its totality.

Issue/Objection No. 2: **Without prejudice to the above whether the Plaintiff's suit in a representative character is incompetent under Order 7 rule 4 and 9 (2) CPR and Order 1 rule 8 CPR.**

The next objection in law by the Defendants is also of a procedural nature. The basis of the objection is that the Defendants are of the view that the case before court is one of a representative action within the meaning of

Order 1 rule 8 and Order 7 rule (4) of the CPR and is not a derivative action by shareholders who are oppressed.

Of course if the arguments of the Defendants are correct then it is their submission that the plaint as filed is vague and therefore is bad in law. In particular is the objection that in order to bring a representative action a party will first have to obtain a representative order from court but that this was not done in this case. In this respect, I was referred to the case of Tarloghan Singh (supra).

Counsel for the Defendant strongly contends that this is not a derivative action as alleged by the Plaintiffs because it is in his view difficult to see how the oppression of the members arises. He submits that the plaint does not show that the Defendants are the majority shareholders capable of oppressing the minority members in the company who in any event are not disclosed. He further submits that this is fatal to the action of the Plaintiffs.

Counsel for the Plaintiffs on the other hand insists that their claim against the Defendants is one of a derivative action. He submitted that a derivative action is brought in reality not on behalf of an individual member or on behalf of the members generally but rather on behalf of the company itself. However, the action is rather misleading coined as a representative one on behalf of the person suing and all the members of a company other than the

wrong doers. In other words the Plaintiffs are not acting as representatives of the other shareholders but rather as representatives of the company. In this regard counsel for the Plaintiff referred me to the judgment of **Lord Denning** in

Wallersteiner V Moir (No. 2) [1975] 1 All ER 849 at P. 855 to 857.

which was adopted with approval by the Supreme Court of Uganda in the case of

Salim Jamal & 2 Others V Uganda Oxygen Ltd & 2 others Civil Appeal No. 64 of 1995 at P. 22 to 28 (unreported).

Counsel for the Plaintiff submitted that the case of Tarloghan Singh (supra) was distinguishable because the Plaintiff in that case had ceased to be a shareholder of the company and could not therefore sue in that capacity.

I have considered these arguments regarding this second objection. The issue is simple. Is the suit a representative action or is it a derivative action? I think I need not labour the law in this regard. If it is a representative action then I find that the Defendant has stated the law fairly well. If it is on the other hand a derivative action then again the Plaintiff has also stated the law well. So which is it?

Paragraph 3 of the plaint provides

> *"The Plaintiffs bring this action against the Defendants jointly and/or severally, on their own behalf and other members of the company in a derivative action to protect and safeguard their rights and on behalf of the company, to protect its interests..."*

In my reading the claim in plaint is clearly a derivation action carefully crafted and drafted by counsel for the Plaintiffs within the reasoning **Lord Denning** in the case of Wallersteiner (supra). I therefore with the greatest of respect disagree with the submission of counsel for the Defendant that the other members of the company that are oppressed need to be named expressly in a derivative action. The suit is therefore not a representative action within the normal meaning of Order 1 rule 8. That being the case the second objection is also overruled accordingly.

Issue/Objection No. 3: Without prejudice whether the Plaintiff's suit in the character of a derivative action does not fall within the exceptions to the rule in the case Foss V Harbottle and is therefore incompetent?

It is the objection of the Defendants that the rule in the celebrated case of **Foss V Harbottle** (1843) 2 Hare 461 is to the effect that court will not ordinarily intervene in a matter which it is competent for the company to

settle itself or in the case of an irregularity, to ratify or condone by its own internal procedure.

It is the case for the Defendants that shareholders have a limited right to bring an action for wrongs done to the company. In this regard I was referred to the decision of **Shah** (JA Kenya) in the case of

Rai and Others V Rai and Others [2002] 2 EA 537 at 551.

Counsel for the Defendant submitted that a derivative action is unavailable where alternative and statutory remedies are available to the members of a company. Counsel for the Defendant also raises some interesting arguments as to nature of this particular case. He submits that the exception in the rule of **Foss V Harbottle** can only apply to companies with a share capital and not to a company like this one which is a company limited by guarantee and having no share capital. In this regard counsel for the Defendant points out that his research has found no comparable legal precedent anywhere in the world for this. He submits that oppression of the minority is oppression through the use of majority shareholding which is not applicable in this case.

Lastly, he submits that the 5th Defendant being a company limited by guarantee means that it is a public charity within the meaning of Section 17

(3) (d) of The Government Proceedings Act (Cap 77) and Section 63 of the CPA. That being the case no action can be commenced against it without the authority of the Attorney General of Uganda.

Counsel for the Plaintiff disagrees with this objection. He briefly replies that the derivative action is founded on a fraud committed on the 5th Defendant by the 1st – 4th Defendants and that is in itself is sufficient to put their claim within the meaning of **Foss V Harbottle**.

Counsel for the Plaintiff submits that for a derivative action to filed, it is immaterial whether the company in question has or does not have a share capital. He refers me to the case of **Edward V Halliwell** [1950] 2 All ER 1064 CA where the exception to the rule in **Foss V Harbottle** was applied in favour of a trade union which is not even a company.

As to the objection of the 5th Defendant being a public trust thus requiring the consent of the Attorney General to institute, the case Counsel for the Plaintiff views this objection as outrageous. He submitted that the issue of a public trust is raised in the defence and not in the plaint and the two should not be mixed up.

He submitted that the company's Memorandum and Articles of Associations do not create a public trust be it express or constructive. He further submitted that the creation of a trust in any event is question of evidence.

I have considered the arguments of both counsel as to this objection. The case of **Foss V Harbottle** has been with us for a long time and there is very little that can be added to it. I agree with the submission of Counsel for the Defendant that the primary forum to resolve complaints in a company is the company itself. Parties and or members should prima facie avail themselves of the existing organs within the company like its general meetings to resolve their disputes. I provided this guidance time and time again to the present parties during the numerous interlocutory applications that this very case generated before me. The resolution of disputes within the company itself is in my view evidence of the existence of good corporate governance in the company a subject that is becoming of increasing importance in contemporary company law and practice. Management transparency and accountability is central to existence of good corporate governance and it is my view that courts of law should uphold these principles. The problem arises when the company organs like the general meeting cannot be used as fora to resolve members disputes. That is where

the exception in the rule in **Foss V Harbottle** steps in to offer an alternative remedy through the courts.

Counsel for the Defendant has submitted that the Plaintiffs have unreasonably sought an account of the annual returns filed with the company registry for 22 years and the company's audited accounts since 1997 (about ten years back). He submits this of the Plaintiffs

> *"…The first Plaintiff could not have been injured before September 2006 being about 7 months before his first AGM. The second Plaintiff was also admitted in the year 2006. He could not have been injured before this time or oppressed in his rights as a member. His rights as a member commenced in the year 2006 only* (emphasis mine)…"

This is my view is a particularly hard stance by the Defendants against the Plaintiffs and I am not sure where that leaves the 5th Defendant company whom it is alleged that a fraud has been committed against. Clearly this requires further and better particulars by way of evidence.

In this regard I am reminded of wise 400 year judgment of **Sir Edward Coke** in **Lord Cromwell's Case** (supra).

"…first take advantage of the matters of fact… and never at first demur in law… after the trial of matters of fact the matters in law will be saved to you…"

In any event this is a situation where the facts have to be ascertained first and therefore the objection is not one of a pure point of law. I accordingly reserve my finding on this part of the objection until after hearing the evidence in this area in the main suit.

As to whether the exceptions to the rule of **Foss V Harbottle** cannot be applied to a company limited by guarantee, I see no reason why this cannot be so. To my mind the exceptions to the rule in **Foss V Harbottle** are flexible and applicable to all forms of companies. The flexibility of the rule is evidenced as rightly pointed out by counsel for the Plaintiff by its application in the case of **Edward V Halliwell** (supra) a trade union matter.

I agree with counsel for the Plaintiff that the Defendants are over stretching it when they submit that the 5th Defendant company is a public charity. On the face of it I do not see how it could be and the onus lies with the Defendants to prove that the 5th Defendant is actually a public charity at the trial. This objection in its entirety is also overruled.

Issue/Objection No. 4: **<u>In the alternative but without prejudice whether the Plaintiff's action is an action under Section 211 of the Companies Act but is incompetent for want of procedure</u>.**

This is a straight forward objection fashioned very much like issue/objection number two about a representative action. Counsel for the Defendant submitted that the case before court is an action of oppression under Section 211 of the Companies Act and as a result should have been filed in court by way of a petition.

The Plaintiffs disagree and state that theirs is a derivative action claim. I have already found in favour of the Plaintiffs that this is a derivative action. It is the Plaintiff's action and I shall not turn it into something that it is not. This objection is overruled.

Issue/Objection No. 5: **<u>Without prejudice whether the Plaintiffs action in relation to the property of the fifth Defendant is in competent for want of the consent of Attorney General under Section 63 of the CPA and the law.</u>**

I have already addressed this issue/objection under issue/objection number 3. I have nothing more to add to it and so I accordingly overrule this objection as well.

Issue/Objection No. 6: <u>Without prejudice whether the suit is statute barred in respect to the Plaintiffs action for accounts tort and contract</u>.

This is an omini bus objection. It is brief in substance as some of its points have already been addressed in this ruling or through the earlier interlocutory applications. The principal objection as I see it is that the Defendants view the Plaintiffs demand for an account of the defendant company since its incorporation in 1964 is time barred. Counsel for the Defendant submits that pursuant to Section 3(2) of the Limitation Act such claims should have been brought within 6 years.

Counsel for the Plaintiffs disagree with the objection. He submits that the suit is a derivative action against wrongs done to the company and hence is not based on personal wrongs. He submits that the wrongs, breaches and torts committed on the company should in the terms of S. 25 of the Limitation Act, date from September 2006 when the Plaintiffs became members of the Defendant company and discovered them.

I personally find this objection to be too general. There is no clear submission as to when any alleged cause of action arose from when time can be computed. In any event the cause of action is a derivative action and goes to mismanagement which is alleged in the plaint to be on going.

In light of my earlier findings as to when a derivative action crystallizes, I also over rule this object.

Issue/Objection No. 7: <u>The Plaintiffs suit is frivolous and vexatious and an abuse of court process</u>.

Under this objection counsel for the Defendant basically reviews his earlier objections and concludes that the Plaintiffs suit is frivolous, vexatious and an abuse of court process.

Counsel for the Plaintiff disagrees and submits that this objection is not particularized.

In light of my findings above, I over rule this objection as well. The Defendant has not been able to succeed on any objection. As pointed out in <u>Odgers</u> (supra P.153) the fact that you think that your opponent pleadings disclose no reasonable cause of action, it by no means follows that you should at once apply to have it struck out. All the pleadings have to do, is to disclose some cause of action or raise some question fit to be decided by trial. I think the Plaintiffs pleadings do just that. Before I leave these preliminary objections altogether I need to point out that the defence put out a record number of objections about 10 in all. That in itself may not be a problem but counsel is under a duty to ensure that the objections are well founded. I am reminded of the judgment of **<u>Lord Templeman</u>** in the case of

Ashmore V Corp of Lloyd's [1992] 2 All E.R. 486 at P. 492

when he observed

> *"…it is the duty of counsel to assist the Judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten ban points the Judge will be capable of fashioning a winner…"* (emphasis mine).

Such objections in points of law which clearly do not dispose of the whole claim do border on abuse of court process by unnecessarily slowing down the trial and delaying its resolution. This should be avoided in contemporary litigation.

I finally once against over rule the objections and order that the pre trial scheduling be competed and trial commence.

Geoffrey Kiryabwire

JUDGE

Date: 11/03/08