

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

COMPANIES CAUSE NO. 0024 OF 2005

**IN THE MATTER THE COMPANIES ACT CAP 110
AND
IN THE MATTER OF GREENVINE COLLEGE LTD
CAMPANIES CAUSE 27 OF 2004**

SEREMBA MARK APPLICANTS

VERSUS

**1. ISANGA EMMANUEL
2. MUWAYA WILLIAM
3. ISABIRYE STEVEN
4. GREENVINE COLLEGE LTD } RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE GEOFFREY KIRYABWIRE.

RULING

This is an application by way of Notice of Motion under S.118 of the Companies Act and Order 34A rr 4 and 5 (d) of the Civil Procedure Rules for orders that

- 1. The register of members of Greenvine College Ltd (the company) be rectified by deleting therefore the names of the 2nd and 3rd Respondents and reflecting the names of the applicant and 1st Respondent as the only members and shareholders.*
- 2. All resolutions of the company purportedly passed at a meeting of the company held on the 15th August, 2002, 23 December, 2002 and 20th March 2003 are null and void and of no consequence.*
- 3. Setting aside and expunging from the companies registry records an (sic) amended Memorandum and Articles of Association of the company purportedly filed on 27th August 2002.*
- 4. That the Applicant and the 1st Respondent are holders of 40% and 60% of the shares respectively in the company.*
- 5. An order directing the 4th Respondent to render an account of all dealings for the period August 1999 to date of making this order.*
- 6. Costs...*

The application is supported by the affidavit of the applicant. The case of the applicant is that on or about the 4th August 1999 the 4th Respondent company was incorporated with the applicant being allotted 40% of the shares and the 1st Respondent 60% of the shares. The 4th Respondent company is a senior secondary school located at Kayunga in Mukono. Before the incorporation the school was run on the basis of a constitution dated 3rd September 1997. After incorporation the relationship between the Applicant and Respondent deteriorated and the Applicant was

left the management and premises of the school. The 4th Respondent company (herein after called the school) then held a general meeting whereby the Memorandum and Articles of Association (herein after referred to as "The MEMARTS") were amended. The amended memarts according to the Applicant allegedly allotted him 1 nominal share and introduced the 2nd and 3rd Respondents as members. It is the case for the Applicant that amendment is null and void as he was not invited to general meeting and the proper procedures to call the meeting were not followed.

The 1st Respondent in his affidavit in reply acknowledges that the Applicant was a founder member of the school but that he never subscribed and paid for the 40% shareholding allotted to him and that is why he was given a nominal 1 share.

At the hearing of the application both counsel insisted that the deponents of the affidavits should be crossed examined and give their evidence orally on oath, as a result of this a lot of evidence in the affidavits needed to be tested. I reluctantly allowed this but the result was that the hearing took substantial longer than is normal for such applications.

The Applicant testified that in January 1998 he entered into a partnership with the 1st Respondent. He said that he contributed his shares both in cash and in kind. He said that he had subscribed 40% of the shares in the school. He further testified that in setting up the school they signed a constitution in September, 1997. He also testified that in 1999 he and the 1st Applicant signed another document which also showed this shareholding but that he had not been able to retrieve it. The Applicant said that

at the school he served as Deputy Principal and teacher. He testified that the operations of the school were largely funded out of school fees and that he was not paid a salary as it would go to his share holding. He also said that he contributed about Ug.Shs.6000,000/= for desks used at the school. The Applicant also testified that the school applied for a loan from a Micro Finance institution called ECLOF in 1999 to fund the operations of the school. He said that he also contributed to the repayment of the loan.

The school was then incorporated on the 4th August 1999 with the Applicant and 1st Respondent as subscribers. The 1st Respondent is shown to have subscribed for 60 shares and then applicant subscribed for 40 shares.

However as a result of poor working relations with the 1st Respondent the applicant resigned his position in writing and left the school. He however made it clear at all material times that he remained a shareholder in the school.

The problem appears to have arisen on or about the 15th August 2002 when the school as a company held a general meeting. At that meeting the school adopted a new set of amended memarts. It also inter alia made the following resolutions

1. *That Mr. E. Isanga the 1st Respondent was appointed Managing Director.*
2. *That Mr. S. Isabirye the 3^d Respondent was appointed a Director/Secretary*
3. *That Mr. W. Muwaya the 2nd Respondent was appointed a Director.*

Shares were then allotted as follows;

- a) E. Isanga 90 shares representing 90%
- b) W. Muwaya 2 shares representing 2%
- c) S. Isabirye 2 shares representing 2%
- d) M. Seremba 1 nominal share representing 1%

The Applicant testified that this meeting and its resolutions were null and void inter alia because he was not notified of the meeting.

The Respondents were also cross-examined orally. The 1st Respondent gave the most detailed testimony. He testified largely to the effect that the Applicant did not pay for his shareholding in the school. The 1st Respondent also denies that before the school was incorporated he was in partnership with the Applicant. He testified that until 2002 the school had no board and company just used to have meetings of its members. He said that at the school's inception apart from the applicant the school had another member called Daniel Mulago, whom he called a founder member.

The 1st Respondent Mr. Isanga does not deny that the Applicant did not attend the general meeting of 15th August 2002. He however testified that he gave the applicant notice of general meeting by filing the notice at the company registry and posting another copy on the school notice board. He said that the applicant did not give him a forwarding address when he left and that the only address he had of the Applicant was that in the memarts. The other testimonies of Edmund Wamala, James William Muwaya, Dan Mulago for the Respondents did not in my view add much value to the

dispute at hand which is to rectify the register of members. None of them could say with certainty as to whether the Applicant paid for his shares or not.

I have perused the evidence placed before court and the submissions of both counsel. I must say that both parties adduced a lot of evidence extraneous to the prayers sought by the Applicant. The application as I see it revolves around the legality of meeting of the 15th August, 2002. Of course part of the problem, it appears to me to be is the non maintenance of company records in the manner required by the Company Act. In the case of **Mark Xavier Wamalwa and Another V Stephen Aisu** companies cause 027 of 2005, court was invited to take judicial notice of the fact that Ugandan private companies are notorious for not maintaining company records like a register of members (under Section 112 and 120 of the Companies Act Rev ed 2000). In that case I did take judicial notice of this sad state of corporate governance in Ugandan companies and held that to resolve disputes of this nature both the de jure and de facto position will have to be looked at.

In this particular case a rectification of the Register of members is sought but no Register of members of the company was tendered into court as evidence. A declaration as to the shareholding of the company is also sought but no share registered or share certificates of the company were tendered in court as evidence. Instead heavy reliance is placed on what happened between the parties before the school was incorporated as a limited liability company. I suppose that this is because that is the most documented part of the party's business relationship. As is normal in such relationships the parties rely more on trust rather than to cultivate a legal

relationship. When the trust fails there is not much of a legal structure to fall back on. In this particular case a lot of reliance is placed on the Greenvine College Constitution signed between the Applicant and the 1st Respondent on the 3rd September 1997 before the school was incorporated as a company on the 4th August 1999. The parties do not agree on the legal effect of this constitution. The Applicant testified that it was evidence of a legal partnership with the 1st Respondent. On the other hand the 1st Respondent denies that it is evidence of a partnership even though he agrees that the school was set up as a profit making venture. Be that as it may, this is not the dispute at hand. What I however find as relevant to consider is the effect of incorporation on this constitution.

According to the learned authors K Smith and DJ Keenon in their book "**Company Law**" 3^{ed} 1978 at page 21 they write

"From the date impressed upon the certificate the company becomes a body corporate with perpetual succession and a common seal, and with the right to exercise the powers given in its memorandum. The company's life dates from the first moment of the day of incorporation (Jubilee Cotton Mills V Lewis [1924] AC 958 cited)"

The learned authors on the same page also wrote

"The issue of a certificate of incorporation incorporates the members of the company into a persona at law and limits their liability if the memorandum requires this..."

It is therefore follows and indeed it is trite law that a company once incorporated is not bound by pre-incorporation contracts/agreements made on its behalf by its promoters. In such a situation the promoters will incur personal liability on the said pre-incorporation contracts.

I find that the Greenvine College Constitution 1997 whatever its legal effect on its promoters was a pre-incorporation contract/agreement for which Greenvine College Limited as incorporated in 1999 is not bound by therefore has no role to play in this dispute. To determine the legal relationship between the parties one therefore must look to the memarts of Greenvine College Limited. Now the evidence shows that there were 2 such memarts. The first was that dated 4th August 1999 and the second is its purported amendment filed at the companies registry on the 28th August 2002.

The subscribers on these two memarts are significantly different. That of 1999 shows the following subscribers;

1. Emmanuel Isanga
P.O. Box 18132
Kayunga – Mukono with 60 shares

2. Mark Sseremba
P.O. Box 18132
Kayunga – Mukono with 40 shares

The memarts of 2002 shows the following subscribers

1. Emmanuel Isanga
P.O. Box 18132
Kayunga – Mukono with 90 shares

2. Muwaya William
P.O. Box 164
Jinja with 2 shares

3. Isabirye Steven
P.O. Box 164
Jinja with 2 shares

4. Mark Sseremba
P.O. Box 18132
Kayunga-Mukono with 1 share

However, in order to determine the rights of the parties in this dispute I find one must of necessity first look to the Articles of the Company as filed and incorporated in 1999.

Unfortunately the memarts of 1999 relied upon by the Applicant are not complete and have only 2 pages of the Articles of Incorporation that is page 11 and 22. The plot thickens as the evidence shows that the whole company file disappeared from the company registry and the 1st Respondent on the 9th June 2002 applied to the

Registrar General for a temporary file to be opened. It is not possible therefore to tell what was filed at the company registry by the 9th June 2002 relating to the company (i.e. Annual returns, particulars of Directors etc). This clearly is not a satisfactory situation. In order to determine whether the meeting of the 15th August 2002 was properly convened one has to look at the articles which in this case are incomplete. The only thing that can be made out of these incomplete articles of 1999 is Article 1 which reads;

"The regulations contained in Table "A" of the first schedule to the Company Act, shall apply to this company in so far as they are applicable to a private company subject to the modifications and special provisions herein contained..."

Since the articles are incomplete the court shall apply table "A" to the Company's Act as the parties have not made any attempt to show court that there are any modifications made to table "A" in their case.

As a general rule Article 50 of table "A" provides that

"...every general meeting shall be called by twenty-one days notice in writing..."

It also provides that notice has to be served or "*deemed to be served*" to such persons entitled to receive notice.

Article 53 provides that unless otherwise provided a quorum will be of "*...three members present in person...*" (emphasis mine).

Article 65 provides that

“No person shall be entitled to vote at a general meeting unless all calls and other sums presently payable by him in respect of shall in the company have been paid...”

These are the normal cornerstone rules of general meetings. The first test is to see that notice in writing of the general meeting is given and served on the persons entitled to be served. In this case based on the 1999 memarts there are only two subscribers namely the Applicant and the 1st Respondent. There is no evidence of any other subscriber at incorporation or at the time of the meeting of 15th August 2002. The notice issued dated 25th July 2002 reads

“All members of Greenvine College Ltd.

RE: ORDINARY MEETING

Take notice that there will be an ordinary meeting at the company premises on the 15th day of August, 2002 at 9:00am for purposes of considering the following proposals and if found proper pass them into resolutions:-

- a) *Allotment of shares*
- b) *Appointment of directors and secretary*
- c) *Amendment of the Memorandum and Articles 17 (c) to the effect that the company restricts the transfer of shares to non-citizens*
- d) *Any other proposals that may be found necessary.*

By copy of this notice Mr. Seremba Mark is reminded that the company has solely been running on the capital injected there in by Isanga Emmanuel and the loans contracted for the purposes of running the company. He should therefore endeavour to attend the meeting with the subscription fee for the 40 to take, otherwise the same shall be open to other shareholders if not subscribed for.

Yours in service

.....

Isanga Emmanuel

cc: Registrar of Companies

cc: Office notice board "

What a strange notice. It really appears to be aimed at Mr. Seremba the applicant and is mixed up with a call on Mr. Seremba to pay up his 40 shares. The assumption must be that by this time Mr. Seremba had not paid up his 40 shares offered to him on incorporation. This notice was posted on the company/school notice board and filed at the Registrar of Companies. Mr. Isanga testified that Mr. Seremba did not leave a forwarding address so the notice was not served on him.

The evidence before court actually shows otherwise. When the Applicant resigned as Deputy Headmaster and teacher at the school, he did so in writing by a letter dated 27th December, 1999. That letter gave his address as

"District Service Commission Masaka

P.O. Box 634

Masaka "

It was also copied to lawyers Kiwuuwa and Co. Advocates.

Over a year earlier on the 23rd July 2001 Mr. Sseremba wrote to the school through his lawyers Abaine, Lukwago, Alaka & Spencer Advocates for the attention of Mr. Isanga Emmanuel demanding inter alia that a general meeting of the school be convened. This is sufficient evidence of how to get correspondence to the Applicant.

I find that the 1st Respondent knew how to get in touch with Applicant even after the applicant left the school either through his new address or through the Applicant's lawyers.

I therefore find that the Applicant was not duly served with the notice of the meeting of 15th August 2002.

The second test is as to quorum. Since it is clear on the evidence before court that the company on incorporation had 2 subscribers it follows that the quorum of the meeting was to be of those 2 subscribers as members (this is an exception to Article 53 supra). It is clear to me that Mr. William Muwaya the 2nd Respondent and Steven Isabirye the 3rd Respondent are first reflected as part of the company after the

meeting of the 15th August 2002. That being the case it is not possible to have a quorum of 1 member whether or not he is the majority shareholder. The Companies Act provides otherwise for such a situation of 1 member (Section 135).

It is clear to me therefore that the meeting of the 15th August 2002 was irregular as it was called and attended by one member that is Mr. Isanga, the 1st Respondent.

As to voting at the meeting, this now becomes an academic matter. However, there is the dispute that even if the meeting was held that Mr. Sseremba would not have voted because it is said that he had not paid up his shares.

Indeed throughout the hearing it appears that it is only Mr. Sseremba's shares that are in doubt. In the absence of a share certificate or share register the onus was on Mr. Sseremba to prove to court that as at that 15th August 2002 he had paid for his 40 shares.

All Mr. Sseremba testified is that before incorporation he had 40% shares in the school which he paid for in kind and cash of Ug.Shs.500,000 – 600,000/= used to buy desks. He does not have receipts or acknowledges for these desks. He also says that his salary as Deputy Headmaster which he was not receiving would be converted into shares. However when he was shown the school audited accounts for 1998 which indicated unpaid salaries to Headmaster and Deputy of Ug.Shs.3,060,000/= he disputed the figure on the grounds they had not yet agreed what their salaries would be. These audited accounts in any event were heavily qualified by the external auditor because proper books of accounts were not kept and so are not reliable.

This is clearly unsatisfactory testimony and I also find that Mr. Sseremba has failed to prove that on incorporation he paid for his 40 shares.

In conclusion I find that the meeting of the 15th August 2002 was improperly convened and therefore was illegal. All resolutions passed at that meeting therefore are null and void. It therefore follows that Mr. William Muwaya (the 2nd Respondent) and Steven Isabirye (the 3rd Respondent) did not become members, shareholders and or office bearers of the company as a result of that meeting. This is the defacto and de jure position. However, since no register of members within the meaning of the law was presented in court I find that there is no register to rectify.

Since the Applicant has equally on the balance of probability failed to prove that he paid for his 40 shares it follows that M/s Greenvine College Limited has only one recognizable fully paid up shareholder and that is Mr. Emmanuel Isanga (the 1st Respondent). I therefore find that for the above reasons it is impracticable to call a meeting of the company.

I therefore exercise my discretion as granted under Section 135 of the Companies Act to on the courts own motion to direct a meeting of the company the quorum of which shall be one member Mr. Emmanuel Isanga. The meeting shall be called by the Registrar of Companies and held at his office at the cost of the company. All other incidental costs for directions given by Registrar of Companies shall also be paid by the company. The meeting shall inter alia cover the following matters;

1. Rectify and provide for a proper duplicate file of the company.
2. Establish a proper register of members of the company.
3. Establish a proper share register for the company.
4. Invite new members, allot and make a call on shares so given to the new members.
5. Receive audited accounts for the company for the years (after incorporation) 1999, 2000, 2001, 2002, 2003 2004 and 2005 prepared by an independent auditor acceptable to the Registrar of Companies at the company's cost.
6. Such other matters as the Registrar of Companies may deem necessary.

I award the Applicant 2/3 of his taxed bill of costs, as he is only partly successful.

.....
Geoffrey Kiryabwire

JUDGE

Date: 04/12/06

04/12/06

10:20am

Ruling read and signed in Court in the presence of:

- J. Luswata for Applicant
- Rose Emeru – Court Clerk

.....

Geoffrey Kiryabwire

JUDGE

04/12/06

R U L I N G