

UGANDA / JUDGMENT

Ofwono & Anor v African Cable Networks Ltd (HCT-00-CV-CI-0025 -2015) [2016] UGHCCD 21 (25 April 2016)

[2016] UGHCCD 21

COURT

HC: Civil Division (Uganda)

BEFORE

Musota, J

CASE / FILE NUMBER

HCT-00-CV-CI-0025 -2015

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

HCT-00-CV-CI-0025 -2015

IN THE MATTER OF THE COMPANIES ACT 2012

And

IN THE MATTER OF AFRICAN CABLE NET WORKS LIMITED

1. OFWONO RICHARD
2. KAMURU ERIC ::::::::::::::::::::::::::::::::::: PETITIONERS

VERSUS

1. AFRICAN CABLE NETWORKS LTD
2. SSETTAALA HAMZA ::::::::::::::::::: DEFENDANTS

BEFORE: HON. JUSTICE STEPHEN MUSOTA

RULING

This is a Company Cause brought by Petition under Section 248 (1) of the Companies Act of 2012 and Section 98 of the Civil Procedure Act Cap. 71 seeking orders that:

1. This court does direct an Annual General Meeting of the Company to be called to determine the remuneration of the directors, operation and regulation of the company.

2. That court makes orders on the regulation and conduct of the Company's affairs/business or otherwise as shall be just.
3. Court makes such other orders as court may deem just and equitable.
4. The costs of this Petition be paid for by the Respondent.

The Petition is supported by the affidavit of the 1st and 2nd Petitioners, dated 22nd day of October 2015. The Respondents did not file any affidavit in opposition of the Petition.

The background of this Cause is briefly that the 1st Respondent Company, African Cable Networks Limited was on the 14th day of February 2006, incorporated under the Companies Act Cap. 110 Laws of Uganda with a share capital of Shs.10,000,000/- divided into 100 ordinary shares of Shs.10,000/-, 90 of which were allotted and payable in cash. The Company at incorporation had three share holders namely; Ssettaala Hamza with 50 shares, Bakkabulindi Murishid with 20 shares and Muyomba Ibrahim with 20 shares.

In an extraordinary meeting that was held on the 20th day of January 2012, it was agreed and resolved that the unallocated shares of the

Company be allocated to new shareholders i.e. Ofwono Richard 5 shares and Kamuru Eric 5 shares. It was also resolved that the 20 shares that had been allocated Ibrahim Muyomba be transferred to the 1st and 2nd Petitioners as 10 shares each and the two Petitioners were made directors of the Company. It is the Petitioners' case that the respondent limited the Petitioners contributions and work in the activities of the Company. The 2nd Respondent has also refused to show them the registered office of the 1st respondent. He has also stopped banking the 1st respondent's money/proceeds from work on the official bank account in Equity Bank and uses the same as personal money.

The Petitioners have also since not been given any dividends and no remuneration has ever been paid to them as directors. That no general meeting of the 1st Respondent has ever been called since 20th January 2012. It is upon that background that the Petitioners have petitioned this court.

The petition proceeded ex parte and there was evidence that despite being served with the summons the Respondents ignored the same. The petitioners at the hearing were represented by Mrs. Shekanabo Immaculate.

In her submissions she submitted that the Petitioners do not wish to wind up the Company but prays court to give orders for the Company to hold an annual general meeting and that the Petitioners be paid their remuneration.

She submitted that since 2012 the affairs of the Company have been ran in a manner prejudicial to the Petitioners and the Petitioners seek protection as minority shareholders. She further submitted that the 2nd Respondent Hamza changed the known Company account from Equity Bank to unknown Bank. That the 1st and 2nd Petitioners after joining, signing contracts and negotiating business, they do not know of any proper books of accounts of the 1st Respondent

despite them being members. She further contended that the 2nd Respondent who is in management has never filed any annual returns since 2006, and he never calls meetings. That the 2nd Respondent's actions amount to prejudicial acts against legitimate expectations of the Petitioners.

I have considered the Petition as a whole, the affidavits in support and the submissions of counsel. Section 248 under which this Petition was brought provides that:

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

The section to my understanding is confined to unfair prejudice to the Petitioners' interests as shareholders.

I will now have to consider whether or not the matters over which the Petitioners complains in the Petition and the evidence in support thereof can amount to a conduct of the affairs of the Company in a manner which is unfairly prejudicial to them as shareholders. To constitute unfair prejudice the value or the quality of the shareholder's interest, that is his/her shares in the Company limited by shares, must be adversely affected.

To invoke the principle of “unfair prejudice” two elements must be present for one to succeed in a Petition under Section 248 and these are.

1. The conduct must be prejudicial in the sense of causing prejudice to the relevant interest of members or some part of the members of the Company i.e. shareholders; and
2. It must also be unfair.

In the case of ***Olive Kigongo Vs Mosa Courts Apartments Ltd, Company Cause No. 01 of 2015*** this court found that Examples that may constitute unfairly prejudicial conducts are:

1. ***Exclusion from management in circumstances where there is (legitimate) expectations of participation.***
2. ***The diversion of business to another company in which the majority shareholder holds interest.***
3. ***The awarding of the majority shareholder to himself of excessive financial benefits.***
4. ***Abuses of power and breaches of Articles of Association for example the passing of a special resolution to alter the Company's Articles maybe unfairly prejudicial conduct if such alterations would affect the petitioner's legitimate expectation that he would participate in the management of the company.***
5. ***Repeated failures to hold Annual General Meetings.***

6. ***Delaying accounts and depriving the members of their right to know the state of the Companies affairs.***

The 1st Petitioner in an affidavit in support of the petition averred that as a shareholder and director, the Respondents limited his contribution and work and that his efforts in the activities of the 1st Respondent have been denied. That the 2nd Respondent refused to show him the registered officer of the 1st Respondent despite him always promising the same and that the 2nd Respondent stopped banking the 1st respondent's money/proceeds from work on the official bank account in Equity Bank and uses the same as personal money. It is further contended that the 2nd Respondent has failed to file returns since 2011 up to-date and since January 2012 no general meeting of the 1st Respondent has ever been called despite reminders to the Respondents.

Despite being served with the summons to appear and defend the Petition the Respondent ignored the same which left this court in doubt that whatever the Petitioners swore indeed happened.

That notwithstanding I am satisfied that the Petitioners' shareholding in the company came with the legitimate expectation of participation in the management of the Company. Therefore I find that the affairs of the Respondent Company have been conducted in a manner unfairly prejudicial to the interests of the Petitioners as shareholders/members.

What remedies are available to the Petitioners?

The Petitioners prayed for orders that:

1. This court does direct an Annual General Meeting of the Company to be called to determine the remuneration of the directors, operation and regulation of the Company.
2. Court makes orders on the regulation and conduct of the Company's affairs business or otherwise as shall be just and such other orders as court may deem just and equitable.
3. The costs of this Petition be paid for by the Respondent.

According to section 250 of the Companies Act, where the court is satisfied that a Petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of and under subsection (2) the court's order may –

1. ***Regulate the conduct of the Companies affairs in the future;***
2. ***Require the Company to refrain from doing or continuing to do an act complained of or to do an act which the Petitioner has complained of that it has omitted to do;***
3. ***Authorize civil proceedings to be brought in the name and on behalf of the Company by such person or persons and on such terms as the court may direct;***

4. ***Provide for the purchase of the shares of any member of the Company by the other members or by the Company itself and in the case of purchase by the Company itself the reduction of the Company's capital accordingly.***

Putting in mind the above provisions of the law, this court orders for the calling of the Annual General Meeting as prayed for by the Petitioners within one month from the date of this judgment.

The second respondent as the majority shareholder should refrain from doing the acts complained of and should stop personalizing the affairs of the Company as it is a separate and distinct entity.

To the extent I have discussed above, this Petition will be allowed with costs to be paid to the Petitioner by the Respondents.

I so order.

Stephen Musota

J U D G E

25.04.2016.

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