



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 120 of 1999 (OS)

**IN THE MATTER OF: AN APPLICATION FOR REGISTRATION OF JUDGEMENT BY
THE 1ST, 2ND AND 4TH DEFENDANT/JUDGEMENT CREDITORS IN CIVIL CASE NO.159 OF
1996 IN THE HIGH COURT OF UGANDA AT KAMPALA**

AND

**IN THE MATTER OF: THE FOREIGN JUDGEMENTS (RECIPROCAL ENFORCEMENT)
ACT CHAPTER 43 LAWS OF KENYA**

**IN THE MATTER OF: CIVIL CASE NO.159 OF 1996 IN THE HIGH COURT OF UGANDA
IN KAMPALA**

BETWEEN

- 1. PIONEER GENERAL ASSURANCE SOCIETY LTD.**
- 2. PIONEER INVESTMENT TRUST LTD.**
- 3. GULSHAN SHAMSUDEEN NIMJI (substituted for SHAMSUDEEN NIMJI
JAVER (DECEASED**
- 4. ABDULMAJID NIMJI JAVER**
- 5. ALI AHAMED HADI NIMJIPLAINTIFFS**

VERSUS

- 1. AULFIKARALI NIMJI JAVER (known as "Zool")**
- 2. RAHEMATTALI ABDULLA**
- 3. RENNIE RICHARDSON**
- 4. INTERNATIONAL HOLDINGS (U) LTD.DEFENDANTS**

AND

1. SADRUDDIN NIMJI

2. ZAINUL VAIYA

3. LAILA SALE MOHAMEDOBJECTORS

RULING

The 3rd plaintiff has filed an application dated 9th November, 2006. The applicant is the executor of the estate of the 3rd plaintiff now deceased and seeks;

(1) That this Honourable court be pleased to set aside notification of sale by public auction of the applicant's shares in the 2nd plaintiff – Pioneer Investment Trust Ltd (now known as Pioneer Investment company Ltd) scheduled for 13th November 2006.

(2) That pending the interparties hearing of prayer No. (2) herein above, this Honourable court do issue an order staying the execution of the decree dated 1st March 1999 in relation to the intended public auction of the applicant's shares in the 2nd plaintiff Pioneer Investment Trust Ltd (known as Pioneer Investment Company Ltd) scheduled for 13th November 2006.

(3) That in the alternative to 3 above pending the interparties hearing of prayer No.2 herein above, this Honourable court do under adjourning the sale of the shares scheduled for 13-11-2006 or do issue an order of temporary injunction restraining the defendants by themselves, their servants, or agents from proceeding with the intended public auction of the applicants' shares in the 2nd plaintiff Pioneer Investment Trust Ltd (now known as Pioneer Investment Company Ltd scheduled for 13/11/2006.

The applicant seeks to stay execution on the grounds that the shares attached are not part of the estate of the deceased. The main ground is that during his life time and well after the suit has been filed, the deceased executed a declaration of trust. And that by that declaration, the deceased purported to hold the shares in **Pioneer Investment Trust Ltd** in trust of his wife, the personal representative and after her death to his children, two of whom are the objectors in this case.

The second ground of the application is that no notice to show cause was served on the applicant who purports that execution had been made one year after the last court appearance. She then objects that no documents were served on her and that no valuation had been done on the shares. And lastly the shares, which were held in trust were only 10,000/= but the attachment is upon 14751 shares some of which did not belong to the judgement debtor.

Mr. Thiga learned counsel for the applicant submitted that the shares to be sold are beneficially owned by the applicant by virtue of a declaration of trust by the original 3rd plaintiff who is now deceased. And the applicant being the executor of her husband's estate is vested in the shares by way of the trust created during the lifetime of her husband. He contends that the applicant bases her claim to the shares on the basis of the trust documents. The execution which the applicant is challenging is directed at the assets of **Shamsudeen Nimji Javer** now deceased and that the trust declaration took the shares, subject matter of the execution out of the estate of the deceased.

No doubt it is indicated that the shares of the deceased were about 14751 and these are the shares the defendants wants to sell But the applicant denied in the supporting and further affidavits that the deceased owned such shares. In the replying affidavit the respondent annexed a register of members of Pioneer Investment Trust in which the defendant say that the deceased owned 14751 fully paid shares. On that extract it shows the date of allotment. It also shows that the first 10,000 shares were acquired between August 1956 and December 1973. The balance of 4751 shares, which the applicant contends do

not belong to her were either allotted or transferred on 8th December, 2005. The deceased died in 2003 and the applicant denies that she was allotted any shares in the year 2005. She says that the shares were never allotted to her in her capacity as the executrix of the estate and/or in her own capacity.

Through a replying affidavit dated 23rd November 2006, the respondents have shown that in the company register attached to that affidavit, the deceased owned 14751 shares in the 2nd plaintiff company. The said document was duly certified by the Company Secretary. According to **Mr. Oraro** Advocate, evidence of ownership of shares is found in the company register, hence that settles the issue of ownership.

On the issue of beneficial ownership **Mr. Oraro** Advocate submitted that the only shares issued is 20 each and the shares referred to in the trust deed cannot be the shares issued by Pioneer Investment Limited, the 2nd plaintiff. The other issue is whether the judgement debtor was capable of creating such a trust. In the view of **Mr. Oraro** Advocate such a trust is ultra vires the company articles on two grounds;

- (1) Article 16 says that no person can be recognized to holding any trust.
- (2) The company had a pre-emption rights on the shares and Article No.3 prohibited any transfer to any person other than a member of the company. There was a right of transmission of shares but only on death of a member, so that the 3rd plaintiff was incapable of assigning his rights during his lifetime as purported by the trust deed.

On the notice to show cause, the respondents attached the order upon which execution was allowed and it shows the order was made on 14th October 2005. It was with the participation of the applicant, while the application was made on 9th May 2006, which is less than one year. In my view that is perfectly within the requirement of Order 21 Rule 18 of the Civil Procedure Rules, therefore the objection on that line has no merit. It is also clear that the attachment of the shares were made through a broker and it definitely means that the broker is obliged to obtain the best price for the shares in the market.

On the ownership of the shares, the applicant in paragraph 6 states;

“that the deceased Shamsudeen Nimji Javer was the registered owner of only ten thousand (10,000) shares of the said company”.

The applicant has been enjoined in these proceedings in place and by virtue of being the executrix of the will of the deceased husband, the debtor herein. The deceased during his lifetime through a declaration of a trust deed transferred 10,000 shares in the capital of **Pioneer Investment Trust Limited**.

Section 112(1) states;

“Every company shall keep a register of its members and enter therein the following particulars-

- (a) the names and postal address of the members and in the case of a company having a share capital a statement of the shares held by each member distinguishing each share by its number so long as the share has a number and of the amount paid or agreed to be considered as paid on the shares of each member.**
- (b) The date at which each member was entered in the register as a member.**
- (c) The date at which any person ceased to be a member”.**

It is clear and beyond peradventure that the estate of the deceased is the registered proprietor of a total of 14751 ordinary shares in **Pioneer Investment Company Limited** under share certificates No. 0013 and 0014 and the said certificates was attached and/or exhibited before court. It is therefore my decision that the deceased was the registered owner of 14751 shares in **Pioneer Investment Company Limited**. The

certificate in respect of the 4751 shares shows that it is a replacement of all previous certificates issued to the shareholder and that all previous certificates were deemed cancelled and nullified.

The question that now remains is whether the applicant was capable of obtaining beneficial interest in the said shares. And whether the judgement debtor was capable of making a trust deed transferring his shares in the company during his lifetime. It is clear and it remains uncontroverted that at the time the purported declaration of trust was executed, the judgement of the High Court of Uganda which has been registered in this matter had already been passed against the deceased.

According to the replying affidavit by **Mr. Zulfikarali (Zool) Nimji Javer** the purported declaration of trust has been manufactured to defraud and frustrate the deceased's creditors and as a mechanism to put some of the deceased's assets out of the reach of his bonafide creditors. That may sound legitimate in view of the history of this dispute and the close family ties between the parties herein. On my part I am persuaded to hold that the trust deed was a scheme made out against the company's regulation and in clear contravention of Article 16 and 30 of the company. It is therefore my decision that the trust deed was made in an attempt to subvert the company's Articles of Association and with a view to defeat the legitimate rights of the respondents. It was meant to hide the assets of the deceased from the debtors, hence meant to subvert justice.

I am in agreement with **Mr. Oraro** Advocate that the purported declaration of trust by the judgement debtor is ultra vires Articles No.16 and 30 of the company's Articles of Association. The judgement debtor could only act within the boundaries of the Company's supreme document, which is the Memorandum and Article of Association. If a party engages in activities outside the central document, then such action is void abinitio. It is therefore my decision that the purported act of transferring 10,000 shares by the deceased to the present applicant during his lifetime was illegitimate and in violation of the law.

In conclusive it is my decision that the application dated 9th November 2006 is without merit and is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 14th day of February, 2008.

M. A. WARSAME

JUDGE