



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, J. MOHAMMED & ODEK, J.J.A)

CIVIL APPEAL No. 189 of 2016

BETWEEN

CLEMENT MUTURI KIGANO .....APPELLANT

AND

KIBERA DEVELOPMENT COMPANY LIMITED .....RESPONDENT

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi, Milimani (M. Mugo J.) dated 10<sup>th</sup> December 2010*

in

H.C.C.C. NO. 641 OF 2009)

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JUDGMENT OF THE COURT

1. **Section 82 (1) (a) and 82 (3) of the Companies Act, Cap 486 of the Laws of Kenya (repealed)** provided as follows:

**82 (1) (a) Every company shall, within sixty days after the allotment of any of its shares..... complete and have ready for delivery the certificates of all shares....., unless the conditions of issue of the shares, ..... otherwise provide.**

**(b) .....**

**82 (2) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine.**

**82 (3) If any company on whom a notice has been served requiring the company to make good any default in complying with the provisions of subsection (1) fails to make good the default within fourteen days after the service of the notice, the court may, on the application of the person entitled to have the certificates .....delivered to him, make an order directing the company and any officer of the company to make good the default within such time as may be specified in the order, and any such order may provide that all costs of and incidental to the application shall be borne by the company or by any officer of the company responsible for the default.**” (Emphasis supplied)

2. By an Originating Motion dated 24<sup>th</sup> July, 2009, the appellant moved the trial court for an order to compel the respondent company to issue him share certificates or warrants in compliance with **Section 82 (3) of the Companies Act (repealed)** in respect of shares paid for by him and standing to his credit. The affidavit in support of the Motion was deposed by the applicant.

3. The grounds in support of the Motion as stated in the supporting affidavit were that the appellant was a founder member and a shareholder of the respondent company; that the respondent company was incorporated on 26<sup>th</sup> August, 1998; that prior to incorporation, the appellant was one of the promoters of the company; that on diverse dates, the applicant made various payments towards incorporation and purchase of shares in the company; that the payments made on diverse dates include Ksh. 1,000/= on 4<sup>th</sup> August, 1996; Ksh. 1,000/= on 7<sup>th</sup> July, 1996; Ksh. 5,000/= on 3<sup>rd</sup> November, 1996; Ksh. Ksh. 4,000/= on 5<sup>th</sup> January, 1997; Ksh. 4,000/= on 2<sup>nd</sup> February, 1997; Ksh. 2,000/= on 4<sup>th</sup> May, 1997; Ksh. 6,000/= on 7<sup>th</sup> June, 1998; Ksh. 2,000/= on 2<sup>nd</sup> August, 1998; Ksh. 5,000/= on 4<sup>th</sup> August, 1998; Ksh. 20,000/= on 6<sup>th</sup> December, 1998 and Ksh. 20,000/= on 6<sup>th</sup> June, 1999; and Ksh. 10,000/= on 2<sup>nd</sup> January, 2000.

4. Payment receipts were issued in favour of **Mr. C. M. Kigano** in respect of all the payments made. The receipts indicate payment for “capital shares.”
5. In his affidavit in support of the Originating Motion, the appellant contended that despite making the above mentioned payments towards purchase of capital shares, the Directors of the respondent company refused and declined to issue him with share certificates to indicate that he is a shareholder of the respondent company.
6. By a further supporting affidavit dated 5<sup>th</sup> February, 2010, the appellant deposed that the initial payments were made on account of **Kibera Self Help Group** which was later incorporated as **Kibera Development Company Limited** - the respondent company herein.
7. The appellant further deposed that he was an advocate of the High Court of Kenya and as such, he advised the members of **Kibera Self Help Group** to incorporate themselves into a Limited Liability Company because the Self-Help Group was an amorphous entity without legal personality. That upon the advice, his firm of advocates, **Muturi Kigano & Co. Advocates** was instructed to incorporate the respondent company.
8. In support of the contestation that he is a shareholder and member of the respondent company, the appellant referred to the Minutes of the respondent company wherein he is referred to as a member.
9. In opposing the Originating Motion, the respondent company filed a replying and supplementary affidavit both deposed by **Mr. Joseph Karanja Mbugua**. He deposed that the appellant made his contributions to **Kibera Development Self Help Group** which had been started to take care of the welfare of its members; that as the Self Help Group was not registered as a company, it could not issue shares to members under the Companies Act; that members of the Group then resolved to incorporate a company; that the appellant failed to make his contribution of Ksh.120,000/= towards shareholding in the company; that the members of the Self Help Group who failed to give their contribution were refunded contributions made to the Group; that even after the incorporation of the respondent company, the appellant remained a member of the Self Help Group until he was refunded his contribution; that the Minutes attached to the appellant’s supporting affidavit do not originate from the respondent company; that the appellant is not a shareholder of the respondent company; that the Self Help Group is ready and willing to refund all monies paid by the appellant.
10. Upon hearing the parties, the learned Judge, Koome J (as she then was) in a ruling signed on 1<sup>st</sup> November, 2010 and delivered on 10<sup>th</sup> December, 2010 by Mugo, J. dismissed the Originating Motion. In dismissing the Motion, the Judge expressed herself as follows:

***“I have carefully considered the issues raised for and against this application. The orders sought are mandatory in nature as they would confer final rights to the applicant if issued. It is trite law that mandatory orders can only be issued in very clear and plain cases. It is instructive in this case the applicant is seeking for rectification of the shareholder’s register of the company. He is also seeking for the Annual General Meeting of the company be convened and also orders that he be paid dividends. The documents relied upon by the applicants are receipts which were not issued by the company, in fact all the receipts do not show to whom the payment was made.***

***According to the company, that is a matter that will require oral evidence for the applicant to prove whom he paid the money.....In other words, there is no clear and plain evidence to support the applicant’s claim for the orders sought. The applicant’s application fails and it is dismissed with costs to the respondent.”***

11. Aggrieved by the ruling of the learned Judge, the appellant has lodged the instant appeal citing the following grounds in the memorandum of appeal:

***“(i) The Judge failed to appreciate that the Companies Act created a special jurisdiction to enable the court to specifically deal with all the matters canvassed in the Motion.***

***(ii) The Judge failed to appreciate there was sufficient material to establish that the appellant was a member and shareholder of the company.***

***(iii) The Judge failed to appreciate there was sufficient material to enable her to deal and or grant the orders sought.”***

12. In the memorandum of appeal, the orders sought are that the register of the respondent company be rectified so as to include the appellant as a member and shareholder of the company; that this Court does order the respondent company to issue a share certificate to the appellant in proportion to the amount paid by him; and that the respondent company be ordered to pay the appellant all past dividends.

13. At the hearing of this appeal, learned counsel Mr. P. Saende appeared for the appellant while learned counsel Mr. Minishi holding brief for Mr. Mwangi appeared for the respondent. Both parties filed written submissions and list of authorities.

## **APPELLANT’S SUBMISSIONS**

14. The appellant submitted that the trial court in total disregard of the Companies Act stipulations disregarded the evidence tendered on record; that the court erred in its conclusion that there was no clear and plain evidence to support the appellant’s claim and that the judge erred and ignored the evidence tendered which proved that the appellant was a founding member of the respondent company. It was submitted that evidence was tendered to prove that the appellant started paying for his shares in 1997 as proven by the sample of receipts attached to the supporting affidavit. It was urged that pursuant to **Section 92** of the **Companies Act**, a subscriber to the Memorandum and Articles of Association of a company becomes a member of the company at the moment of registration without his name being placed on the

Register of Members. That considering the appellant is one of the founding members of the respondent company, his membership thereto was automatic. Counsel cited dicta in **Numeaton Football Club, Re [1989] B.C.L.C. 454 CA** where it was stated that subscribers to the Memorandum of Association are the first members of the company and should be entered on the register of members.

15. The appellant further faulted the trial court for ignoring the deposition by the respondent in the replying affidavit of **Mr. Joseph Karanja Mbugua** where he deposed that the **Kibera Self Help Group** was ready and willing to refund the appellant his monies. It was submitted that the deposition by **Mr. Joseph Karanja Mbugua** was an admission by the respondent company that the appellant had in fact paid his subscription for shares. That it is contradictory for the respondent to say that those members of the Self Help Group who were not able to pay their subscriptions were refunded their money and at the same time state that the appellant had not been refunded his money. Counsel urged that the replying affidavit contains an admission that the appellant was a member of the Self Help Group and also a founding member of the respondent company. For the foregoing reasons, the appellant submitted that the learned Judge grossly erred in failing to find that the appellant was a shareholder of the respondent company and that he is entitled to a share certificate.

16. The appellant further submitted that the learned Judge having erred in failing to find that he was a shareholder of the respondent company, further erred in failing to order rectification of the respondent company shareholders/members register. That **Section 103** of the **Companies Act** empowers the court to order rectification of the register. That if the name of any person is, without sufficient cause, omitted from the register of members of a company, the person affected may apply to the court for rectification of the register. Grounded on the provisions of **Section 103** of the **Companies Act**, the appellant submitted that this Court has jurisdiction to order rectification of the shareholder's/members register. In support of the submission that a court has jurisdiction to rectify a company register, counsel cited the case of **Guo Dong -v- Multi Win Trading (E.A) Company Ltd. & 6 others [2015] eKLR and Re Hoicrest Limited [2000]1 WLR 414**.

17. In concluding his submissions, the appellant stated that the evidence on record clearly and plainly proved that indeed there existed a relationship between the appellant and the respondent company in which the appellant had subscribed to the latter's shares. That the learned Judge did not properly evaluate the evidence on record and thus arrived at wrong conclusions of fact and applicable law.

#### **RESPONDENT'S SUBMISSIONS**

18. The respondent in urging us to dismiss the instant appeal reiterated its contention that the appellant was not a founding member of the respondent company and as such, had no rights and entitlements that accrue to shareholders of the company.

19. Counsel submitted that the evidence on record shows that the appellant was a member of **Kibera Self Help Group**; that the appellant failed to pay and raise his share of subscription money to become a shareholder of the respondent company; that the payment receipts attached to the appellant's supporting affidavit were not issued by the respondent company; that at the time of incorporation of the company, the appellant was not a subscriber to the Memorandum or Articles of Association of the company.

20. On the issue of rectification of the register, counsel submitted that a court can only rectify a company register in plain and clear cases. That **Section 118** of the **Companies Act** cannot be invoked when there is a real and complicated dispute as to the interests of the parties; that since the appellant is and was not a founding member of the company, he is not entitled to issuance of a share certificate or any dividends. In concluding its submissions, it was stated that the trial Judge did not err in dismissing the appellant's Originating Motion.

#### **ANALYSIS and DETERMINATION**

21. We have considered the grounds of appeal as well as submissions by both counsel and the authorities cited. Being a first appeal, it is our duty to analyse and re-assess the evidence on record and reach our own conclusions. In **Selle -vs- Associated Motor Boat Co. [1968] EA 123**, it was expressed:

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif - v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).”**

22. In this appeal there are two issues that impact on and determines all other grounds urged in the appeal. The two issues are:

**(i) Whether there is evidence on record to prove that the appellant paid monies and subscribed to become a shareholder of the respondent company. Tied to this issue is whether or not the appellant is entitled to a share certificate and rectification of the shareholder's/member's register.**

**(ii) Whether the trial court properly evaluated the evidence on record.**

23. The appellant urges that the trial Judge erred and failed to appreciate that there was sufficient evidential material to establish that he was a member and shareholder of the respondent company; that there was sufficient material for the learned Judge to order rectification of the respondent company register of shareholders and an order for payment of dividends to the appellant and that there was sufficient evidence for the court to compel the respondent company to issue the appellant with a share certificate.

24. The jurisdiction of the court to order rectification of a company's shareholder's or members register or to compel issuance of a share certificate is not in doubt. (See **Obsidion Investments Limited -v- Attorney General &another [2015] eKLR and Surco Limited -v- Prabha Mahesh Gudka [2006] eKLR**).

25. In **Halsbury's Laws of England, (4th Edn.), Vol. 7(1) paragraph 372** the learned authors were quite categorical concerning the court's jurisdiction in rectification of a company register. The same can only apply to a company's share register. The authors note as follows;

***"372. General jurisdiction to rectify company's register of members The jurisdiction to rectify a company's register of members is discretionary; and it is not limited by the provisions of the Companies Act 2006. Thus the court will rectify the register, apart from that Act, to enable the members of a company to have a fair and reasonable exercise of their rights.***

***When the court entertains the application, it is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition and the purpose for which relief is sought...."***

26. In this matter, **Sections 82 (3) and 118** of the **Companies Act** expressly confer jurisdiction on a court to make an order for issuance of a share certificate and rectification of the register respectively. In relevant excerpts, **Section 82 (3) of the Companies Act** provides that the court, on the application of the person entitled to have the certificates delivered to him, may make an order directing the company and any officer of the company to make good the default within such time as may be specified in the order.

27. On the other hand, **Section 118 (1)** of the **Companies Act** provides:

***"118 (1) If— (a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or (b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the court for the rectification of the register."*** (Emphasis supplied)

28. A reading of both **Sections 82 (3) and 118 (1)** of the **Companies Act** aptly shows that the jurisdiction of the court to make an order for issuance of a share certificate or rectification of the register is not automatic. Under **Section 82 (3)** of the **Act**, the person moving the court must prove and demonstrate that he is entitled to have the share certificates delivered to him. Under **Section 118 (1)** of the **Act** an applicant to the court must demonstrate that there is no sufficient cause to omit his name from the register of members. Both **Sections 82 (3) and 118 (1)** of the **Companies Act** contain a condition precedent for the court to exercise its jurisdiction. In our considered view, the power of the court to rectify the register of members or order a person to be given a share certificate must be exercised sparingly and in exceptional circumstances.

29. Of significance to this appeal is the provision in **Section 82 (1) (a)** of the **Act**. The phrase "*after allotment of its shares*" is critical. The allotment creates an enforceable contract for the issue of the shares and the shares are issued when an application to the company has been made followed by allotment and notification to the purchaser and completed by entry on the register of members. (See **National West Minister Bank PLC -v- IRC 1994] 3 All ER 1, [1995] 1 AC 119, [1994] UKHL TC – 67 –**; see also **Farrar's Company Law, 4<sup>th</sup> Edition, Butterworth's 19998 at pages 166-167**).

30. In this regard, we are persuaded by Lord Templeman in **National West Minister Bank PLC -v- IRC 1994] 3 All ER 1**, where he expressed that there is a distinction between an enforceable contract for the issue of shares (which contract is constituted by an allotment) and the issue of shares which is completed by registration. Allotment confers a right to be registered. Registration confers title. Without registration, an applicant is not the holder of a share or a member of the company: the share has not been issued to him. No person can be a shareholder until he is registered. In the instant matter, the respondent company has not allotted any shares to the appellant. In the absence of allotment, there is no enforceable contract for the issuance of shares to the appellant.

31. On the issue of rectification of the register of shareholders, comparative jurisprudence reveal that the great majority of the cases on the power of the court to order rectification of member's register involve a situation where a transfer has been executed but not registered, and the applicant seeks to be put on the register. (For example see **Re Contract Corporation, Head's Case, White's Case, (1866) LR 3 Eq 84; Re Overend, Gurney & Co., Ward and Garfit's Case (1867) LR 4 Eq 189; Re London, Hamburg and Continental Exchange Bank, Ward and Henry's Case (1867) LR 2 Ch App 431 (conflicting transfers); Smith -v- Charles Building Services Ltd [2006] BCC 334; Blindley Heath Investments Ltd -v- Bass [2014] EWHC 1366 (Ch)**).

32. The next largest category is cases where the applicant is already on the register but wishes to be removed, e.g. because the registration was effected as a result of misrepresentation (**Re Scottish and Universal Bank Ltd, Ship's Case (1865) 2 DJ&S 544**) or was effected without authority (**Martin's Case (1865) 2 H&M 669**) or was illegal because exchange control permission was not obtained (**Re Transatlantic Life Assurance Co. Ltd [1980] 1 WLR 79**) or bonus shares were improperly issued (**Re Cleveland Trust plc [1991] BCC 33**).

33. The other category of cases is where the applicant asserts he/she is entitled to legal, equitable or beneficial interest in shares.

34. The appellant moved the High Court seeking an order to compel the respondent company to issue him with a share certificate. He also moved the Court seeking an order for rectification of the respondent's register of members. To succeed in this matter, the burden of proof was on the appellant to demonstrate that he was entitled to a share certificate and to membership of the respondent company and that there was no sufficient reason for his name not to be on the register of members of the respondent company.

35. In the instant appeal, the appellant submitted that there is sufficient evidence on record to demonstrate and prove that he is entitled to a share certificate and that there is no sufficient reason why his name should not be on the register of members of the respondent company. The appellant fault's the trial judge for failing to properly evaluate the evidence on record to find that indeed there was sufficient evidence and material before the court to prove that he is entitled to a share certificate, dividends and rectification of the register.

36. What evidence is on record to prove that the appellant is entitled to a share certificate of the respondent company? Proceedings for

rectification of a register of companies can only be brought where the applicant has a right to registration as a member or shareholder of the company.

37. In the instant matter, the only items of evidence in support of the appellant's case for issuance of a share certificate and rectification of the register is the receipts attached to his affidavit in support of the Originating Motion. The appellant deposed that on diverse dates he made payments towards purchase of shares in the respondent company. That he paid Ksh. 1,000/= on 4<sup>th</sup> August, 1996; Ksh. 1,000/= on 7<sup>th</sup> July, 1996, Ksh. 5,000/= on 3<sup>rd</sup> November, 1996; Ksh. 4,000/= on 5<sup>th</sup> January, 1997; Ksh. 4,000/= on 2<sup>nd</sup> February, 1997; Ksh. 2,000/= on 4<sup>th</sup> May, 1997, Ksh. 6,000/= on 7<sup>th</sup> June, 1998; Ksh. 2,000/= on 2<sup>nd</sup> August, 1998; Ksh. 5,000/= on 4<sup>th</sup> August, 1998; Ksh. 20,000/= on 6<sup>th</sup> December, 1998; Ksh. 20,000/= on 6<sup>th</sup> June, 1999; and Ksh. 10,000/= on 2<sup>nd</sup> January, 2000.

38. We have examined and scrutinized the receipts issued in regard to the foregoing payments. The receipts are issued in the name of **C.M. Kigano** as payee of the monies so received. None of the receipts show the name of the recipient; none of the receipts make reference to either **Kibera Self Help Group** or **Kibera Development Company Ltd.** The respondent company denied issuing the receipts.

39. The record shows that the respondent company was incorporated on 26<sup>th</sup> August, 1998 as per its certificate of incorporation. Most of the receipts attached to the appellant's supporting affidavit were issued prior to incorporation of the company. In law, the respondent company had no legal capacity to receive payment or issue a receipt in respect to any payments made prior to its incorporation. Until a company has been incorporated, it cannot contract or do any act. Nor once incorporated, can a company become liable for or entitled under contracts purporting to be made on its behalf prior to incorporation - for ratification is not possible when the ostensible principal did not exist. Any preliminary pre-incorporation arrangements will either have to be left to mere gentleman's agreements or the promoters will have to undertake personal liability. (See **Kelner -v- Baxter (1886) KR 2 C.P. 174**; see also **Newborne -v- Sensolid (Great Britain Limited) [1954] 1 QB 45 C.A.**)

40. It follows that in this matter, if at all the receipts were issued, they must have been issued by the Kibera Self Help Group. To this extent, we concur with the submissions that the respondent company has neither received any payment for its shares nor issued any receipt to the appellant in relation to capital shares as stated on the face of the receipts.

41. The appellant asserts that he is a founder member of the respondent company and a subscriber to the Articles and Memorandum of Association of the respondent company. As of 14<sup>th</sup> August 1998 when the respondent company was incorporated, the subscribers to its Articles and Memorandum of Association are indicated to be **Mr. Joseph Karanja Mbugua** and **Mr. Peter Mburu Kariuki**. The name of the appellant does not appear as a signatory to either the Articles or Memorandum of Association of the company.

42. A subscriber to the Articles and Memorandum of Association is the person who signs these documents on the date of incorporation. The appellant did not sign the documents and it is erroneous to state he is a subscriber to the Articles and Memorandum of Association of the respondent company. Further, the Companies Act does not recognize the position and title of a founder member. A founder member is an anomalous colloquial that has no legal effect in the registration process of a company. The appellant further submitted that he was one of the promoters of the respondent company. The rights of a promoter, if any, must be stipulated in the Articles and Memorandum of Association of the company. In the instant matter, there is no evidence illustrating any rights that were reserved for promoters of the respondent company vis-a-vis the company upon its registration.

43. In totality, upon our re-evaluation of the evidence on record, there is no sufficient evidence or material on record to prove that the appellant was and is a subscriber to the Articles and Memorandum of Association of the respondent company. The appellant has not satisfied us that he paid for and made subscription for share in the respondent company. The appellant has satisfied us that he made payment to Kibera Self Help Group and most of the payments made were prior to incorporation of the respondent company. On a balance of probability, we find that the appellant did not establish a plain and clear case to justify the trial court to invoke and exercise its jurisdiction under **Sections 82 (3) and 118 of the Companies Act**. The conditions precedent for a court to exercise its jurisdiction to order rectification of a company's shareholders' register were not proved. We are comforted in our finding by the persuasive dicta from the Supreme Court of India in **Ammonia Supplies Corporation (P) Limited -v- Modern Plastic Containers (P.) Limited [1998] (9) TMI 427** where it was held that under the grab of rectification of the register of members, questions of fact involving contentious issues cannot be raised.

44. The upshot is that we find this appeal has no merit and it is hereby dismissed with costs.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of November, 2019**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**J. OTIENO ODEK**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR**