



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 311 OF 2000

SURCO LIMITED APPELLANT

AND

PRABHA MAHESH GUDKA RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Githinji J) dated 27th day of October, 1997

in

MISC. CASE NO. 1153 OF 1996)

JUDGMENT OF THE COURT

This is an appeal from the Ruling of the High Court of Kenya at Nairobi (Githinji J. as he then was) delivered on 27th October 1997 in *High Court Miscellaneous Application Number 1153 of 1996* in which Prabha Mahesh Gudka (hereinafter “**Prabha**”) was the applicant and Surco Ltd was the respondent.

The facts giving rise to the suit were largely undisputed. They were that Mahesh Somchand Gudka was a substantial shareholder in Surco Limited (hereinafter “the Company”) owning all but 15 shares out of the issued share capital of 50,000 shares. His wife, **Prabha** was a director of the Company.

Mahesh Somchand Gudka (hereinafter “the deceased”) died on 4th February 1996. Two days prior to his death he had, on 2nd February 1996, executed three share transfers by which he transferred all his total of 49,985 shares in the Company to Rashmikant Zaverchand Chandaria (5,000 Ordinary Shares), Surendra Somchand Gudka (20,000 Ordinary Shares) and Mit Mahesh Gudka (24,985 Ordinary Shares).

It is not disputed that the share transfers were indeed executed by the deceased and that they were duly stamped.

In her affidavit dated 22nd November 1996, **Prabha**, in support of the application deponed as follows:-

- 1. I am the applicant in this cause and I am also the executrix named in the will of Mahesh Somchand Gudka, deceased, my late husband.**
- 2. In Nairobi succession Cause No. HC 2024 of 1996 I have applied for probate of my husband’s will.**

3. ***One of my husband's enterprises was the company Surco Limited and I am a director of this company.***
4. ***In the attempt to ascertain the estate of my husband my advocates searched the file of the company and this showed my husband as owning all but 15 shares in the company. This was at 19th September 1996.***
5. ***Mr. Surendra Somchand Gudka has denied me access to the company and to any information concerning it.***
6. ***I have received a notice of an annual general meeting of the company to be held on 27th November 1996 in Mombasa and I have the following comments on this.***
7. ***I have never had notice of or attended a directors meeting which is required before the annual general meeting nor have I approved the accounts allegedly produced for the meeting.***
8. ***At no time have I had notice of or attended any meeting of directors at which the transfer of the shares of my late husband was discussed or agreed. Annexed and marked "A" is a copy of the notice and of correspondence with Anjarwalla Abdhusein & Co.***

On 25th November 1996 **Prabha** filed an Originating Motion under **Rules 7 and 3** of the Companies (High Court) Rules and **Order 39 rule 2**. This application, supported by the affidavit dated 22nd November 1996 of Prabha sought the following orders:

- "1) That the register of the company be rectified to record the ownership of 49,985 shares in the name of the applicant as executrix of the late Mahesh Somchand Gudka;***
- 2) That the meeting of the company called for 27th November 1996 be postponed pending the hearing of the application;***
- 3) That no proceedings be taken by the company or any of its officers or agents and no moneys paid out of its bank accounts or other property transferred without consent of the applicant.***
- 4) Costs".***

It is in respect of this application that Githinji J's Ruling dated 27th October 1997 now appealed against was made. The decisions reached by the learned Judge and set out in his Ruling were as follows:-

"For the foregoing reasons I allow the application and in respect of the first prayer order that:

The company do register applicant Prabha Mahesh Gudka as the executrix of the will of her deceased husband as the one legally entitled to the 49,985 shares upon application.

II Alternatively, if the 49,985 have already been registered in the names of the transferees, the Register of members of the company is rectified to record the 49,985 shares in the name of the applicant and that Notice of this order of rectification be given to the Registrar of Companies.

I give orders in terms of prayer No 3 in the application. The company to pay costs of the application to the applicant".

The reasons given by the learned Judge for the making of these orders were as follows:-

"The application is brought under Rule 7 and 3 of the Companies (High Court Rules) and Order 39 Rule 2 (C P Rules). By Rule 7 of those Rules, an application to rectify the register of

members of a company under section 118 of the Companies Act shall be by originating motion or when the company is in voluntary liquidation by summons. By Rule 3 of the Rules any proceedings brought under the rules shall be deemed a suit within the meaning of the Civil Procedure Act and the procedures and general practice of suits apply to the present application.

Mr. Rustam Hira for the company contends that as there are complex matters of law and fact involved, the proceedings of this nature should have been commenced by a plaint.

By section 118 (3) of the Act, where an application for rectification of the Register has been made, the court has jurisdiction to decide any question relating to the title of any party to the application to have his name entered in or omitted from the Register of the members and to decide generally upon any question necessary or expedient to be decided for the rectification of the Register.

As the Companies (High Court Rules) provides and mandates that an application for rectification of the Register should be made by originating summons and such an application is deemed as a suit and as S. 118 (3) of the Companies Act gives court jurisdiction to decide all disputes arising in the application for rectification of the Register, I hold that the application is competently before the court and Mr. Hira's objection fails.

There is no dispute that the applicant is the widow of Mahesh Somchand Gudka who died on 4.2.96 and an executrix of his will. There is also no dispute that her deceased husband owned 49,985 shares in the company. There is no dispute that when applicant (sic) searched the file of the company on 19.9.96 she found that her husband was registered as owner of all the shares in the company except 15 shares. The basis of the application is that the firm of Anjarwalla Abdhusein and Company advocates has informed her lawyers that her husband's shares are not part of the estate of her husband as the shares were transferred by the deceased during his life time and that she on (sic) her own right as a shareholder of the company has never had notice of a meeting or attended a directors meeting at which the transfer of her husbands share was discussed or agreed.

Mr. Surendra Somchand Gudka, a director of the company, has sworn a replying affidavit. He states in para 4 of the replying affidavit that deceased transferred 5000 shares to Rushimkant (sic) Saverchand (sic) Chandaria on 4.2.96; 20,000 shares to Surendra Somchand Gudka on 4.2.96 and 24985 shares to Mit Mahesh Gudka on 4.9.92 (sic).

He has annexed photostat copies of the three transfers. They show that 5000 shares were transferred at a consideration of Shs. 525,000 and the 20,000 shares at a consideration of shs 2,000,000/- They also show that the 24,985 shares were transferred to Mit Mahesh Gudka – son of deceased out of the deceased natural love and affection for his son.

Mr. Surendra Somchand Gudka does not say in his affidavit that a meeting of the directors has been held to approve or authorise the transfers by the deceased. More specifically he does not say that the transfers were approved by the directors or that the transfers have been entered in the Register of Members. The evidence of the applicant is not refuted that by 19.9.96 the companies file at the companies Registry still showed the deceased as the registered owners of the shares.

The Register of Members which should be prima facie evidence of such transfers (section 120 of the Companies Act) has not been availed by Mr. Surendra Somchand Gudka or by the Company.

The Articles of Association of the company which is evidently a private company has not been produced. If the company adopted Table A of the First Schedule, then by clause (sic) 22 of Table A, where there has been transfer of shares, the transferor remains the holder of the shares until the transferees (sic "transferee") is entered in the Register of Members.

Further, by Clause (sic) 29 and 30, where the deceased was the sole holder of the shares, as in the present case, his personal representative is the only one entitled to the deceased's interest in the shares and the directors have no right to decline or suspend registration.

Applicant states that it is the company which has details of the transaction and which it has failed to disclose to the applicant. I agree, as it is the company which has the Register of Members and which can say how far the transaction had reached before the death of the deceased.

From the affidavit evidence and the annexures I find no evidence that the transfer of the shares allegedly executed by the deceased two days before his death was approved by the directors and names of the transferee entered on the register before the death of the deceased. Indeed, it appears practically and legally impossible for the transferees to have stamped the transfers, made an application to the Company Registry and the company to have called a meeting of Directors for a decision, within the two days before the death of the deceased.

Even if the deceased executed the transfers and died two days later before the process of approval and registration was completed, no further action towards the registration of the transferees could have been legally taken after the death of the applicants husband as the applicant, as the executrix of the will, is the only one who could have perfected the title. That is to say that the transferees' remedy would have been to file a suit for specific performance of the sale of the shares against the executrix.

That notwithstanding, there is no tangible evidence or certainty that the transfers were Registered as the company did not provide a copy of the Register. The order for rectification of the Register cannot be made or effected unless the Register has been altered. In the circumstances of this case, the order for rectification can only be made in the alternative.

No effective order can be made in respect of the second prayer in the application as the date of holding the meeting has expired.

The third order is still valid.

For the foregoing reasons I allow the application and in respect of the first prayer order that:-

- 1. The company do register the applicant Prabha Mahesh Gudka as the executrix of the will of her deceased husband as the one legally entitled to the 49,985 shares upon application.***
- 2. Alternatively, if the 49,985 have already been registered in the names of the transferees, the Register of Members is rectified to record the 49,985 shares in the name of the applicant and that Notice of this rectification be given to the Registrar of Companies."***

On the issue raised by Mr. Hira that the application involved such complicated issues of law and fact that it was not appropriate for it to be dealt with by way of an originating summons but should have been the subject of plaint, we are satisfied that the learned Judge was right to deal with the dispute on the Originating Summons for the reasons given by him in his Ruling set out above.

We do not consider that the facts were particularly complicated, indeed, most of them were not in dispute. It was not in dispute that signed transfers of the shares in question had been executed prior to the death of the transferor. It was not disputed that there had been no registration of the transfers of the shares in the Register of Members of the company by the time of the hearing in the superior court.

The appellant company took and still takes the stand that because the transfer of the shares of the deceased had been duly completed prior to the death of the transferor the legal title to the shares had passed to the transferees so that no legal title to the shares remained vested in the deceased at the time of his death two days after the execution of the share transfers.

It is, however, necessary to examine closely the relevant provisions of the law to ascertain whether in law the legal title to the shares had passed upon the execution of the share transfers.

The critical provisions of the applicable law are to be found in the Articles of the respondent company and in the Companies Act.

It was not in contention that the Respondent is a private company. No Articles of Association of the Company were produced at the hearing in the superior court. Mr. Hira for the appellant relied on the Regulations in Table A Part II in the Companies Act Cap 486 as being the relevant articles of the company which was clearly a private company.

Regulation 1 of Part II provides:

“1. The Regulations contained in Part I of Table A (with the exception of regulations 24 and 53) shall apply”.

Regulation 22. of Part I of Table A provides:-

“22. The instrument of transfer of any share shall be executed by or on behalf of the transferor and transferee, and the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of members in respect thereof”.

Mr. Hira, submitted that the use of the word “**deemed**” in regulation 22 meant that this regulation did not mean that the transferor remained a holder of the share until the name of the transferee is entered in the register of members. He did not produce any authority for this proposition and we find no merit in it. The regulation cannot have any other meaning than that the transferee of the shares does not become a holder of the share until the name of the transferee is entered in the register of members.

Regulation 3 of Part II of Table A provides that:-

3. The directors may, in their absolute discretion and without assigning any reason therefor, decline to register any transfer of any share, whether or not it is a fully paid share.

It is not in dispute that the directors, of which **Prabha** is one, have not registered, in the register of members of the company, the transferees of the shares referred to in the transfers executed by the deceased on 2nd February 1996.

It was the contention of **Prabha** before the superior court and is her contention before this Court that the shares of the deceased, prior to the execution of the transfers by him, remain the property of his estate, of which she is the sole Executrix, so that the register of members of the company should be rectified to show her as executrix and the shareholder of the said shares.

Mr. Hira further sought to rely on a number of authorities to the effect that in a contested winding up of a family company which was a quasi partnership the courts would take a lenient view as to the technical rules of company law. He cited the House of Lords decision in ***Ebrahim v. Westbourne Galleries Ltd.*** [1973] AC at 360.

With respect to Mr. Hira we do not find these authorities of assistance in a case such as the present which does not concern issues as to what is just and equitable on a winding up petition of such a family company.

Paragraph 392 of Halsbury’s Laws of England Fourth Edition is as follows:-

“392. Vendor’s Obligation. Under an ordinary contract for the sale of shares, made subject to the rules of the Stock Exchange, the vendor’s only duty is to execute a valid transfer, hand it and the certificate to the purchaser, and do all that is necessary on his part to enable the purchaser to

be registered, it being the purchaser's duty to obtain registration of the transfer....". (emphasis added).

We have not found any specific authority that this does not apply to sales of shares in a private company not subject to the rules of the stock exchange and none was cited to us.

We consider that, taking all the above into account, the legal title to the shares in question in this appeal had not been transferred to the transferees under the share transfer documents executed by the deceased prior to his death. Such legal title would only pass to the transferees upon registration in the Register of Members of the company.

It is not disputed that **Prabha** was appointed by the deceased in his will as the Executrix of his will. Ground c) of the Memorandum of Appeal states:

“That the Learned Trial Judge failed to appreciate that the Respondent was a Director of the Appellant Company and was the joint executor with the brother of the deceased who is and was a Director of the Company. There was no evidence in the affidavit or elsewhere to support this assertion of joint executorship.”

We are satisfied that the transferees under the share transfer documents are not members of, or shareholders in the company unless and until they are registered as such in the Register of Members of the company. We are further satisfied as was the learned Judge that **Prabha**, as the sole executrix of the deceased is, and has been since the death of her deceased husband entitled to be registered in the Register of Members of the Company.

As we have seen above the learned Judge held that he was obliged to make the orders in the alternative. We think that he was right to do so as, in the absence of production of the Register of Members it was not certain whether or not the Register had been altered subsequent to the death of the transferor.

The superior court was therefore entitled to make the orders it made and we hereby order that the appeal be dismissed with costs.

Dated and delivered at Nairobi this 22nd day of December, 2006.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR