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Namo'aporo Landowners Association Inc v Sakai [2020] PGNC 10; N8178 (4 February 2020)

N8178

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

OS. NO. 396 OF 2019

BETWEEN
NAMO'APORO LANDOWNERS ASSOCIATION INC.
Plaintiff

AND
MARK SAKAI, DONALD WASAL, RONNY MUTU AND SAKA KEI, the Removed Management Committee of NAMO'APORO LANDOWNERS ASSOCIATION INC and as Board of Directors of NAMO'APORO INVESTMENT LIMITED
First Defendants

AND
NAMO'APORO INVESTMENT LIMITED
Second Defendant

AND
REDSKINS ESTATE LIMITED
Third Defendant

Waigani: Makail, J
2019: 5th November
2020: 4th February

COMPANY LAW – Directors duties – Breach of director’s duties – Duty of care and good faith – Piercing of corporate veil – Grounds of – Fraud – [Companies Act, 1997](#) – Section 112

TRUST – Breach of trust – Trustee shareholders and directors – Shares held in trust of or for benefit of landowners in company – Transfer of shares – Shares transferred without prior approval of landowner members

LAW OF ASSOCIATION – Management Committee – Membership of Management Committee – Meeting of Management Committee – Quorum of – Quorum determine based on constitution of Association – Association Incorporation Act

COMPANY LAW – Shares – Shares in company – Personal property – Share is transferable – Allotment and transfer of shares – Fair value – [Companies Act, 1997](#) – Sections 36, 40 & 46

Cases Cited:

Papua New Guinea cases

John Kapi Nato & Ors v. Mark Sakai & Ors (2019) [N7866](#)

Kawage v. Mondu [1999] [PNGLR 543](#)

Kuyan v. Andrew Salell (2008) [N3376](#)

Marika v. Silari [2004] [PNGLR 25](#)

Michael Gene v. Royale Thompson (2007) [N3254](#)

Odata Limited v. Ambusa Copra Oil Mill Limited (2001) [N2016](#)

Relyne Komet v. Angeline Komet (2018) [N7407](#)

Overseas cases

Dean v. Prince [1954] Ch 409

Counsel:

Mr. E. Waifaf, for Plaintiff

Mr. T. Cooper, for Defendants

JUDGMENT

4th February, 2020

1. **MAKAIL, J:** This action has been commenced by the plaintiff to challenge the various decisions and actions of the directors of a company called Namo’aporo Investment Limited which is the second defendant in this proceeding.

Issues

2. At the pre-trial hearing and in consultation with the parties, the following issues were identified for determination:

(a) Whether there was quorum at each meeting of the plaintiff on 18th July 2016, 23rd September 2016 and 24th September 2016.

(b) Whether there was an Annual General Meeting (AGM) by the members of the plaintiff whereby it was agreed to transfer shares of the plaintiff to one of the defendants Mark Sakai.

(c) Whether there was a resolution specifically on allotment and transfer of shares and value of shares passed by the management committee of the plaintiff.

(d) Whether the transfer of title of the property described as Allotment 03, Section 427, Hohola and commonly referred to as the First Heritage Centre (FHC) Building to the third defendant was procured by fraud and set aside under Section 33(1)(a) of the *Land Registration Act*.

(e) Whether the proceedings is incompetent because the plaintiff was not a duly certified Association under Section 10(1)(c) of the *Association Incorporation Act* at the time of commencement of the proceedings.

3. Except for the issue (e) which was abandoned at trial, the rest of the issues bring up the fundamental issue of whether or not there has been a breach of duty by the directors of the second defendant and in turn the issue of whether the breach support a case for the corporate veil of the second defendant to be lifted and the conduct of the directors in transferring of its shares and sale of the company's asset to one of its directors be set aside.

Directors Duties

4. At the heart of the controversy are the second defendant and its directors who are the first defendants. The first defendants are also members of the management committee of the plaintiff. They are being called to account for their deeds in approving a sale of 9,306,311 shares of the plaintiff in the second defendant to the third defendant and sale of the FHC to one of the first defendants namely Mark Sakai before being sold by him to the third defendant.

5. At common law a director owes a duty of care or fiduciary duty to the shareholders, employees and creditors of the company and must act in the best interests of the company. In PNG the common law position has been incorporated into Section 112(1) of the [Companies Act 1997](#) which states that:

“Subject to this section, a director of a company, when exercising powers or performing duties, shall act in good faith and in what the director believes to be the best interests of the company.”

6. It is even an offence under Section 112(5) if the director contravenes Section 112 and is liable, on conviction, to a penalty set out in Section 413(4) which may be a fine not exceeding K200,000.00 or imprisonment for a term not exceeding five years, or both.

7. Some of the legal duties and obligations of a director include exercising of care and diligence in the management of the company, acting in good faith and in the best interests of the company and avoiding of any conflicts of interest between the director and the company.

Undisputed Facts

8. According to the evidence of John Kapi Nato for the plaintiff and Mark Sakai for the defence, the following facts are not disputed:

- In 1996 Mark Sakai and late Henry Kapi Nato were signatories to the revised Memorandum of Agreement (MOA) between the Southern Highlands Landowners and the State for the Kutubu Petroleum Project.
- They signed the MOA on behalf of the plaintiff.
- Mark Sakai is the sole surviving signatory to the MOA.
- The members of the plaintiff are land groups incorporated (ILGs) for land owning clans in PDL2 Kutubu Oil and LNG Project area.
- There were 117 ILGs and each is represented by its Chairman at the General Meeting of the plaintiff.
- The office bearers of the plaintiff comprises of Chairman, Deputy Chairman, Secretary (Public Officer), Treasurer and three Executive Members from the landowners appointed by the landowners. They make up a Management Committee of the plaintiff.

- In 2001 the 117 members of the plaintiff passed a resolution at an AGM to incorporate the second defendant and for the plaintiff to acquire 9,306,311 shares in the company.
- The plaintiff is the sole shareholder of the second defendant.
- The asset of the second defendant is the Business Lease where the FHC property is located.
- In 2010 the first defendants were elected as members of the Management Committee of the plaintiff.
- The validity of the election of members of the Management Committee was taken to the National Court by John Kapi Nato & Ors in proceedings OS No 647 of 2010.
- The election of the first defendants was nullified by the National Court in 2013 and a fresh election was ordered.
- On 30th May 2014 only 58 out of the total of 117 member ILGs of the plaintiff held a General Meeting and to elect new members of the Management Committee of the plaintiff.
- For the second time, the first defendants were elected as members of the Management Committee.
- Again John Kapi Nato and others disputed the validity of their election and commenced proceedings OS No 385 of 2014.
- On 19th September 2014 the National Court granted an interim injunction restraining the defendants from conducting any Special AGM proposed for 19th September 2014 or any other AGM until the determination of the substantive matter.
- Pursuant to the interim injunction no AGM was held by the plaintiff.
- Meanwhile the first defendants held a series of meeting on 18th July 2016, 23rd September 2016 and 24th September 2016 in their capacity as the Management Committee of the plaintiff.
- They passed resolutions and approved the transfer of the FHC property from the second defendant to Mark Sakai.
- They also approved the transfer of shares of the plaintiff held in the second defendant to Mark Sakai. It is said that the transfer of title of the FHC property and shares of the second defendant to Mark Sakai is to enable the latter to secure funding to renovate and refurbish the deteriorating FHC property.
- Furthermore, on 4th October 2016 the second defendant signed a power of attorney authorising Mark Sakai to do any of the following:
 - Obtain a loan not exceeding K8 million to refurbish the FHC, or
 - If the FHC would be sold, it should be not less than K10 million.
- Mark Sakai incorporated the third defendant and transferred ownership of the FHC to the third defendant for a consideration of K1.00.
- It was not until 9th May 2019 that a decision was made by the National Court upholding the proceedings OS No 385 of 2014 and ordering another election to be held, this time with the full membership of 117 member ILGs to participate in the election: *John Kapi Nato & Ors v. Mark Sakai & Ors* (2019) [N7866](#).
- The National Court also appointed John Kapi Nato and his group to be an interim Management Committee and organise a General Meeting for election of the members of the Management Committee.
- From the meeting and election on 8th June 2019, Mark Sakai lost to John Kapi Natto for the position of Chairman. Emma Atakaro was elected as Deputy Chairman beating Daniel Wasai while Peter Heno was elected Treasurer ahead of Ronnie Mutu and Clark Faso defeated Sakai Kei for the position of Secretary (Public Officer).
- One of the resolutions passed by the current Management Committee is to commence legal action to review the propriety of the decisions and actions of the first defendants to sell the shares of the plaintiff in the second defendant to Mark Sakai and secondly the sale of the FHC to Mark Sakai and from him to the third defendant.

Quorum of Management Committee Meeting

9. The plaintiff submits that the series of meetings held on the mentioned dates are illegal, null and void because they lacked the requisite quorum. It submits that its membership is seven and the required number of members to constitute a quorum is four. There were only three members present in each of the meetings.

10. It refers to Section 8.1 of the plaintiff's constitution which provides that the Management Committee comprises of four office bearers and three executive committee members giving a total of seven Management Committee members. It submits that Section 8.4 of the plaintiff's constitution states that a quorum can be 100% participation meaning presence of all of the seven members at the meeting or if it is impractical, presence of five of the members will form a quorum.

11. In terms of evidence, the tendered meeting minutes of each meeting shows that only three office bearers attended each of the meetings. They were the Chairman, Deputy Chairman and Secretary (Public Officer). Also present was a non-member namely their lawyer. The Treasurer was absent.

12. The evidence does not support the defence case that the first defendants complied with the requirement of quorum.

13. The defendants do not contest these submissions but point to a number of events which made it practically impossible for the first defendants to hold a Management Committee meeting with the required quorum. Amongst them is the interim injunction of 19th September 2014. According to the defendants, the interim injunction restrained the 117 member ILGs of the plaintiff to hold an AGM to elect the remaining three Executive Members of the Management Committee.

14. Consequently, it rendered Section 8.4 of the plaintiff's constitution with regards to quorum inoperable against them. Conversely, it reduced the number of Management Committee members to four and to be present for each of the meeting to three to form a quorum, which was what had happened.

15. The defendants supported their submission by referring to Section 39 of the [Interpretation Act, 1975](#) and the case of *Michael Gene v. Royale Thompson* (2007) [N3254](#) to demonstrate that in a case where there is no prescribed number for a quorum, a majority of the members is sufficient. By what is exactly a majority is a reference to a simple majority. In this case, as the total membership of the Management Committee is seven, the required simple majority is four. In each meeting, there was a quorum.

16. The significance of a quorum cannot be underestimated. Where the members are required to cast a vote, the presence of the number of members will decide the matter. In this case, the defendants' submission is contrary to the expressed terms of Section 8.4 of the plaintiff's constitution.

17. Also the interim injunction did not render Section 8.4 of the plaintiff's constitution inoperable. The reason for these two propositions is that, Section 8.4 does not expressly reduce the membership of the Management Committee from seven to four. Neither can it be inferred. Thus, for all intent and purposes, Section 8.4 does apply and the first defendants are bound by it.

18. On the other hand, the plaintiff's submission is consistent with what Section 8.4 states. As a matter of law, where it is impractical to have the presence of all of the seven members at the meeting, the presence of five of the members will constitute a quorum. If the number of members present is less than five, there is no quorum for a meeting to be held and it must be put off.

19. Secondly, as a matter of fact, the evidence of the meeting minutes proves that there was presence of only three members at each of the meetings. Thirdly, irrespective of the interim injunction, either one or more of the Executive Members appointed by the landowners must be present in the absence of the one or more of the office bearers to form a quorum.

20. In this case, the undisputed fact is that, the Treasurer Ronnie Mutu was absent at all of the three meetings. The lawyer being a non-member is ineligible to cast a vote on any matter which required a decision of the Management Committee.

21. The consequential effect is that, votes taken in a meeting that lacked quorum will be declared null and void: *Kuyan v. Andrew Salell* (2008) [N3376](#). As the Court held in *Kawage v. Mondu* [[1999](#)] [PNGLR 543](#) members present who unanimously voted on an agenda that lacked quorum is invalid. In *Marika v. Silari* [[2004](#)] [PNGLR 25](#) it was held that absolute majority is not counted from the number present in the meeting but the number of seats in the Assembly and the vote taken in a meeting that lacked quorum is a nullity.

23. It follows that the meetings having lacked the quorum, the resolutions passed in relation to the transfer of shares of the plaintiff in the second defendant to Mark Sakai and the sale of the FHC to Mark Sakai must be found to be without the authority of the board of the second defendant and will be declared null and void or invalid.

Annual General Meeting

24. The undisputed fact is that there was no AGM held by the plaintiff since the grant of the interim injunction on 19th September 2014.

25. From this, the plaintiff submits that, as a matter of law, the first defendant failed in their duties as members of the management committee to obtain approval from the landowners at the AGM before transferring 9,306,311 shares of the plaintiff in the second defendant to Mark Sakai and sale of the FHC to Mark Sakai and then from Mr Sakai to the third defendant.

26. The defendants submit that as the surviving signatory to the MOA, Mark Sakai was authorised as a trustee of the landowners to procure and have the shares of the plaintiff transferred to him. Similarly, he was authorised to transfer the title of the FHC to him and then from him to the third defendant.

27. The authority conferred on him is further affirmed by the power of attorney given to him by the second defendant in October 2016 to either obtain a loan of K8 million to refurbish the FHC or sell it at a price of not less than K10 million.

28. However, the position taken by the defendants is contrary to the original position in 2001 where the 117 member ILGs through their respective Chairman passed a resolution at an AGM to incorporate the second defendant and for the plaintiff to acquire 9,306,311 shares in the company.

29. If those decisions were made by the 117 member ILGs through their respective Chairman, logically and in retrospect, any decision to part with the plaintiff's shares in the second defendant must be made by the same constituted body, it being the 117 member ILGs through their respective Chairman. That decision can be only made at an AGM. As to an AGM, it is an undisputed fact that no AGM was held since the interim injunction of 19th September 2014.

30. It follows that the first defendants had no authority to approve the transfer of shares of the plaintiff in the second defendant to Mark Sakai. The said share transfer is unlawful, null and void.

Resolution on Allotment, Transfer and Value of Shares

31. Deducing from the Company Extract of the second defendant dated 17th March 2016, the business enterprise structure of the plaintiff and the second defendant resembles the one in *Nimp v. Rumants* [1987] PNGLR 96. In that case, a number of clans appointed members of each clan as a shareholder and director of a company called Koibuga Plantation Pty Ltd. The asset of the company was a coffee plantation.

32. The members of the clans were not widely consulted before the defendants sold shares of the company to a third party. The plaintiffs through their appointed representatives sought orders to declare themselves as beneficiaries of shares held by the defendants and have the shares sold to a third party declared void.

33. The National Court held that the directors of the company were trustee directors and were obliged to widely consult the beneficiaries before any decision made. Further "*without proper consultation with a valuation, and followed by a sale effected without following normal commercial procedures of full advertisement, proper evaluation, and accounting the beneficiaries have a good ground to challenge the trustee's actions*".

34. In the instant case, the Company Extract shows that there are non-landowner directors and landowner directors on the board of the second defendant. Secondly, the plaintiff is the sole shareholder of the second defendant. Thirdly, as an Association under the *Association Incorporation Act*, the plaintiff is managed and run by a Management Committee.

35. About four of the members of the Management Committee are also directors of the Board of the second defendant. These directors are elected by the 117 member ILGs through their respective Chairman at an AGM. The 117 ILGs comprises of land owning clans within the project area.

36. Based on this structure, the plaintiff submits that there is a trust created by the 117 member ILGs and the Management Committee of the plaintiff whereby the latter holds property on trust of or for the benefit of the 117 member ILGs. Where the plaintiff holds shares in the second defendant, the plaintiff holds them in trust of, or for the benefit of the 117 member ILGs, which are the bodies that represent the land owning clans in the project area. I accept this submission and find that there is a relationship of trust between the 117 member ILGs and the members of the Management Committee of the plaintiff and also the first defendants as directors of the second defendants.

37. The plaintiff made further submissions on the significance of a resolution and its effect on a share of a company. In this respect, I accept the plaintiff's submission that a share in a company is a personal property under Section 36 of the [Companies Act 1997](#). As it is a personal property, under Section 40 of the Act, it is transferrable from one person to another: see *Relyne Komet v. Angeline Komet* (2018) [N7407](#).

38. Where the shares are owned by a company or association, there must be a resolution for their transfer by the company or association to another.

39. The defendants submit that on 26th September 2016 the first defendants in their capacity as the Management Committee resolved that 9,306,311 shares of the plaintiff in the second defendant be transferred to Mark Sakai.

40. They further submit that there is nothing irregular about the conduct of the first defendants in passing this resolution because if the plaintiff is complaining about no valuable consideration been given for each share by Mark Sakai, the complaint is without merit.

41. This is because pursuant to Section 46 of the [Companies Act, 1997](#) the consideration for which a share is issued may take any form and may be cash, promissory notes, contract for future services, real or personal property, or other securities of the company.

42. In this case, in return for the transfer of the shares and the transfer of title of the FHC to Mark Sakai, the consideration is in the form of a contract for future services where Mark Sakai as the founding and sole surviving signatory to the MOA will use his financial capacity and influence to raise the required funds to renovate the FHC.

43. The validity of the share transfer is further supported by the relevant application and lodgement of share transfer to the Registrar of Companies where it is registered in the share register and is prima facie evidence of the legal title vested in Mark Sakai as the transferee.

44. The statement by the defendants that because Mr Sakai is a pioneer and sole surviving signatory to the MOA, the transfer of shares and FHC property to him is to enable him to use his influence to secure funds to renovate the FHC property is self-serving. The conduct of the first defendants has exposed them to a number of glaring irregularities. They can be summarised as follows:

- First, there is no evidence of financial ability of Mark Sakai to justify the decision of the first defendants to authorise him to use his position to secure funds to renovate the FHC. In other words, it is not known how Mark Sakai will be able to secure funds to renovate the FHC.
- This is true where the said transactions were done in 2016 and after more than three years, there is no evidence to show that funds had been secured by Mr. Sakai to renovate the FHC.
- Second, there is no evidence of debt by the second defendant to justify the first defendants' decision to authorise Mr Sakai to secure funds to settle its debt. In other words, it is not known who the creditors of the second defendant are to support the decision to authorise Mr Sakai to use his position to secure funds to settle the second defendant's debts.
- Again this is true where the said transactions were done in 2016 and after more than three years, there is no evidence to show that funds had been secured by Mr. Sakai to settle the second defendant's debts.
- Third, regardless of the unavailability or absence of an accountant, the preparation of a statement of profit and loss for each year is not an option and is necessary to have it presented at the Board of Directors meeting to justify the decisions taken by the first defendants. The statement for each year is relevant to determine whether the second defendant has met the solvency test. There is no evidence of this document, more relevantly for the years prior to 2016.
- Fourthly, while Section 46 of the [Companies Act, 1997](#) gives a shareholder a variety of options in return for an issued share, in this case it is unreasonable and unfair to offer shares totalling 9,306,311 in return for services to be rendered by one person and for a pathetic sum of K1.00.
- Finally and significantly, as the plaintiff held a very significant number of shares totalling 9,306,311 in the second defendant, there is no evidence of a valuer or accountant to assess a fair value for each share of the plaintiff in the second defendant before decision by the first defendants to allot each share to Mr Sakai: *Dean v. Prince* [1954] Ch 409. This is necessary because each share acquired by Mr Sakai carried with it power to control the second defendant, with demising value. It follows that there is no justification for the transfer of 9,306,311 worth of shares from one person to an entity where he is the sole shareholder and sole director without any proper documentation on valuation.

45. Even if the share transfer has been lodged and registered in the share register of the Companies Office pursuant to Section 46 of the [Companies Act, 1997](#) it does not mean that it is absolute. It may be set aside where it is proved that it was issued by mistake, without the expressed approval of Shareholders or procured by fraud.

46. And so based on the conduct of the first defendants outlined at [44] above, I am satisfied on the balance of probabilities that the transfer of 9,306,311 shares from the second defendant to Mr Sakai was without the expressed approval of the 117 member ILGs through the plaintiff as the sole shareholder of the second defendant and not in the best interest of the plaintiff and the second defendant. It follows that each share transfer must be found unlawful and declared null and void.

Fraud on the title of the FHC property

47. It is trite law that a title holder of State lease has an indefeasible title. However, it may be set aside if it is proven that one or more of the exceptions set out in Section 33 of the *Land Registration Act* is present. In this case the plaintiff alleges that the transfer of title of the FHC from the second defendant to Mark Sakai was procured by fraud and must be set aside under Section 33 of the *Land Registration Act*.

48. As to transfer of title of the FHC from Mr Sakai to the third defendant, the plaintiff also alleges that it was procured by fraud. It submits that fraud is inferred from the conduct of the first defendants as outlined at [44] above. Pursuant to Section 33 of the *Land Registration Act*, the title of the third defendant should be set aside and the title be restored to the second defendant.

49. Except for the submission that there is no illegality in the transfer of title because on 24th September 2016 the first defendants as the former Management Committee of the plaintiff had resolved to have the title of the FHC transferred to Mark Sakai (which resolution was found to be unlawful due to lack of quorum) in order for him to use his financial capacity to raise required funds to renovate the FHC, the defendants do not contest the submissions of the plaintiff that the title of the FHC was procured by fraud.

50. On the other hand, they challenge the standing of the plaintiff to bring the action based on fraud. The challenge to the standing of the plaintiff is based on the fact that, the second defendant was the registered title holder of the FHC prior to its title transfer to Mr Sakai. It was not the plaintiff.

51. After title was transferred to Mr Sakai, he transferred it to the third defendant. Thus, if there is any dispute to the third defendant's title, it should be the second defendant who should dispute it and not the plaintiff. For this reason, the plaintiff lacked standing to dispute the propriety of the transfer of title.

52. However, while it is accepted that the doctrine of separate legal entity where the members of the company are separate from the company favours the defendants, it is not absolute. For that, the defendants' submissions overlook the fact that the plaintiff was the sole shareholder of the second defendant prior to its shares being transferred to Mr Sakai and avoids the issue of tracing of the property.

53. If the title of the FHC is traced back to the original title holder, it will be noted that the second defendant was the original title holder of the FHC. The sole shareholder of the second defendant was the plaintiff. Then the title was transferred from the second defendant to Mr Sakai.

54. As the plaintiff was the sole shareholder of the second defendant at the relevant time, it is open to argue that the plaintiff has standing to challenge the decision of the directors of the second defendant to resolve to transfer the title of the FHC property to Mr Sakai. Mr. Sakai then transferred the title to the third defendant. Significantly, Mr Sakai is the sole shareholder of the third defendant. For the forgoing reasons, I am satisfied that the plaintiff has standing to sue in this proceeding.

55. As to the question whether the title of the third defendant was procured by fraud, I am satisfied on the balance of probabilities that the irregularities and breach of procedure in relation to the approval of the share transfer and transfer of title to the third defendant outlined at [44] above is sufficient to find that the title was procured by fraud.

56. The fraud is actual because the evidence from the minutes of the meetings of the plaintiff's Management Committee of 18th July and 23rd and 24th September 2016 point to Mr Sakai as the person who masterminded and instigated the transfer of shares and title of the FHC property from the second defendant to him. He then transferred the title of the property to the third defendant after he had incorporated it on 13th February 2017 and put himself as its sole director and sole shareholder.

57. The purpose for the share transfer and transfer of title of the FHC property to him and then transfer the property title from him to the third defendant is not what the defendants say is to enable Mr Sakai as the pioneer and sole surviving signatory to the MOA to use his influence to secure funds to renovate the FHC.

58. Rather it is what the plaintiff has maintained all along, and that is, to take the FHC property away from the landowners and place it in the hands of one man (Mr Sakai) in order for him to have complete control and ownership and "*to defraud the Plaintiff off (sic) its shares and investments in the Second Defendant*". This finding is further fortified by the breach of the power of attorney by Mr Sakai.

Power of Attorney

59. Turning now to the power of attorney, the plaintiff submits that Mr Sakai as a director of the second defendant breached the power of attorney granted to him by the landowners through the second defendant. It submits that pursuant to one of the expressed terms of the power of attorney, Mr Sakai was required to sell the FHC property for not less than K10 million. He breached this term when first, he incorporated the third defendant and transferred the ownership (title) of the FHC property to it. Secondly, the consideration for the sale of the property was only K1.00.

60. The defence does not address this issue in its written or oral submission. As there is no contest to the validity of the power of attorney, the plaintiff's submissions must be accepted as being consistent with the terms of the power of attorney. It will be noted that it was agreed that Mr Sakai was to sell the property for nothing less than K10 million.

61. In breach of this term first, he incorporated the third defendant. Second, he put himself as the sole shareholder and sole director of the third defendant as confirmed by the Company Extract of the third defendant dated 4th April 2019. Third, the property was sold to the third defendant for cash of K1.00.

62. In real time, as an agent of the landowners back in the village he failed to comply with their wishes. He did not sell the FHC property for K10 million and failed in his duty to act in the best interest of the landowners who are the beneficiaries of this asset. What he did also constitute a flagrant breach of trust and abuse of power. He must not be allowed to unjustly enrich himself from such flagrant breaches and abuse of power to the detriment of the members of the 117 member ILGs of the plaintiff.

63. I am satisfied that there has been a breach of duty by Mr Sakai as one of the directors of the second defendant. The next issue is whether the corporate veil should be lifted.

Piercing the Corporate Veil

64. Legal commentaries define a corporate veil as a legal concept that separates the personality of a corporation from the personalities of its shareholders and directors, and protects them from being personally liable for the company's debts and other obligations. However, this protection is not absolute.

65. Legal commentaries also refer to the concept of piercing the corporate veil which is a situation where the Court puts aside limited liability of the company and holds its shareholders or directors personally liable for the company's actions or debts. One of the grounds they refer to which a party may rely on to ask the Court to pierce the corporate veil is fraud or a wrong doing which may be illegal or criminal in nature or injustice to third parties.

66. In this jurisdiction, a detailed discussion of the factors relevant to piercing the corporate veil was given by Kandakasi J (as he then was) in *Odata Limited v. Ambusa Copra Oil Mill Limited* (2001) [N2016](#). Respectfully, it is noted that the grounds to pierce the corporate veil are not restricted to fraud or illegality but may include some other grounds. One of them is where the result is so unsatisfactory that it warrants a departure from the doctrine of separate legal entity.

67. From the irregularities and breaches identified above, I am satisfied that they constitute grounds to warrant the piercing of the corporate veil of the second defendant by the plaintiff as its former shareholder to question the decisions or actions of the first defendants as former directors of the second defendant.

68. I am further satisfied that the first defendants have failed in their duty to exercise care and diligence and failed to act in the best interest of the second defendant when they resolved and transferred 9,306,311 shares of the plaintiff in the second defendant to Mr Sakai.

69. Secondly, they failed in their duty to exercise care and diligence and failed to act in the best interest of the second defendant and its sole shareholder being the plaintiff when they resolved and transferred the FHC property to Mr Sakai for a grossly undervalued sum of K1.00.

70. Thirdly, they failed in their duty to exercise care and diligence and failed to act in the best interest of the second defendant and its sole shareholder being the plaintiff when they did not stop or prevent Mr Sakai from selling the FHC property to the third defendant for a grossly undervalued sum of K1.00 and have its title transferred to the third defendant.

71. Finally, even if the decisions/resolutions were passed in meetings which had the required quorum (which is not the case), they are so unsatisfactory such that it warrants the Court to lift the corporate veil of the second defendant and set aside the decisions/resolutions.

72. For the forgoing reasons, I am satisfied that the plaintiff has made out a case for the orders it seeks to be granted. As to costs, based on the findings that the first defendants were responsible for the breaches, they will bear the costs of the proceedings, to be taxed, if not agreed.

Conclusion

73. The plaintiff will be granted orders in these terms:

1. An order in the nature of declaration that the meetings and resolutions passed by the first defendants as Management Committee of the plaintiff on 18th July 2016, 23rd September 2016 and 24th September 2016 respectively are illegal, null and void.
2. All transactions made by the first defendants giving effect to the resolutions passed in the meetings of 18th July 2016, 23rd September 2016 and 24th September 2016 are declared null and void and of no effect.
3. An order in the nature of mandamus directing the Registrar of Companies to cancel the transfer of 9,306,311 shares from the second defendant to Mark Sakai and have them restored to the plaintiff and the Company records be updated forthwith.
4. An order in the nature of declaration that the transfer of ownership in the FHC property described as Business Lease Volume 94 Folio 07 Allotment 03 Section 427 Hohola National Capital District from the second defendant to Mark Sakai and registered by the Registrar of Titles on 3rd February 2017 and thereafter, transmission of ownership by Mark Sakai to the third defendant on 8th March 2017 is null and void and set aside on the basis of fraud forthwith.
5. An order in the nature of mandamus directing the Registrar of Titles to cancel the registration of transfer of title of the FHC property described as Business Lease Volume 94 Folio 07 Allotment 03 Section 427 Hohola National Capital District on 8th March 2017 in the name of the third defendant and have it restored to the second defendant forthwith.
6. The first defendants shall pay the costs of the proceedings, to be taxed, if not agreed.

Edward M. Waifaf

Lawyers: *Lawyers for Plaintiff*

TL Cooper Lawyers : *Lawyers for Defendants*

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