

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO. 74 OF 2020
EMMAUS FOUNDATION INVESTMENTS (U) LTD ::::::::::::::: APPLICANT
VERSUS**

- 1. EMMAUS FOUNDATION LTD**
- 2. THE REGISTERED TRUSTEES OF EMMAUS FOUNDATION TRUST**
- 3. FR. ISIDORE MBALEEBA**
(Executors of the Estate of the Late Rev. Fr. Giovanni Scalabrini)
- 4. COMMISSIONER LAND REGISTRATION ::::::::::::::: RESPONDENTS**

**CONSOLIDATED WITH
MISCELLANEOUS APPLICATION NO. 740 OF 2020**

- 1. EMMAUS FOUNDATION LTD**
 - 2. THE REGISTERED TRUSTEES OF EMMAUS FOUNDATION TRUST**
 - 3. FR. ISIDORE MBALEEBA**
**(Executors of the Estate of
the Late Rev. Fr. Giovanni Scalabrini) ::::::::::::::: APPLICANTS**
- VERSUS**
- 1. EMMAUS FOUNDATION INVESTMENTS (U) LTD**
 - 2. COMMISSIONER LAND REGISTRATION ::::::::::::::: RESPONDENTS**

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

The two applications were brought in respect of the same subject matter. Miscellaneous Cause No. 74 of 2020 was brought by Notice of Motion (amended) under *Section 98 of the Civil Procedure Act (CPA), Sections 3 and 182 of the Registration of Titles Act (RTA), and Order 52 Rule 2 of the Civil Procedure Rules (CPR)* seeking orders that:

1. The Respondents show cause why the Applicant should not take custody of its duplicate certificates of title for land described as Leasehold Register Volume 4071 FOLIO 9, PLOT 1, Third Ring Road; Leasehold Register Volume 3724 FOLIO 22, PLOT 3-7, Third Ring Road Land at

LUZIRA; and KYADONDO BLOCK 243 PLOT 2123, Land at Kyebando, Luzira.

2. The costs of this application be provided for.

The application was supported by an affidavit deposed to by Barigye Martin, a Director in the Applicant Company, which set out the grounds of the application.

M.A No. 740 of 2020 was also brought by Notice of Motion under Section 98 of the CPA, Sections 3 and 182 of the RTA, Order 52 Rules 1, 2 and 3 of the CPR for orders that the Duplicate Certificates of Titles for land comprised in LRV 4071 Folio 9, LRV 3724 Folio 22 and Kyadondo Block 243 Plot 2123 that are in custody of the 2nd Respondent (Commissioner Land Registration) be handed over to the Applicants; and that the costs of the application be provided for. This application was supported by an affidavit deposed to by Justice Remy Kasule, a Trustee of the first Applicant who was appointed as one of the Executors of the will of the Late Fr. Giovanni Scalabrini.

Since both applications were seeking the same remedies in respect of the same subject matter, it was agreed that disposing of one would, in effect, dispose of the other. The applications were therefore consolidated and heard using the pleadings in M.C No. 74 of 2020.

The grounds of the application are as follows:

- a) The Applicant Company is the registered proprietor of the above listed pieces of land, hereinafter referred to as **“the subject property or subject Certificates of Title”**.
- b) The 4th Respondent is empowered by law to take the charge and control of the office of titles and to exercise powers and perform various duties under the law.

- c) In performance of his duties, the 4th Respondent took custody of the Applicant's Duplicate Certificates of Title upon retrieving them from the wrongful possession of the 3rd Respondent on 8th January 2020. The 3rd Respondent surrendered the subject certificates of title to the 4th Respondent having learnt that the 4th Respondent was slated to issue special certificates of title to the Applicant.
- d) The 4th Respondent undertook to verify the current management of the Applicant company and then surrender the certificates of title to the appropriate person on behalf of the company which is the registered proprietor. The 4th Respondent was furnished with all the relevant information pertaining to the Applicant's Directorship but did not release the subject titles. The Applicant's efforts to have the 4th Respondent substantiate the continued holding onto the said Titles have been met with no formal response whatsoever.
- e) The aspects to do with the management and or directorship of the Applicant company were already decided upon this Honourable Court.
- f) The 1st to 3rd Respondents have no legal basis of claiming entitlement to have custody of the subject land titles which are registered in the names of the Applicant company. The 1st to 3rd Respondents are not part of and are strangers to the Applicant company and thus cannot claim to have custody of the company assets.
- g) The 1st to 3rd Respondents were already adjudged by this court to be committing acts of fraud by holding on to the subject land titles.
- h) The management and control of the company assets vests in its directors.
- i) The 1st to 3rd Respondents have never officially presented their claims, if any, to the Applicant Company for consideration. The authenticity of the alleged will of the late Fr. John Giovanni upon which the said Respondents base their claim is questionable.

- j) The handing over of the subject land titles to the Applicant will not prejudice the interests of the 1st to 3rd Respondents, if any, since they lodged caveats over the subject property.
- k) It is just and equitable that the court finds that the Applicant is the proper legal person to take custody of the subject titles.

The 1st to 3rd Respondents opposed the application and, as already stated above filed a counter application which has been consolidated with this application. The affidavit in reply was deponed to by Justice Remmy Kasule, a Trustee of the 1st Respondent duly appointed as one of the Executors of the will of the late Rev. Fr. Giovanni Scalabrini. He deponed the affidavit on behalf of the Executors of the said Estate. The deponent stated as follows:

- a) The appointment of Barigye Martin, the other Directors and the Company Secretary of the Applicant was fraudulently done and therefore invalid and his affidavit in support of the application cannot be relied on as it deliberately misleads the court regarding the true state of affairs concerning the subject land. The 1st to 3rd Respondents dispute the authority and appointment of the existing directors of the Applicant company and the matter is still pending before the Court of Appeal vide Civil Application No. 49 of 2020.
- b) The Respondents do not dispute the ownership of the subject land by the Applicant as they (1st to 3rd Respondents) are the only paid up shareholder in the Applicant Company and have rights to management in the company of the late Fr. Giovanni Scalabrini. The 1st to 3rd Respondents are holders of Letters of Probate to the said estate.
- c) The 1st to 3rd Respondents are the ones who handed over the subject certificates of title to the office of the 4th Respondent to resolve the matter of who has the rightful custody of the same. As such, the claim that the subject titles were taken to verify the directorship of the Applicant company is an outright falsehood. The subject certificates of title were

handed over to disprove the false assertions of the alleged directors who had applied for special certificates of title so as to fraudulently deal with the subject land to the prejudice of the estate of the late Fr. Giovanni Scalabrini.

- d) The 1st to 3rd Respondents have an interest in the Applicant Company as Executors of the estate of the late Fr. Giovanni who kept custody and managed all affairs of the Applicant company as the said Giuseppe Giamonna (the other subscriber to the Memorandum and Articles of Association) had exited the company and had never paid for any shares after the incorporation of the company. The said Respondents are therefore entitled to the custody of the subject titles. The Respondents relied on an undertaking allegedly executed by the said Giuseppe Giamonna indicating he had never paid for any shares.
- e) The assertion that the late Fr. Giovanni Scalabrini died before being allotted any shares in the Applicant company is false and the Respondents have evidence to the contrary.
- f) The 1st to 3rd Respondents have shown cause why the Applicant Company should not have custody of the duplicate certificates of title as the appointment of the directors of the company was irregular and would not be in the interest of the said Respondents for the titles to be released to the said directors whose appointment is being challenged and is still pending in court.

The 4th Respondent too filed an affidavit in reply deponed to by Bigiira Johnson, the Ag. Principal Registrar of Titles in which he laid the background as to how the 4th Respondent came to withhold the subject titles. The deponent categorically stated that the 4th Respondent has no claim over the subject titles and is willing to hand the same over to any party that this court will determine to be entitled to their possession.

The Applicant filed an affidavit in rejoinder sworn by the same deponent, Barigye Martin, whose contents I have also taken into consideration and will rely on in the course of resolution of the issues before the Court.

Representation and Hearing

At the hearing, the Applicant was represented by Mr. Eloket Eric, Mr. Tayebwa Martin and Mr. Kuteesa Paul. The 1st to 3rd Respondents were represented by Mr. Byamukama Jude and the 4th Respondent by Mr. Babu Hakeem. It was agreed that the hearing proceeds by way of written submissions which were duly filed by Counsel. I have considered and relied on the submissions in resolving the issues before the Court.

Issues for determination by the Court

Two issues were agreed upon for determination by the Court, namely;

- 1. Who is supposed to take custody of the Applicant company's land titles as between the current company directorship and the 1st -3rd Respondents?**
- 2. What remedies are available to the parties?**

Resolution by the Court

Issue 1: Who is supposed to take custody of the Applicant company's land titles as between the current company directorship and the 1st -3rd Respondents?

Applicant's Submissions

It was submitted by Counsel for the Applicant that the Applicant is a corporate sole and is the registered proprietor of the titles in issue. Counsel submitted that the Applicant company has its memorandum and articles of association that were signed by Giuseppe Giamonna with 50 shares and the Late Fr. John (Giovani) Scalabrini with 50 shares. The company has three directors, namely,

Barigye Martin, Atukunda Isaac and Ebaka Sheila Akandwanaho, who were appointed pursuant to a court order vide Company Cause No. 002 of 2018 wherein the Court ordered that the remaining shareholder, Giuseppe Giammona hold a one-man meeting and conducts company business following the death of Fr. John (Giovani) Scalabrini in 2016.

Counsel for the Applicant pointed out that at the time of the death of Fr. John Scalabrini, he had not yet been allotted any shares in the company. Counsel mentioned that Giuseppe Giammona was the only person who was allotted 50 shares in accordance with Section 61 of the Companies Act 2012. Counsel contended that the current company directors are the rightful persons to take custody of the land title in issue.

Counsel further submitted that the 1st to 3rd Respondents lacked locus standi to challenge the present application and that even if the late Father John Scalabrini had left a valid will, the deceased's wishes in the will would have to conform to the company's Articles of Association. Counsel concluded that the 1st to 3rd Respondents have no basis to challenge the application simply by virtue of being executors.

Submissions by Counsel for 1st to 3rd Respondents

In reply, Counsel for the 1st to 3rd Respondents submitted that the question for determination was on the custody of the certificates of title. Counsel stated that a group of two directors, with dubious and legally questionable appointments, are asserting a strange claim through this application in so far as they claim to be the rightful custodian of the company property in a private company that was incorporated by two subscribers. Counsel noted that the directors led by Martin Barigye are not representing interests of any shareholder. Counsel submitted that this explains why the said directors failed to obtain an affidavit

from the original subscriber, Giuseppe Giamonna, and have resorted to forgeries and falsehoods.

Counsel submitted that the Applicant's contention that the Executors were not recognized by the company is contrary to the provisions of the Companies Act 2012 and established legal principles. Counsel submitted that executors of an estate of a deceased share holder or member of a company are automatic members of the Company without any need for formalities. Counsel relied on **Section 94 (a) of the Companies Act, 2012** which is to the effect that *"evidence of grant of probate of the will or letters or certificate of administration of the estate of a deceased person having been granted to some person shall be accepted by the Company notwithstanding anything in its articles as sufficient evidence of the grant of undertaking"*. Counsel further relied on **Section 242 (1) of the Succession Act Cap 162** which provides that *"a grant of probate has effect over all property, movable and immovable of the deceased throughout Uganda."*

Counsel submitted that immovable property included shares or related interests in limited liability companies such as the Applicant. Therefore, the purported failure to comply with Article 15 of the Articles of Association of the Applicant by the Executors of the estate of the late Fr. Giovanni Scalbrini did not take away the rights of the deceased in the Company. Counsel relied on the cases of ***Re: Jermyn Street Turkish Baths Ltd (1970) 3 All ER 57*** and of ***Re Bayswater Trading Co. Ltd 1970 1 All ER 608*** to the effect that personal representatives of a deceased member of a company must be regarded as members of the Company even if they are not registered as members of the company.

Counsel further submitted that the said Executors herein do not only have locus standi to intervene in matters of the Applicant company but they have

every right to ensure that its affairs are not conducted in a manner calculated to defraud the company of property that was in safe custody and oversight of a deceased shareholder. Counsel prayed that custody of the subject titles be given to the said Executors.

Determination by the Court

It is settled law that a company is a legal entity separate from its members, including from subscribers to the memorandum and articles of association. After persons have subscribed to the memorandum and articles of association, they become members of the company and are entered on the register of the company. *Section 47 of the Companies Act 2012* gives the following definition of a member of a company;

“Definition of member.

(1) The subscribers to the memorandum of a company shall be taken to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.

(2) A person who agrees to become a member of a company, and whose name is entered in its register of members shall be a member of the company.”

It is clear from the above definition that upon registration of the company, the subscribers to the memorandum and articles of association become members. The Memorandum and Articles of Association contain an entry of the number of shares allocated to each subscriber. The subscribers therefore become members/shareholders. Upon such registration of a private limited liability company, the members are obliged to allot shares and where they do so, they shall file a return of allotment of shares. *Section 61 (1) (a) of the Companies Act* provides as follows:

“(1) Whenever a private company limited by shares or a company limited by guarantee and having a share capital makes any allotment of its shares, the company shall, within sixty days thereafter, deliver to the registrar for registration —

(a) a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and descriptions of the allottees and the amount if any, paid or due and payable on each share.”

On the facts before me, there is evidence that two persons subscribed to the memorandum and articles of association of the Applicant company, namely, Fr. John (Giovanni) Scalabrini with 50 shares and Mr. Giuseppe Giamonna with 50 shares. By virtue of the provision of the law cited above, the two persons became members/shareholders of the company. According to available evidence, beyond the indication of the number of shares in the memorandum, there was no formal allotment of shares and no return of allotment of shares was filed with the Registrar by the time of death of Fr. Giovanni Scalabrini in 2016. The company was incorporated on 7th April 2014 according to Annex “A” to the affidavit in support of the application. As such, there is no evidence of the number of shares paid for and/or payable by each of the two members, as at that time.

It was claimed by the 1st to 3rd Respondents that the late Fr. Giovanni Scalabrini was the only paid up shareholder in the company. This claim was, however, not supported by any evidence. It therefore cannot be believed. To the contrary, the Applicant adduced evidence to show that after securing a court order vide Company Cause No. 002 of 2018, allowing him to hold a one-man meeting, he appointed Directors who filed a Return of Allotment of Shares dated 21st March 2018 and filed on 3rd April 2018.

It was further claimed by the 1st to 3rd Respondents that the said Giuseppe Giamonna had by document dated 24th April 2014 declared that he had not paid and he “will not pay for any shares” in the Applicant company. The document further states – “I hereby direct that all my interest in the said Emmaus Foundation Investment Limited be vested in Rev. Fr. John Scalabrini”. The document is said to be signed by the said Giuseppe Giamonna in presence of one Reacheal Nakabonge, an Advocate. The document is attached to the affidavit in support of the application No. 740 of 2020 (the counter application).

The above said document was denied by the Applicant through the affidavit in rejoinder deponed to by Barigye Martin, one of the Directors of the Applicant company, who attached email correspondence between him and the alleged author of the impugned document. It was submitted by Counsel for the 1st to 3rd Respondents that the evidence disputing the said document is inadmissible and unreliable since the very person (Giamonna) failed to personally make an affidavit in the matter. Counsel submitted that the absence of the said Giuseppe Giamonna was suspect and constituted evidence of bad faith. I however note that in the said email correspondence, on record as Annex “S”, the alleged author explains that he ought to have been available to participate in the court proceedings but for prolonged lock down occasioned by the Covid 19 pandemic. The email correspondence is dated 5th November 2020 and is preceded by an email message from Barigye Martin of 4th November 2020 directed to the said Giuseppe Giamonna.

The email correspondences were attached to the Applicant’s evidence. Counsel for the 1st to 3rd Respondents did not seek to challenge that evidence through cross-examination of the deponent and/or by applying for the same to be expunged from the record. The matter having proceeded upon affidavit evidence, it is taken that any averment or annexure that has not been

successfully challenged is taken as admitted. I therefore do not find any issue of admissibility of the said email correspondences.

Regarding the unreliability of the said evidence owing to the absence of one of the participants to the correspondence, this still goes to failure by the Respondents' Counsel to challenge the said evidence during the hearing. The deponent who adduced the correspondence participated in the communication. He is therefore a competent witness to adduce the same. I do not see any factor that made it imperative for the said Giuseppe Giamonna to depone to an affidavit in this matter. He was not a party to the Cause. He was not deemed by the Applicant to be a necessary witness. As such, his absence does not make the evidence adduced by the Applicant unreliable.

Looking at the document dated 24th April, 2014, alleged to be a declaration made by Giuseppe Giamona, the character of the document does not help its authenticity. It is not in any known form of a document sought to be binding. It is certainly not a statutory declaration or any form of oath. Although it is said to have been witnessed by an advocate, the said advocate did not witness it as a Commissioner for Oaths. The document cannot therefore be relied upon. The denial by the alleged author of ever having signed it has not been rebutted by the Respondents. The document is therefore disregarded by the Court.

That being the case, there is no evidence that Giuseppe Giamonna had ever ceased being a member of the Applicant company. Available evidence indicates that when the late Fr. Giovanni Scalabrani died, Giamonna remained the only member in the company. As seen from Section 47 of the Companies Act, membership is by virtue of either subscribing to the company memorandum or by agreeing to become a member of a company, and having one's name entered in the company register of members. Therefore, after the death of Fr. Scalabrini, there was no other person who qualified as a member. The

Executors of the Estate of the Late Fr. Scalabrini were neither subscribers nor have they shown that they agreed and sought to be admitted as members and were registered on the company register of members.

It was argued by Counsel for the 1st to 3rd Respondents that upon grant of Letters of Probate, the Executors automatically became members. Counsel relied on the old English decisions in ***Re: Jermyn Street Turkish Baths Ltd (1970) 3 All ER 57*** and of ***Re Bayswater Trading Co. Ltd 1970 1 All ER 608*** which propagated the law as such. Counsel for the Applicant on the other hand referred the Court to a more recent and homelier decision in ***Re Kahawa Sukari Ltd [2004] 2 EA 93*** in which **Ringera J (High Court of Kenya)** directly dealt with the applicability of the two above cited decisions in light of the provisions of Section 211 of the Companies Act of Kenya which is the equivalent of our Section 94 of the Companies Act 2012. After a detailed expression of reasons as to why he respectfully declined to agree with the decisions in the two English cases, the Learned Judge held that from the definition of a member of a company, it was apparent that he/she has to be such a person as has been entered in the company's register of members. Accordingly, a personal representative of a deceased member cannot, ipso facto, be regarded as a member of the company. He must first get his/her name into the register.

The above legal position is well supported by Section 47 of our Companies Act. Indeed, in my view, it is not true as submitted by the Respondents' Counsel that the provision in Section 94 of the Companies Act support the view that legal representatives of a deceased member of a company automatically become members. From the clear reading of the provision, it does not support that view. It provides as follows:

Evidence of grant of probate.

The production to a company of any document which is by law sufficient evidence of —

(a) probate of the will or letters or certificate of administration of the estate, of a deceased person having been granted to some person; or

(b) the Administrator General having undertaken administration of an estate under the Administrator General's Act,

shall be accepted by the company, notwithstanding anything in its articles as sufficient evidence of the grant or undertaking.

Clearly the section makes provision for the basis for admission as a member in the company and not for automatic conversion into a member. It indicates that the document (probate or letters of administration) has to be produced to the company, and the company is then obliged to accept it as sufficient evidence of the grant. The company shall then admit such a holder and enter their name on the register of the company. It therefore goes without saying that before the company can accept such a holder as a member, the person must make an application attaching the grant. Any reading into that provision of an automatic conversion of the legal representative into a member is grossly misconceived.

On the evidence on record, the Executors have never sought to become members of the company. They cannot, therefore, be members of the company. The fact remains that upon the demise of Fr. Scalabrini, Giuseppe Giamona remained a single member of the company. Evidence further indicates that vide Company Cause No. 002 of 2018, he applied to court for an order to hold a one-man meeting. The order was granted by the court and pursuant to the meeting, he appointed the current directors and secretary of the Company who made and filed a return of allotment of shares, among other activities.

The 1st to 3rd Respondents are opposed to the said appointment of directors. However, according to the record, their challenge of the same before this court failed and was dismissed. The application for leave to appeal against the dismissal order was also dismissed. The said Respondents currently have an application before the Court of Appeal for leave to appeal against the said dismissal order. As such, the appeal is not yet filed. Be that as it may, even if the appeal had been filed, the orders of the court still stand, i.e. the one allowing a single member to hold a one-man meeting and the one dismissing the application to review the earlier order. The law is that unless set aside by a court of competent jurisdiction, an order of the court, even when challenged, remains valid and enforceable. As it is therefore, the directors appointed by the single member are the current directors of the company until otherwise decided by the company or a court of competent jurisdiction.

Under the principles of company law, directors are the mind, ears, eyes and hands of the company. The management and control of the company are under the charge of directors. This includes control and management of the property of the company. Since the Executors are neither members nor directors of the company, and the subject certificates of title are registered in the names of the company, the Executors have no locus standi to claim for custody of the said certificates of title. It is well noted that the Executors have an interest in the subject property. But they cannot protect that interest through holding onto the property of the company whose custody and control is the duty of company directors. As averred by the Applicant, the Executors can ably protect their interest by maintaining the caveats that they have already lodged on the subject titles.

For the above reasons, and in answer to the first issue, the Directors of the company are the ones responsible and entitled to take custody of the subject certificates of title.

Issue 2: What remedies are available to the parties?

Given the above finding on issue one, I allow the application (MC No. 74 of 2020) and dismiss the counter application (M.A No. 740 of 20200) with the following orders:

1. The Applicant is entitled to take custody of its duplicate certificates of title for land described as Leasehold Register Volume 4071 FOLIO 9, PLOT 1, Third Ring Road; Leasehold Register Volume 3724 FOLIO 22, PLOT 3-7, Third Ring Road Land at LUZIRA; and KYADONDO BLOCK 243 PLOT 2123, Land at Kyebando, Luzira.
2. The 4th Respondent is directed to hand over the said certificates of title to the Directors of the Applicant Company.
3. The costs of both applications shall be met by the 1st to 3rd Respondents. I have found no reason to condemn the 4th Respondent to costs since they retained the subject certificates of title in good faith.

It is so ordered.

Signed, dated and delivered by email this 30th day of April, 2021.



Boniface Wamala

JUDGE