IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MMILLA, J.A., And LILA, J.A.)

CIVIL APPEAL NO. 117 OF 2011

MOROGORO HUNTING SAFARIS LIMITED ..... APPELLANT

VERSUS

HALIMA MOHAMED MAMUYA ..... RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Mruma, J.)

Dated 1st day of April, 2011

in

Commercial Case No. 36 of 2006

JUDGMENT OF THE COURT

2nd May, & 8th June, 2017

MMILLA, JA.:

This appeal originates from Commercial Case No. 36 of 2006 in the High Court of Tanzania (Commercial Division) at Dar es Salaam. Before that court the respondent, Halima Mohamed Mamuya, sued the appellant, Morogoro Hunting Safaris Limited (the company/appellant), praying for declaration that she was a *bona fide* shareholder and director in the appellant company by virtue of the provisions of the Memorandum and Articles of Association; payment by the appellant company a sum of T.shs

124,312,000/= as special damages; and a further sum of T.shs 200,000,000/= as general damages, among other reliefs.

The brief background facts of the case are that the appellant, a tourist hunting company, was incorporated on 3.12.2003 under the laws of Tanzania. The initial subscribers and directors of that company were Mr. Jamal Suleiman Bin Thabit (the Chairman/DW3), Ali Ahmed Saeed and the respondent, Halima Mohamed Mamuya. Each of them took a specified number of shares; DW3 had 8519 shares, Ali Ahmed Saeed 8518 shares, and the respondent had 8518 of them. Each share was worth T.shs 10,000/=. The directors allegedly appointed DW3 as the Chairman of the company and sole signatory, and the respondent as the Managing Director, with a special assignment of procuring for the company an allocation of a hunting block by exploiting her contacts in the tourism industry.

The problems leading to the suit on which this appeal is founded are well explained by the respondent herself who testified as PW1. In fact, she was the only witness who testified in support of her case. PW1 told the trial court that she succeeded to procure a hunting block at Sasawala area in Ruvuma Region in June, 2004 and obtained for the appellant company a

licence which had six legal obligations to be discharged by the company as licence holders, namely:-

(i) To pay block fees;

(ii) To pay tourist agent fees;

(iii) To pay camp building fees in the hunting block;

(iv) To contribute funds to the adjoining villages;

(v) To contribute money towards anti-poaching operations; and

(vi) To indulge in development of infrastructure (mainly roads) within the hunting block.

She had also testified before that court that then, the company had no funds necessary to meet those obligations, and that in consultation with other directors, she secured and spent in excess of T.shs 100,000,000/= for meeting those legal obligations. The respondent was precise that she spent T. shs 6,440,000/= towards development in respect villages around Sasawala hunting block; T. shs 37,000,000/= being camp building fees in the hunting block; T. shs 120,000,000/= for anti-poaching operations; T. shs 15,552,000/= for road maintenance within the hunting block, and a further sum of T. shs 30,000,000/= for water supply; all totaling T. shs 124,000,000/=.

PW1 had also testified that the Chairman of the appellant company (DW3) had on 24.2.2004 deposited shs 100,000,000/= into the appellant company's account, but that the said amount of money was withdrawn by him on 26.2.2004. Apart from shs 20,000/= which was re-deposited being commission to the bank, no other transactions took place in respect of the respondent company's account.

According to the respondent, the turning point came on 10.8.2004 when, in flagrant violation of the company's Memorandum and Articles of Association, the Chairman of that company called a meeting of Board of Directors, but that she was singled out because she was not served with a notice although she was entitled as of right to attend that meeting. PW1 stated that through that meeting the Board of Director purportedly made a resolution calling upon the shareholders to pay a sum equivalent to 75 per cent of the nominal value of their shares. She informed the trial court that such move was similarly a blatant breach of the respondent company's regulations.

The respondent had similarly testified that the subsequent meeting of the Board of Directors was held on 26.11.2004 and, like the former meeting, no notice was served on her. Through that meeting, she said, the

Board of Directors made another resolution on the basis of which her shares and those of her colleague, Alli Ahmed Saeed, were forfeited and transferred to DW3's two sons namely, Mohammed Jamal and Ahmed Jamal . Four days later, that is on 30.11.2004, there was an extra ordinary general meeting whereby the resulting resolution removed them from the list of directors of the appellant company.

The respondent had testified further that after her removal from the appellant company, the latter wrote an embarrassing and defamatory letter to various government authorities thereby injuring her reputation and her personality in the society, particularly so considering that she was a Member of Parliament. She stressed that she had not resigned as a director of the appellant company and was a *bona fide* holder of 8518 shares in the said company.

On the other hand, three witnesses had testified for the appellant company. The first was DW1 Abdul Ramadhani Kimbengele. That witness told the trial court that he was the operations officer of the appellant. He also stated that on the instructions of DW3, he visited Sasawala hunting block upon suspicions that the respondent was illegally involving herself in the business and affairs of the appellant after her removal as director of

the appellant company. His inquiry, he had said, confirmed that the respondent was indeed unlawfully operating in the said hunting block.

Zuberi Dwidi Msekeni testified as DW2. He told the trial court that he was employed by the appellant company in 2004, and was its administrative officer. He added that he was attending all the Board Meetings. He mentioned DW3, the respondent, and Alli Ahmed Saeed as having been the first directors of the appellant company. He testified further that he was the one who served the notice to the respondent at her UWT office along Morocco and Alli Hassan Mwinyi Roads at a building which used to be Gogo Hotel, informing her to attend the meeting of 10.8.2004 as per Exhibits D3 and D4 being copies of the letters and an extract from the dispatch book. He said that the respondent did not attend all the meetings though she was served with the notices, which is the reason why the resolutions were passed in her absence. He similarly testified that the forfeited shares were re-allocated to Mohamed Jamal and Ahmed Jamal who became the new shareholders and directors of the appellant company.

The last witness for the appellant company was Jamal Abdallah Suleiman Bin Thabit (DW3). This witness had testified that he was the sole director of the appellant company after the removal of two of the initial

directors; the respondent and Alli Ahmed Saeed. His recount leading to their removal was briefly that they did not pay 75 per cent of the nominal value of their respective shares in the company following the resolution of the Board of Directors of 10.8.2004 to that effect. He added that in the Board Meeting of 26.11.2004, the Board of Directors made another resolution which resulted in the forfeiture of the shares of those subscribers who did not pay for their respective shares, and that upon the extra ordinary general meeting held on 30.11.2004, the respondent and Alii Ahmed Saeed were removed as directors of the appellant company. He added that the forfeited shares were re-allocated to Mohammed Jamal Abdallah and Ahmed Jamal Abdallah who became the new shareholders and directors of the appellant company. He contested the assertion that the respondent was appointed as the Managing Director of the appellant company, nor that she was the one who raised the funds for the purpose of procuring Sasawala hunting block. He said he was the one who paid for all the statutory obligations of the appellant company in respect of that hunting block. He testified that he gave T. shs 100,000,000/= to the respondent for that purpose. DW3 had testified further that he was saddened to find that after they had paid for that hunting block, the respondent used it as her own property and leased it to Rostam Aziz at an annual rent of US$ 100,000.00.

Concerning the allegations touching on defamation, while admitting to have written a letter dated 2.6.2006 to various authorities informing them that the respondent was neither a shareholder nor a director of the appellant company following the latter's own actions of misrepresentations to various government authorities and the public at large to that effect; DW3 vehemently denied that the said letter contained defamatory statements, or that it was embarrassing and/ or frustrating. He clarified that the said letter merely required the respondent to provide explanation to the appellant company in respect of the unwarrantable activities she was conducting in its name.

After trial, the High Court delivered its judgment on 1.4.2011. The respondent succeeded on four aspects. It found and held that the respondent's forfeiture of her shares was irregular; therefore that she was a shareholder and a *bona fide* director of the appellant company. It also held that the appellant's decision to terminate the respondent from the company was irregular. It further found and held that there was sufficient evidence to establish that the respondent personally raised funds to the tune of USD 27,000.00 and paid the same to the Ministry of Natural Resources and Tourism, on behalf of the appellant company, for procuring

and maintaining Sasawala hunting block in Ruvuma region. It further found and held that the letter which was written by the appellant company to the Ministry of Natural Resources and Tourism was defamatory, consequent to which it awarded the respondent T. shs 50 million thereof. The appeal to the Court is against that decision.

Before this Court, Mr. Juma Nyamgaluli, learned advocate, represented the appellant, and the respondent enjoyed the services of Mr. John Ngeleshi, learned advocate.

The appellant's memorandum of appeal has raised 8 grounds as follows:-

1. That the learned trial judge erred in law and in fact in failing to consider adduced evidence showing that properly called and constituted Board meeting was held to make a call for the shares held by the respondent in the company.
2. That the learned trial judge erred and misdirected himself in law in holding that the appellant's alleged forfeiture of the respondent's shares in the company was irregular and invalid while the Board of Directors of the appellant's company invoked the powers conferred upon them under the Companies Act;

3. That the learned trial judge erred in law in holding that the respondent is still a *bona fide* shareholder of the appellant's company while the respondent failed to pay for the shares that she voluntarily subscribed;
4. That the learned trial judge erred in law and in fact in holding that the appellant's decision to terminate the respondent from the company was irregular and invalid while the removal of the respondent as shareholder and director of the appellant's company was done in accordance with the Companies' Act, 2002;
5. That the learned trial judge erred in law and in fact in holding that the respondent, with the knowledge of the appellant incurred personal expenses in procuring Sasawala Hunting Block for the company while there was no any resolution of the Board of Directors of the appellant's company which authorized and approved these expenses and the respondent did not adduce any proof to the contrary.
6. That the learned trial judge erred in law and in fact in holding that the respondent did not unlawfully interfere with the business and affairs of the appellant's company while the respondent with no lawful appointment and even when removed as a shareholder and director of the appellant's company, continued her action thereby unlawfully interfering with the business and affairs of the appellant company;

7. That the learned trial judge erred in law and in fact by adjudicating on the issue of defamation while knowing that the honourable court, being a Commercial Court, has no jurisdiction to adjudicate on defamation matters;
8. That the learned trial judge erred in law and in fact in failing to consider the appellant's counterclaim while the appellant suffered losses and damage due to unauthorized activities by the respondent.

At the hearing of this appeal, Mr. Nyamgaluli adopted the written submission he had prepared and filed in compliance with Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). He informed the Court that he had nothing to add, but prayed for costs.

On the other hand, Mr. Ngeleshi as well prayed to adopt the written submissions he had filed. Like his colleague Mr. Nyamgaluli, he too said he had nothing to add, but prayed for costs.

The submissions of both advocates were reasonably long but well focused. We wish to take this opportunity to commend them for their brilliant presentations and the several supportive authorities they provided us.

The learned advocates for both parties discussed the 8 grounds of appeal separately, one after another. For the sake of convenience, we have decided to follow the same style but with slight modifications, beginning with the first ground thereof.

As already pointed out, the first ground of appeal allege that the trial judge failed to appreciate that there was sufficient evidence to show that a properly convened and constituted Board Meeting was held to make a call for the shares held by the respondent in the appellant company.

Essentially, this ground focuses on the appellant company's Board Meeting of 10.8.2004. As submitted by Mr. Nyamgaluli, it was in that meeting that the Board of Directors passed a resolution (Exhibit D2) pursuant to Articles 8, 9, and 10 of the Memorandum and Articles of Association of that company, calling upon its subscribers to pay 75 per cent of the nominal value of their respective shares. Relying on the evidence of DW2 and DW3, also Exhibit D4 which was the purported notice relevant to that meeting, Mr. Nyamgaluli insisted that all the directors of the appellant company, the respondent inclusive, were dully served with that notice requiring them to attend that meeting. He submitted that while the

chairman and Alli Ahmed Saeed attended that meeting, the respondent deliberately declined to attend.

Mr. Nyamgaluli also submitted that in fact, under Regulation 41 of Table A of the Companies Act, 2002, lack of, or accidental omission to give notice, or non-receipt of the notice by a member of the company, does not invalidate the proceedings at any meeting. He similarly referred the Court to Regulation 118 of Table A of the Companies Act.

On his part, Mr. Ngeleshi firmly challenged that the respondent was not at all served with a notice to attend the meeting of 10.8.2004 of the Board of Directors as was purported, therefore that the resolution which was made calling upon the subscribers of that company to pay 75 per cent of the nominal value of the subscribed shares was irregular, invalid and of no consequences. He also submitted that even where it was to be said the respondent received the said notice, still, under Article 11 of Table A of the Companies Ordinance Cap. 212 of the Revised Edition, 2002, it is not permitted to call for payment of subscribed shares in excess of one-fourth of the nominal amount at any given time.

Before we may tackle the first ground, we have found it necessary to resolve one point raised by Mr. Ngeleshi concerning the applicable law;

that is, is it the Companies Ordinance Cap. 212 of the Revised Edition (the old Companies legislation), or the Companies Act No. 12 of 2002 (the new Companies legislation), which came into operation on 1st March, 2006?

We think that this point should not unnecessarily detain us. There is no doubt that the disputes between the parties in this case are on the matters which occurred in 2004. Then, the applicable law was the Companies Ordinance Cap. 212 of the Revised Edition, 2002 (the old Companies legislation), and not the Companies Act No. 12 of 2002 (the new Companies legislation), because the latter came into operation on 1st March, 2006. In the circumstances, we find that the old Companies legislation is the applicable law in this case. We now proceed to discuss the merits of the grounds raised.

We have carefully traversed and examined all the evidence touching on this point. The controversy between the parties centered on the question of service of the notice calling them to attend the Board Meeting of 10.8.2004 as aforesaid. The relevant evidence on this point came from the respondent (PW1) on the one part who said she was not served with the notice to attend that meeting, and DW2 and DW3 on the other part who testified that the respondent was served with notice to attend that

meeting but she deliberately declined to attend. DW2 was particular in his evidence that he personally served the said notice to the respondent at her UWT office along the junction of Morocco and Alli Hassan Mwinyi Roads where she was then working as the Secretary of Women Wing (CCM) at what used to be Gogo Hotel, and that she signed in the dispatch book (Exhibit D4). DW3's testimony that the respondent was served with the notice to attend that meeting was anchored on that same document, (Exhibit D4), but that she deliberately declined to attend.

Like the learned trial judge, our starting point is Exhibit D4 which is an extract from the dispatch book in which the respondent was alleged to have signed to acknowledge service of notice to attend the Board Meeting of 10.8.2004 which passed the resolution calling for payment. However, a thorough examination of Exhibit D4 shows that the respondent signed to acknowledge receipt of a copy of the resolution of the Board of Director and not a notice to attend the meeting of 10.8.2004 as purported. In fact DW2, a witness who had testified that he was the one who personally served the written notice to the respondent at her UWT office along the junctions of Morocco and Alli Hassan Mwinyi, referred to Exhibit D3 as the notice which he served to the respondent, which is false because Exhibit

D3 refers to a call notice to pay the nominal value of the shares allocated to the respondent and her co-director, Alli Ahmed Saeed.

At this stage, we would like to seize this opportunity to expound the point that Board Meetings are an integral part of the business of the company, as they inform the Board Members about the condition, strategy and/or failures of the company. On that basis, it is crucial for the directors to be served with notice on when and where the meeting will take place to give them opportunity to attend such meetings. Of course, the notice is not necessarily required to be in writing, unless the company's articles of association so require. In the circumstances of the present case, the articles are silent on the point. That presupposes that the notice may be verbal (face to face), or by phone, by post, fax or e-mail. However, whatever the practice, it must be reasonable and fair, taking into account factors such as where the directors are likely to be, and the place of the meeting or venue. At any rate, the evidence that notice of whatever form was given, is all important.

In our present case, given that none of the exhibits D4 and D3 were a notice which DW2 purported to have served to the respondent, and in the absence of any other clear evidence to establish service of the notice

on the respondent to attend the meeting of 10.8.2004, in whatever form, we are unable to fault the finding of the trial judge that the respondent was not served with notice to attend the Board Meeting of 10.8.2004.

It is also important to observe, as did the trial judge, that while it is beyond controversy that the appellant company was incorporated on 3.12.2003, the document constituted in Exhibit D3 which DW2 purported to be the notice he served to the respondent informing her to attend the meeting of 10.8.2004 refers to the company which was incorporated on 21.11.2003. None of the witnesses who testified for the appellant company, including DW3 himself who was the chairman and director of the appellant company, clarified that discrepancy.

We have also considered the argument advanced by Mr. Nyamgaluli that under Regulation 41 of Table A of the Companies Act, 2002, lack of, or accidental omission to give notice, or non-receipt of the notice by a member of the company does not invalidate the proceedings at any meeting. So also Regulation 118 of Table A of the Companies Act which he referred us to.

As observed above, the respondent was not served with notice informing her to attend the meeting of 10.8.2004. The immediate issue becomes: was it accidental?

As already pointed out, any particular company carries out its management functions by its directors, and that the directors must act collectively that is, by resolution, unless provided otherwise in the Articles. We have also already pointed out that because of that, notices informing them about the board meetings must always be given to all of them in sufficient time to enable them attend any particular meeting. While **accidental omission** to give notice to any of them resulting into failure to attend the meeting **is not fatal** (Regulation 43 of Table A of the old legislation); **deliberate omission** to serve the notice **is fatal and invalidates the meeting and resolution** - See the cases of **Portuguese Consolidate Copper Mines Limited** (1890) 45 Ch. D. 16, **Re Homer District Consolidated Gold Mines Limited Ex parte Smith** (1888) 39 Ch. D., 546 and **Smyth v. Darley** (1849) 2 Comp Cas 789 HL.

We are satisfied in the present case that DW2 had known the whereabouts of the respondent. To be precise, he said she was ordinarily at her UWT offices at what used to be Gogo Hotel along the junction of Morocco and Alli Hassan Mwinyi. He purported that Exhibit D3 was the

notice he served to her at those offices, which turned out to be false because Exhibit D3 is a call notice to pay the nominal value of shares allocated to the respondent and her co-director, Alli Ahmed Saeed. This being the case, failure to serve the notice to the respondent requiring her to attend the meeting of 10.8.2004 was not accidental; *ipso facto,* it was deliberate. Consequently, the Board Meeting of 10.8.2004 was invalid.

The other problem is whether calling the shareholders to pay up to 75 per cent of the nominal value of the subscribers' respective shares was in conformity with the provisions of the governing law.

Mr. Ngeleshi strongly submitted in this regard that even where it was to be said the respondent received the notice, still, under Regulation 11 of Table A of the Companies Ordinance (old legislation), it is not permitted to call for payment of subscribed shares in excess of one-fourth of the nominal amount at any given time. We hasten to say that we agree with him. That Regulation provides that:-

> *"The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares* ***provided that no call shall exceed one-fourth of the nominal amount of the share,*** *or be payable at less than one month from the last call; and*

each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payment) pay to the company at the time or times so specified the amount called on his shares." [Emphasis added].

In view of the clear provisions of this Regulation, it is obvious that since the call for payment of 75 per cent of the nominal value of the subscribed shares was contrary to Regulation 11 of Table A of the Companies Ordinance (old legislation), and because there is no provision in the Articles of Association of the appellant company which provides for call of shares or which varies or exclude the application of Table A of the Companies Ordinance, Regulation 11 of Table A stands supreme. In the circumstances, the trial judge correctly found and held that the appellant company ought to have called not more than one fourth which is 25 per cent and not 75 per cent as was the case.

It is certain therefore that even assuming that the Board Meeting was properly constituted and the respondent was dully served (which was not the case), still, the resolution which was purportedly passed would not be valid as it was against the law.

For reasons we have assigned, the first ground of appeal lacks merit and is accordingly dismissed.

The second ground alleges that the trial judge misdirected himself in holding that the appellant's alleged forfeiture of the respondent's shares in the appellant company was irregular. In our view, this ground may conveniently be discussed together with the third and fourth grounds because of their relatedness. While the third ground alleges that the trial judge erred in holding that the respondent was still a *bona fide* shareholder of the appellant company; the fourth ground challenges that the trial judge erred in holding the appellant company's decision to terminate the respondent from the company was irregular and invalid.

As to the second ground, Mr. Nyamgaluli submitted that the right to forfeit shares in the present matter was properly exercised because such power is conferred by the Articles of Association of the appellant company. He cited Regulation 23 of Table A of the Company Act. He also submitted that according to the evidence of DW2, the respondent's shares were forfeited on 30.11.2005, more than a year after issuance of a notice of a call. He complained that the trial court erroneously held that the appellant

company's act of forfeiting the respondent's shares was irregular and invalid because the said company acted according to law.

Coming to the third ground, Mr. Nyamgaluli urged the Court to answer it in the positive because the respondent was called upon to pay for the shares she had subscribed for subsequent to a valid resolution of the company to that effect, but she did not comply. He added that because the shares were forfeited after almost a year from the time the notice was issued, the trial court had no justification to declare the forfeiture of those shares as invalid.

On the fourth ground, Mr. Nyamgaluli submitted that the respondent's removal as a director of the appellant company was lawful because it was done in accordance with the Companies Act, 2002. He relied on section 193 (1) of that Act. He added that on 26.11.2004, the appellant company called an extra ordinary general meeting following which a resolution was made terminating the respondent as a director of the appellant company.

On his part, Mr. Ngeleshi submitted on the second ground that the Board of Directors did not pass any valid resolution requiring the subscribers to pay for their respective shares. Basing on that, he stated

that the trial judge correctly held that the appellant's act of forfeiting the respondent's share was irregular and invalid.

Concerning the third ground, Mr. Ngeleshi submitted that in view of the trial judge's holding that the meeting of 10.8. 2004 was not properly convened because the respondent was not served with a notice to attend, it is certain that the respondent remains a *bona fide* shareholder and director in the appellant company.

As regards the fourth ground, Mr. Ngeleshi submitted that the trial judge correctly held that the termination of the respondent from the appellant company was irregular, invalid and of no legal effect. He contended that the appellant's advocate resort to section 193 (1) of the Companies Act, through which he tended to justify the respondent's removal, is misleading because that legislation was not the applicable law on 26.11.2004 when the general meeting of the appellant company purported to remove the respondent from her position as director. He stated that the appellant was bound to comply with Article 72 of Table A which was incorporated into the appellant's regulations. He stressed that the holding in the case of **Southern Foundries (1926) Ltd and Federated Foundries Ltd v. Shirlaw** (1940) 2 All E.R. 445 (page 734)

which was cited by the trial judge, correctly applies in the circumstances of the point under discussion. He prayed for the Court to dismiss this ground too.

It is certain that the legality or otherwise of the appellant company's action in forfeiting the respondent's shares depends on the finding we have made in respect of the first ground. In that regard, we have found that the Board Meeting was not properly constituted because the respondent was not dully served with any notice of whatever kind, to attend the Board Meeting of 10.8.2004.

The authority to forfeit the shares resides in the Board of Directors. This is in terms of Regulation 25 of Table A. It is stated under that Regulation that if a member fails to pay any call or installment of a call on the day appointed for payment thereof, the directors may, at any time thereafter, decide to forfeit such shares by passing a resolution. It is worth noting here that the forfeiture of the shares is conditional upon having there been a resolution passed in a valid Board Meeting.

Having found and held in respect of the first ground of appeal that there was no proof that any notice of whatever kind was served to the respondent to attend the meeting of 10.8.2004; it is explicit that the Board

of Directors did not pass any valid resolution requiring the subscribers to pay for their respective shares.

While we agree with the submission of Mr. Nyamgaluli, who relied on the statement of **Rosalind Nicholson in his Book titled Table A – Articles of Association**, in relation to his discussion of Regulation 23 of Table A in connection with the decision in the case of **Spackman v. Evans** at page 45, that the notice in relation to the Board Meeting need not necessarily be in writing, we nevertheless stress, as afore-pointed out, that there must be a notice of any other form because forfeiture of shares must be preceded by a validly held meeting, calling for payment of nominal value of subscribed for shares, which we have said was not the case in the circumstances of this case.

In the circumstances, we find that there is no basis for faulting the finding of the learned trial judge that forfeiture of the respondent's shares in the appellant's company was invalid, irregular and illegal. Thus, the second ground of appeal has similarly no merit and we dismiss it.

Concerning the third ground, we agree with Mr. Ngeleshi that the trial judge's holding that the meeting of 10.8.2004 was invalid because it was not preceded by a validly held meeting calling for payment of nominal

value of subscribed for shares cannot be faulted, especially after having found in respect of the second ground of appeal that forfeiture of the respondent's shares in the appellant's company was invalid, irregular and illegal. It follows that the respondent remains a *bona fide* shareholder and director in the appellant company. Thus, this ground too fails.

On the basis of the same reasoning, we find and hold that the fourth ground of appeal lacks merit. This is because, as rightly submitted by Mr. Ngeleshi, the appellant's advocate resort to section 193 (1) of the Companies Act (new legislation), through which he tended to justify the respondent's removal, is misleading. There are two reasons here; **one** that the cause of her removal was based on a meeting calling for payment of nominal value of shares subscribed for which was not validly constituted as the respondent was not served with a notice of whatever kind to attend that meeting; **two** section 193 (1) of that Act which was relied upon by Mr. Nyamgaluli was not the applicable law on 26.11.2004 when the general meeting of the appellant company purported to remove the respondent from her position as a director was held. Of course, we agree with Mr. Ngeleshi that the appellant was bound to comply with the law (on the question of a valid notice) then governing the affairs of the company, just as was observed in the case of **Southern Foundries (1926) Ltd and**

Federated Foundries Ltd v. Shirlaw (1940) 2 All E.R. 445 (page 734) which was cited by the trial judge. It was stated in that case that the contractual relationship between a company and its directors cannot be determined, save for the events stipulated for in the contract, or by operation of the law, or, by will of the two parties.

Thus, we are resolute that the trial judge correctly held that the termination of the respondent from the appellant company as shareholder and director was irregular, invalid, and of no legal effect. In the circumstances, this ground as well lacks merit and we dismiss it.

The fifth ground of appeal alleges that the trial court erred in holding that the respondent, with the knowledge of the appellant company, incurred personal expenses in procuring Sasawala hunting block for the appellant company while there was no any resolution of the Board of Directors of the Company authorizing and approving those expenses, and the respondent did not adduce any proof of authorization or ratification of those expenses by the appellant company.

In the first place, Mr. Nyamgaluli submitted that the respondent advanced no evidence to establish that she paid an amount of T. Shs 124,312,000/= in procuring Sasawala hunting block for the appellant

company, and that the alleged payment was done with the knowledge of the latter, or that there was any resolution of the Board of Directors which authorized and approved those expenses. Even, he added, there was no notification or subsequent adoption of those expenses by the appellant company. He further submitted that to the contrary, the evidence of DW3 established that it was him who gave to the respondent the sum of US$ 60,000.00 and directed her to pay for the hunting block and other expenses. Mr. Nyamgaluli contended further that it was wrong for the trial judge to question the resolution of the Board of Directors to pay the respondent the sum of US$ 60,000.00 for the aforesaid purpose without looking on the other side of the coin if there was any company resolution which authorized the respondent to spend the monies she allegedly spent to fund the activities of the appellant company, in the absence of authentic proof in that regard.

On his part, Mr. Ngeleshi submitted that his learned friend wrongly submitted that the trial judge held that the respondent incurred T.sh. 124,312,000/= in procuring Sasawala hunting block, as the correct version is that the trial court awarded the respondent the amount of US $ 27,000.00 as having been the actual sum she paid to the Wildlife Department of the Ministry of Natural Resources and Tourism, being the

statutory fee payable by licence holders of hunting blocks. He added that there was evidence from the witnesses from both sides that the respondent was assigned by the appellant company's Board of Directors to procure a hunting block. He similarly said the task given to the respondent to look for the funds for those expenses did not require the resolution of the Board of Directors because this obligation was consistent with her earlier assignment, namely the procurement of a hunting block.

Concerning the contention by Mr. Nyamgaluli that DW3 had paid the respondent US$ 60,000.00 to meet the appellant company's statutory obligations, Mr. Ngeleshi supported the finding of the trial judge. He argued that the allegation was not proved by any documents, such as a payment voucher or any other document. Even, he added, neither Amur Said nor Muhsin Said, through whom DW3 had alleged to have paid the monies to the respondent testified to support that allegation. He submitted similarly that the trial judge correctly rejected that claim because it did not even feature in the pleadings. He prayed the Court to dismiss that ground too.

As will be appreciated, the affairs of any company, including policy and financial issues and all major problems are dealt with at Board

Meetings of the respective company. Under the doctrine of collective responsibility, all directors are bound by its resolutions, meaning, firm decisions of the company to do or not to do something.

We wish also to point out that while the Board of Directors of some of the companies may delegate to any of their directors or officers the authority to manage the day to day matters, material actions require prior approval. However, whether or not any particular matter is material to the business (as opposed to day to day), will depend on the circumstances of the particular company. While it is a fact that there is no fast rule on which matters may be material and which are not, normally serious matters, such as borrowing or lending money, hiring or terminating members of the senior management, to mention only some, will most always require prior approval of the board.

In our present case, the Memorandum and Articles of Association are silent on this aspect. We note however, that the monies which were allegedly spent by the respondent in discharging the statutory obligations were substantial, that is, over and above T.shs 100,000,0000/= million.

Going by what we have just expressed, we think that Mr. Nyamgaluli has a strong point in saying that the respondent could not have spent that

huge amount of money for the sake of the company without assurance of being refunded by first there being a resolution of the Board of Directors, authorizing her to borrow and spend such money. We are also satisfied that there was no evidence to show that such spending was ever ratified by the appellant company in its subsequent Board Meetings. For those reasons, the High Court was not justified to award the respondent the amount of US$ 27000.00 as being the actual sum she paid to the Wildlife Department of the Ministry of Natural Resources and Tourism. We accordingly reverse that finding.

We also find it relevant to point out at this stage that the trial judge's finding that DW3 could not have given US$ 60,000.00 to the respondent for discharging the said statutory obligation because there was no any resolution of the appellant company authorizing him to do so was an unwarranted double standard in weighing evidence of rival parties in a case, which translates into bias or morally unfair application of the principle that all people are equal before the law as envisaged by Article 13 (1) of the Constitution of the United Republic of Tanzania as amended from time to time (the Constitution). See also the cases of **Hangi Said Mwinjuma & 2 Others v. Republic**, Criminal Appeal No. 74 of 2000 CAT and

Benedict Ngwenya v. Republic, Cr. Appeal No. 81 of 2014, CAT (both unreported).

In a nut - shell we find and hold that, save to a limited extent explained above, this ground has merit and we allow it.

The sixth ground of appeal is a complaint to the effect that the trial Court erred in holding that the respondent had not unlawfully interfered with the business and affairs of the appellant company after having been lawfully removed as a shareholder and director of the said company.

The submission by Mr. Nyamgaluli in support of this ground was that after the termination of the respondent as a shareholder of the appellant company on 26.11.2004 through "a valid extra ordinary general meeting" called by the appellant company, the respondent had no business in the Sasawala hunting block, the property of the appellant company, as she had done. At most, he added, she was a trespasser into the appellant company's assets.

Also, Mr. Nyamgaluli added, the respondent invalidly continued to purport and act as a Managing Director of the appellant company for the same reason that she had then been lawfully removed from the appellant

company. Thus, he maintained, the trial court ought to have held that the respondent had no authority to act as such, hence that she unlawfully interfered in the appellant's business and affairs.

Mr. Ngeleshi's response to ground No. 6 was that the removal of the respondent as a shareholder and as a director in the appellant company was void and of no legal effect as earlier on submitted because, whatever the respondent did in Sasawala hunting block was consistent with her position as a company director in the appellant company. In the premises, he went on to submit, the respondent did not unlawfully interfere with the business and affairs of the company as is being contended. He prayed for this ground too to be dismissed.

We think this is another ground which should not unnecessarily detain us in view of what we have repeatedly said in this judgment regarding the respondent's current position in the company. Having found that her shares were invalidly forfeited because there was no evidence that she was served with the notice to attend the meeting of 10.8.2004 at which the resolution calling for payment of 75 percent of the nominal shares the respondent had subscribed for was made; and having found that she was a *bona fide* shareholder and director; further that she was wrongly removed from the company; it follows that the trial court correctly

found and held that the respondent had not unlawfully interfered with the business and affairs of the appellant company. In the premises, this ground too is devoid of merit. We accordingly dismiss it.

Next is the seventh ground which alleges that the trial court had no jurisdiction to adjudicate on the issue of defamation having been aware that it was a Commercial Court.

Mr. Nyamgaluli began his submission by citing Rule 5A of the High Court Registries Rules (HCRR) which proclaimed the existence of a Commercial Division of the High Court within the registry of Dar es Salaam in which the proceedings of Commercial nature may be instituted. He also cited Rule 2 (sic: Rule 3) on the interpretation of the said Rules which provides for the meaning of a "Commercial Case" as a case involving a matter considered to be of commercial significance. The list of such cases, he went on to submit, are from Rule 3 (a) to (j) of the HCRR. He contended that defamation is not amongst the matters listed as having commercial significance, hence his query that the trial court had no jurisdiction to adjudicate on that claim.

He also cited the book titled "The History of Administration of Justice in Tanzania, Mathew Book and Stationers, 2004, 1st Edition," written by

the Court of Appeal of Tanzania, in which he said, the authors explained the intention behind the establishment of Commercial Court Division, that is, to devise some means and a system to grapple with a complex adjudication in areas such as company law, commercial law, international business transactions, intellectual property and other forms of litigations.

In the light of the above, Mr. Nyamgaluli contended that the trial court ought not to have adjudicated a matter of defamation as it had no jurisdiction.

Mr. Nyamgaluli submitted further that assuming the trial court has jurisdiction to hear and determine the cases on defamation, then it violated the provisions of section 57 (1) of the Newspapers Act Cap.229 of the Revised Edition, 2002 which provides that trial of cases of defamation shall be done with the aid of not less than three competent assessors, and in terms of sub section (2) of that section, each assessor is required to give his/her opinion. Since this was not so in the circumstances of this case, he added, the decision of the trial court was clearly wrong. He urged the Court to allow this ground of appeal.

On his part, Mr. Mr. Ngeleshi submitted that the trial court had jurisdiction to adjudicate on the issue of defamation. He cited first Article

108 (1) and (2) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time (the Constitution). He contended that while sub Article (1) of Article 108 of the Constitution creates the High Court of Tanzania, sub-Article (2) of that law confers jurisdiction on that court. Article 108 (2) of that statute provides that:-

> *"Where the Constitution or any other law does not expressly provide that any specified matter shall first be heard by a court specified for that purpose, the High Court shall have jurisdiction to hear every matter of such type. Similarly, the High Court shall have jurisdiction to deal with any matter which, according to legal traditions obtaining in Tanzania, is ordinarily dealt with by the High Court:*
>
> *Provided that the provisions of this sub article shall apply without prejudice to the jurisdiction of the Court of Appeal of Tanzania as provided for in this Constitution or any other law."*

Similarly, Mr. Ngeleshi cited section 5 of the Judicature and Application of Laws Act Cap. 358 of the Revised Edition, 2002 (the JALO). That section deals with powers of a single judge of the High Court, and that under it, a single judge of the High Court may exercise all or any part

of the jurisdiction of, and all or any of the powers and authorities conferred on, the High Court.

Mr. Ngeleshi contended as well that that Rule 5A of the HCRR cited by his learned friend did not take away the powers of a single judge to adjudicate on matters falling within the jurisdiction of the High Court, but were merely intended to streamline the administrative functions of the Commercial Division of the High Court, especially the timely disposal of cases. Even, he added, the definition of the term "Commercial Case" in Rule 3 of the said Rules is not exhaustive. He challenged that if, as suggested by his learned friend, the effect of Rule 5A of the HCRR was to take away the jurisdiction of a judge of Commercial Division of the High Court, then such Rule, being a subsidiary legislation, would be inconsistent with the provisions of section 5 of the JALO, therefore void in terms of section 36 (1) of the Interpretation of Laws Act Cap 1, Revised Edition, 2002.

Mr. Ngeleshi did not end there. He submitted further that the decision of the trial judge to award damages for defamation in the present matter arose from the acts of the appellant company's officer's breach of contract, including the allegation that they wrote an embarrassing and

defamatory letter to various government authorities. Being an act which arose from the same transaction, he added, it was proper for the trial court to grant the relief prayed for in the commercial suit.

Concerning section 57 (1) of the Newspaper Act, Mr. Ngeleshi contended that the section would not be applicable to a commercial case on the ground that the subject matter of defamation in the present case was not published in the newspapers as contemplated by section 56 (2) of said Newspapers Act. As such, Mr. Ngeleshi prayed the Court to dismiss this ground too.

It is a fact that the Commercial Division of the High Court was established within the Registry of Dar es Salaam under Rule 5A of the HCRR, 1984 [GN. 23/1984] as amended by the HCRR (amendment) Rules, 1999 [GN 141/1999 which was later repealed and replaced by the HCRR [GN. 96/2005]. The latest amendment was made in 2012 [GN 250/2012 Published on 13/7/2012]. After that proclamation, the proceedings of commercial nature are required to be instituted in that division of the High Court. Rule 3 of those Rules defines the term "commercial case" as:-

" *. . . a civil case involving a matter considered by the Court to be of commercial significance,* ***including any claim or application***

arising out of a transaction of trade or commerce but not limited to: *(a) the formation of a business or commercial organization: (b) the management of a business or commercial organization; (d) the contractual relationship of a business or commercial organization with other bodies or person outside the business or commercial organization; (d) the liability of a business or commercial organization or official of the business or commercial organization arising out of its commercial or business activities; (e) the liabilities of a business or commercial person arising out of that person's business or commercial activities; (f) banking and financial services; (g) the restructuring or payment of commercial debts by or to business or commercial organization or person; (h) the enforcement of arbitral award; the enforcement of awards of a regional court or tribunal of competent jurisdiction made in accordance with a Treaty or Mutual Assistance arrangement to which the United Republic of Tanzania is a signatory and which forms part of the law of the United Republic; (i) admiralty proceedings; and (j) arbitration proceedings."* [Emphasis added].

Our careful reading of Rule 3 of those Rules entices us to agree with Mr. Ngeleshi that the HCRR did not take away the powers of a single judge

to adjudicate on matters falling within the jurisdiction of the Commercial Division of the High Court, but were merely intended to streamline the administrative functions of that court, especially the timely disposal of cases, for reasons we are about to assign.

In the first place, we are of the resilient view that the words ***"including any claim or application arising out of a transaction of trade or commerce but not limited to . . ."*** in that Rule suggest that the list provided there under in respect of the kind of claims which may be heard and determined by a judge of the High Court (Commercial Division) is not exhaustive. That phraseology is the key reason why we are convinced that a judge in that court may hear and determine a claim of defamation if it arises from, or is interconnected to an aspect which is of commercial significance.

As already pointed out above, the decision of the trial judge to award damages for defamation in the present matter arose from the acts of the appellant company's officers breach of contract, including the allegation that they wrote embarrassing and defamatory letter to various government authorities thereby injuring her reputation and her personality in the society, especially considering that she was a Member of Parliament.

Secondly, while we think that a judge **cannot normally rely** on the general jurisdiction under Article 108 (2) of the Constitution to asset jurisdiction when faced with the issues whether or not he has the requisite jurisdiction to hear and determine a particular matter before him **because there are normally specific other laws granting jurisdiction to that effect**; we nevertheless find that a single judge of the High Court may exercise jurisdiction to hear and determine a claim **not strictly of commercial significance where it may be interwoven with matters which are of commercial significance under powers conferred on such a judge under section 5 of the JALO.** As already pointed out, the list provided under Rule 3 of the High Court Registry Rules in respect of the kind of claims which may be heard and determined by a judge in the High Court (Commercial Division) is not exhaustive. Section 5 of the JALO provides that:-

> *"Subject to any written law to the contrary, a judge of the High Court may exercise all or any part of the jurisdiction of, and all or any powers and authorities conferred on, the High Court."*

We also agree with Mr. Ngeleshi that were we to agree with Mr. Nyamgaluli that Rule 5A of the HCRR took away the jurisdiction of a judge of Commercial Division, then such Rule, being a subsidiary legislation,

would be inconsistent with the provisions of section 5 of the JALO, therefore void in terms of section 36 (1) of the Interpretation of Laws Act, Cap 1, Revised Edition, 2002. That section provides that:-

> *"(1) Subsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made, or of any Act, and subsidiary legislation shall be void to the extent of any such inconsistency."*

In view of what we have stated herein, we find and hold that the learned trial judge had jurisdiction to hear and determine a claim touching on defamation.

Yet to be considered in respect of this ground is the issue whether or not the decision of the trial judge on the claim of defamation would still be valid when it is considered that he did not sit with assessors as envisaged by section 57 (1) of the Newspapers Act.

The starting point in this respect is section 57 (1) of the said Act. It provides that:-

> *"S. 57 (1): Notwithstanding any provision contained in any other law for the time being in force regulating the procedure and practice of courts, in all proceedings to which the provisions of this Part apply,*

the court shall sit with not less than three competent assessors and the case shall be tried in the manner prescribed in this section."

As already pointed out, Mr. Ngeleshi contends that the condition imposed by section 57 (1) of the said Act does not apply in the circumstances of the present case because the subject of the claim of defamation in that case was not published in the newspapers as contemplated by section 56 (2) of said Newspapers Act. Section 56 (2) of that Act states that:-

"S. 56 (2): (2) The provisions of this Part shall apply to every proceeding relating to a suit of a civil nature in respect of any action for libel arising out of anything or matter published in a newspaper and to no other proceeding."

After carefully going through the evidence on record, we found that the letter which is the subject of complaint was dated 2.6.2006. It was addressed to the Principal Secretary of the Ministry of Natural Resources and Tourism, and was copied to the Director of Wildlife, the Director General of Tanzania Revenue Authority, and the Principal Secretary of Industries, Trade and Marketing. DW3 admitted having written it. We are also satisfied that there was evidence to show that the media landed their hands on it because it was published in some of the local newspapers. In

one of the local newspapers, an article was published with the title "**Mbunge Abwagwa, Atupwa Nje ya Kampuni.**" That evidence was not challenged. In the circumstances, we hold firm that section 57 (1) of the Newspaper Act was applicable because the matter was published in the newspapers.

In view of the above position, the burning issues becomes whether or not by not sitting with assessors in hearing and determining a claim of defamation, the trial court violated the provisions of section 57 (1) of the Newspapers Act.

We have already reproduced section 57 (1) of the News Paper Act in this judgment. Admittedly, the said provision is couched in mandatory terms in so far as part of it reads that "*. . . in all proceedings to which the provisions of this Part apply, the court shall sit with not less than three competent assessors and the case shall be tried in the manner prescribed in this section.*" Indeed, this suggests that since the trial judge did not sit with the assessors in the trial of that claim, that provision was violated. It follows therefore that the finding of that court on damages resulting from that tort was erroneous. Consequently, that court improperly awarded the

sum of T. shs 50,000.000/=. We accordingly reverse that finding. Thus, this ground succeeds to that extent.

The last ground of appeal alleges that the trial judge erred in law and in fact in failing to consider the appellant's counterclaim while the appellant suffered losses and damages due to unauthorized activities by the respondent.

In support of this ground, Mr. Nyamgaluli submitted that the counter claim raised in the appellant's written statement of defence was wrongly ignored. He contended that the counter claim was founded on the respondent's action of renting out the appellant company's Sasawala hunting block to her own economic gains in the name of the appellant company without the authority of its directors. He contended that the appellant company sustained losses and damages as was particularized in paragraph 46 of the counter claim; thus she was entitled to the refund thereof.

On his part, Mr. Ngeleshi challenged that the trial judge properly dismissed the counter claim. He reasoned that since a counter claim is a cross suit, the appellant company ought to have called witnesses to prove its claim, but it did not. He added that no evidence was led to prove the

quantum of damages it allegedly suffered, hence that the counter claim was rightly dismissed. He prayed the Court to dismiss this ground too.

We have noted in this case that the appellant company raised a counter claim in the written statement of defence which was filed on 1.9.2006 and is reflected from page 65 to 74 of the Record of Appeal. Since a counter claim is a cross suit, or rather an independent cause of action brought by the defendant against the plaintiff in a civil proceeding that asserts an independent cause of action; in a fit case, the appellant company would have been duty bound to call witnesses to prove its claim. However, we hasten to say that this ground is baseless for a different reason from that which was advanced by Mr. Ngeleshi.

As will be recalled, after the respondent had instituted her suit in court on 4.7.2006, the plaint was amended twice; the first amended plaint was filed on 24.8.2006, and the second amended plaint was filed on 7.8.2007.

On the other hand, the appellant company filed their first written statement of defence (WSD) on 10.8.2006, and the first amended WSD was filed on 1.9.2006. That WSD carried a counter claim appearing at page 65 to 74. However, when they filed their second amended WSD on

21.7.2007, the counter claim was not included. On the basis of that, it appears to us that the appellant company's eighth ground of appeal is based on the first amended WSD which, as pointed out was filed on 1.9.2006. That being the case, then this ground of appeal is lacking merit. We are saying so for no other reason than the point that upon filing the second amended WSD on 21.7.2007, all the previous WSD, including the first amended WSD of 1.9.2006 which carried the counter claim, ceased to have any effect as they were as good as if they never existed. See the case of **Tanga Hardware & Auto Parts Ltd and Six Others v. CRDB Bank Ltd**, Civil Application No. 144 of 2005, CAT (unreported) which relied on the persuasive case of **Warner v. Sampson & Another** [1958] 1 QB 297 in which it was held, *inter alia* that:-

> *". . . once pleadings are amended, that which stood before amendment is no longer material before the court."*

For this reason, we are not convinced that the appellant's counter claim was erroneously ignored, instead the appellant discarded it. Consequently, the eighth ground of appeal lacks merit and we dismiss it.

In conclusion, save for ground No. 6 and part of ground No. 7, the appeal is dismissed to the extent herein explained. For the same reasons, we are justified to direct that each party bears own costs.

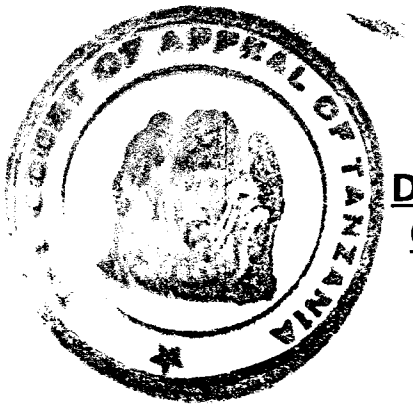
DATED at **DAR ES SALAAM** this 5th day of June, 2017.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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



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