**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: MKUYE, J.A., KIHWELO, J.A. And MAKUNGU, J.A.)**

**CIVIL APPEAL NO. 200 OF 2016**

**DAVID JOSEPH MAHENDE.....APPELLANT**

**VERSUS**

**AFRISCAN GROUP (T) LTD.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam)**

**(Songoro, J.)**

**dated the 15th day of December, 2015**
**in**
**Commercial Case No. 86 OF 2013**

.....

## JUDGMENT OF THE COURT

*24th October 15th December, 2022*

**KIHWELO, J.A.:**

This is an appeal against the decision of the High Court of Tanzania, Commercial Division (Songoro, J.) in Commercial Case No. 86 of 2013 (the suit) which awarded the respondent judgment and decree as prayed.

The facts of this case as can be gleaned from the record are not so complicated to understand, and they are as follows. The appellant and the respondent were amongst the founder members of Afriscan Construction Co. Ltd, a limited liability company incorporated on 30th October, 1990 under

the laws of Tanzania (the company) to carry among other objects, the business of civil engineering and construction, and each of them holding 40 shares while 20 shares were held by one Saidi Msangi. Sometimes in September 2000 at the joint meeting of the company's shareholders and directors and in view of injecting more working capital, the appellant transferred 10 shares to the respondent which was evidenced by share transfer forms and minutes of the Board Meeting both dated 15th September, 2000 which were later admitted in evidence and marked as exhibit P3 and exhibit P5 respectively as a result, the appellant remained with 30 shares only.

It is further, pointed out that, in June, 2013 the appellant conducted search at the Registrar of Companies into the affairs of the company purporting to show that he was holding 40 shares knowingly that he had already transferred 10 shares to the respondent. The appellant's further, through his prior letter dated 5th June, 2013 indicated that the respondent's Managing Director namely Ulf Nilsson had neither mandate nor interests to serve in the company the position he knew was not the true.

Consequently, the respondent instituted the suit at the High Court of Tanzania (Commercial Division) (High Court) against the appellant praying among other things, for declaration that the defendant had on 15th

September, 2000 transferred 10 shares in the company, general damages and costs of the suit.

In the ensuing case before the High Court the respondent produced four witnesses namely Ulf Nilsson (PW1), Raymis Zakayo (PW2), Farida Nelson (PW3) and EX E2912 Detective Staff Sergeant Johannes Joseph Mugayi (PW4) and a host of documentary exhibits namely Memorandum and Article of Association (exhibit P1), Certificate of Incorporation (exhibit P2), share transfer form and Tanzania Revenue Authority (TRA) payment notice and deposit slip (collectively marked as exhibit P3), Agreement between the appellant and the respondent (exhibit P4), minutes of the meeting of the Board of Directors of the company (exhibit P5) and the Forensic Examination Report (exhibit P6). On the adversary side, the appellant featured two witnesses, the appellant himself (DW1) and Said Abdallah (DW2).

At the height of the trial on 15th December 2015, the High Court (Songoro, J.) found out that the respondent's evidence proved on the balance of probability that, the appellant lawfully sold and transferred his 10 shares to the respondent and therefore the respondent's case succeeded with costs. In the result, the appellant dissatisfied filed this appeal which is grounded upon five (5) points of grievance, namely:

1. *That, the learned trial Judge erred in law and in fact in entertaining the invalid suit, having been expired on 24th December, 2015 without any order extending the same.*
2. *That, the learned trial Judge erred in law and in fact in admitting the inadmissible documentary evidence, to wit, exhibit P5 and P6 and further erred in law when he relied upon the same to enter judgment in favour of the respondent.*
3. *That, the learned trial Judge erred in law and in fact in holding that the purported meeting of 30th September, 1998 and 15th September, 2000 which meeting allegedly deliberated on the sale and approval of his 10 shares held in Afriscan Construction Co. Ltd to Afriscan Group (T) Ltd the respondent, were valid meetings.*
4. *That, the learned trial Judge erred in law and in fact in holding that the purported Board Resolutions made in the meetings attended, chaired and voted for by Ulf Niison a non-shareholder and non-director, was valid and effectual, towards transacting sale of shares by the appellant to the respondent.*
5. *That, the learned trial Judge erred in law and in fact in holding that the alleged sale of 10 shares of the appellant to the respondent, which sale flouted the law and procedures that govern sale and transfer of shares, was valid.*

We should interpose here and observe that on 9th February, 2021 upon a request by Mr. Samson Mbamba, learned counsel for the appellant who made a formal prayer to the Court for it to take additional evidence or direct the High Court to do so, and in terms of

rule 36 (1) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules), we directed the High Court to take additional evidence relating to the Document Examination Report with Ref. No. FB/DOC/LAB/01/2020 dated 28th January, 2020 disowning the previous examination report. We further directed the High Court to certify such evidence to this Court together with a statement of its own opinion regarding the credibility of the witnesses who adduced the additional evidence in relation to the exhibit tendered.

When eventually, the appeal was placed before us for hearing on 24th October 2022, the appellant was represented by Mr. Mbamba, learned counsel while Mr. Joseph Rutabingwa, learned advocate appeared representing the respondent. Before highlighting the respective written submissions lodged in support or in opposition to the appeal, the learned counsel prayed and were granted leave to adopt them so as to form part of their oral arguments. Mr. Rutabingwa further prayed and was granted leave to withdraw the notice of cross appeal which was lodged in Court on 3rd June, 2022 which automatically made the notice of preliminary objection on cross appeal raised by Mr. Mbamba, redundant. On the other hand, Mr. Mbamba prayed and was granted leave to abandon ground one of the appeal

and in its place argue an additional ground of appeal in terms of rule 113 (1) of the Rules thus:

> *"In so far as the trial court's judgment was wholly based on exhibit P6, which was falsely said to have been sourced from the Forensic Office, which office disowned it, the said judgment was obtained by falsehood/fraud, and by reason of the falsehoods/fraud, the same cannot stand, for whatever reasons".*

Mr. Mbamba, argued first the additional ground of appeal and his submission was to the effect that, in as much as the impugned judgment was wholly procured based upon exhibit P6 which is a report of the handwriting expert in relation to the disputed signatures of the appellant in exhibit P5 that is minutes of the board resolution and exhibit P3, share transfer forms which was disowned by the Forensic Bureau in the course of taking additional evidence, then the entire judgment was obtained by falsehood or fraud and therefore it cannot stand. Specifically, the learned counsel referred us to pages 101 and 102 of the supplementary record of appeal as well as exhibit ADD-EVD-No.1 and exhibit ADD-EVD-No. 2. He further, referred us to pages 126 and 127 of the supplementary record of appeal as well as pages 783 to 784 of the record of appeal to facilitate the appreciation of his proposition.

The learned counsel zealously contended that, since exhibit P6 was the sole evidence in relation to the conclusion of the sale of shares then it utterly destroys the confidence of the evidence tendered before the trial court which lead to the impugned judgment. He paid homage to the case of **Mathias Timothy v. Republic** [1984] TLR 86 in which the High Court discussed the effect of falsehood in the testimony of the witness. In his considered opinion, all witnesses who testified in relation to exhibit P6 cannot be trusted because exhibit P6 never existed at the time they were testifying. Reliance was further placed in the case of **Zakaria Jackson Magayo v. Republic**, Criminal Appeal No. 411 of 2018 (unreported).

Mr. Mbamba, further argued the remaining grounds of appeal conjointly and his complaint was mainly based upon the failure by the trial Judge to analyze the evidence on record but also what he termed erroneous interpretation of the law governing sale and transfer of shares in a limited liability company like the company in dispute.

In support of the argument that the learned trial Judge did not properly analyze the evidence on record, Mr. Mbamba submitted that, it was wrong and misleading for the learned trial Judge to find that the appellant legally sold his 10 shares to the respondent while relying on the evidence of PW1, PW2 and PW3 as well as the evidence in exhibit P3, exhibit P5 and exhibit

P6 knowingly that the appellant gallantly refuted to have appended his signatures in exhibit P3 and exhibit P5 and also without regard to the fact that the appellant also contested exhibit P6. He went on to submit further that, exhibit P6 was not admissible in civil trial to resolve the controversy on handwriting, since it was made in terms of section 205 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002, unless and until it was tested in a criminal case which was not a case in the impugned decision.

Illustrating further, Mr. Mbamba faulted exhibit P6 in that the witness who tendered did not indicate the Government Gazette under which he was appointed as handwriting expert and the source of the specimen signature and handwriting was uncertain, citing the case of **Mashaka Pastory Paulo Mahengi@Uhuru & Others v. Republic**, Criminal Appeal No. 49 of 2015 (unreported). Mr. Mbamba went on to fault exhibit P6 for not showing the necessary scientific criteria for testing the accuracy of the conclusion made by the expert so as to enable the court form its own independent judgment by applying the criteria to the facts before it and cited the case of **DPP v. Shida Manyama @Selemani Mabuba**, Criminal Appeal No. 285 of 2012 (unreported).

In further support of the appeal, Mr. Mbamba contended that, the learned trial Judge erroneously failed to find that the sale of the alleged 10

shares was invalid and no title could be said to have passed from the appellant to the respondent because the alleged transfer violated the very law that regulates transfer of shares. The learned counsel, recited article 4 (a), (b) and (c) of the Articles of the Association of the company (exhibit P1) which prohibits sale of shares to a non-member of the company and submitted that, the learned trial Judge erroneously interpreted the provision of article 4 (a), (b) and (c) to mean that it is not a bar but merely a control which to his considered opinion is not right as the proper procedure required is to issue a notice of intention to sale shares amongst shareholders followed by a board meeting to agree on the buyer and the price something which the learned trial Judge did not address at all, the learned counsel submitted.

Finally, the learned counsel challenged the validity of the board meeting which sanctioned the sale of shares in that it was irregular as it violated the Articles of Association of the company. Elaborating, he zealously argued that, according to exhibit P5 the meetings were called for and presided over by PW1 who was neither a chairman nor a director of the company contrary to the dictates of Article 45 of Table A to the Companies Act, Cap. 212 R.E. 2002 (the Companies Act) which was adopted by the company to regulate its internal affairs. He went on to contend that, even more glaring the notices of the meetings were not sent to members within

the required 21 days and in the absence of a special resolution to that effect. Mr. Mbamba argued that, the totality of the above infractions should warrant the Court to allow the appeal and set aside the judgment of the trial court.

The respondents' learned advocate Mr. Rutabingwa, prefaced his reply submission by arguing that he will divide the submissions into two parts, one, submissions in relation to the evidence which was before the learned trial Judge and two, submissions in relation to additional evidence which was not before the trial Judge and that in so doing he will not follow the pattern adopted by the learned counsel for the appellant.

Mr. Rutabingwa argued in response to the additional ground of appeal that, exhibit P6 was not the sole basis upon which the impugned judgment was wholy procured because exhibit P6 was not the sale itself but rather the basis of the sale was the confirmation of sale which was done by the board meeting as evident in exhibit P5 and according to Mr. Rutabingwa, the basis of the decision was the testimony of PW1, PW2, PW3 as well as exhibit P3, exhibit P5 and exhibit P6. Citing section 74 of the Companies Act, he argued that, there was no problem in selling shares to anyone else other than members of the company as argued by Mr. Mbamba. He reiterated what was held by the learned trial Judge that according to the Articles of Association in particular article 4 (a), (b) and (c) there is no restriction in one member

of the company selling to another and referred us to extract from a textbook by a renown author, *Gower and Davies Principles of Modern Company Law*, 8th Edition at pages 936 and 937 and argued that there was ample evidence before the learned trial Judge other than exhibit P6, to confirm that the appellant transferred his shares to the respondent.

Responding the complaint that the appellant did not attend in the meeting and that this fact was appreciated by the learned trial Judge in his judgment, Mr. Rutabingwa submitted at considerable lengthy on this aspect, and his submission was that, the trial judge did not affirm this in his judgment but rather the appellant misconstrued the findings of the learned trial Judge who was satisfied that the appellant attended the meeting and actually signed the share transfer documents relying on the overwhelming evidence of PW1, PW2 and PW3. He referred us to pages 780 to 782 of the record of appeal and zealously submitted that there was ample evidence on record to support the findings that the appellant was present at the meeting and actually signed the minutes and share transfer documents.

Regarding the forensic report, exhibit 6 which was challenged by the appellant's counsel, Mr. Rutabingwa submitted that, although the report features in the impugned judgment but the same was subject of a ruling of the trial court which was delivered on 21st October, 2015 in which the

learned trial Judge adequately addressed the issue of admissibility of handwriting expert report. Mr. Rutabingwa referred us to pages 630 and 666E of the record of appeal and contended that, given the considerable deliberation which the learned trial Judge did in respect of the report, there is no way he can be faulted for admitting exhibit P6 in evidence. The learned counsel went further to argue that, regarding the complaint that PW4 who tendered exhibit P6 was not gazzetted, this was clearly addressed by PW4 during examination in chief and cross examination and if at all the appellant was still in doubt he ought to have brought evidence to the contrary.

The learned counsel, further submitted in response to the complaint that the documents were not sourced by the handwriting expert and also the complaint that the report did not have adequate scientific analysis, by arguing that, the Forensic Bureau received the documents for analysis and that it is not the duty of the bureau to go around looking for documents and that the forensic report was exhaustive enough and met the criteria for scientific analysis.

In response to the argument that the sale of shares was unlawful for breaching article 4 (a), (b) and (c) of the Articles of Association, which is part and parcel of the Memorandum and Articles of Association of the company, exhibit P1, which restricted sale of shares to non-member, Mr.

Rutabingwa argued that, that was not the proper interpretation of clause 4 (a). He argued that, the proper interpretation is that, sale of shares may be done to a member or any person selected by the directors as a desirable person to buy shares of the company and in his opinion, the learned trial Judge was undeniably right to have held that the restriction is a mere control and not a bar or prohibition on transfer of shares to an outsider like the respondent. The learned counsel therefore was of the view that, article 4 (a) was not violated as alleged by the appellant since all directors were present and they confirmed the share transfer. He further argued that, the issue of failure to issue notice arose during the hearing as it was never raised through pleadings.

Mr. Rutabingwa further argued in reply to the complaint that the board meeting which sanctioned the sale of shares was invalid because it was chaired by PW1 who was not a director of the company. He contended that, PW1 in his witness statement confirmed that he was a Managing Director of the company and PW1 further stated so during cross examination and re-examination. He further, argued that the issue of 21 days' notice was not a requirement under exhibit P1 which do not indicate anywhere, and article 5 of the Articles of Association is categorically clear that articles 39 to 53 of

Table A shall apply subject to variations. He therefore, prayed that the appeal be dismissed with costs.

In the course of hearing, we prompted the learned advocates for either side to address us on whether the evidence of PW1 was properly taken. Whereas Mr. Mbamba argued that the witness statement was sworn and left the matter to the Court to give directions, Mr. Rutabingwa was of the opinion that the evidence of PW1 was properly taken and therefore, there was nothing wrong with it.

Having listened to the oral account and read the written rival submissions by the learned trained minds, the question we are enjoined to answer, at this juncture, is whether the appeal before us is meritorious. Put differently, can we say that the learned trial Judge was right to arrive at the conclusion he made? For the sake of convenience, we shall deal first with the question which was raised by the Court on whether the evidence of PW1 was properly taken by the trial court.

We find it apt to reproduce the relevant parts of the testimony of PW1 as featured at pages 304 and 615 of the record of appeal. The Witness Statement of PW1, which was made under rule 48 (2) of the High Court (Commercial Division) Procedure Rules, 2012, Government Notice No. 250

published on 13/07/2012 (Commercial Court Rules) at page 304 reads in part:

> *"1. My name is Ulf Nilsson*
>
> *2. I am an adult, Christian, resident of Oysterbay Kinondoni Municipal Dar es Salaam City.*
>
> *3. My age is 71 years.*
>
> *4. I am the Managing Director of Afriscan Group (T) Ltd and Afriscan Construction Company Limited and an accountant by profession."*

Furthermore, the testimony of PW1 during trial is reflected at page 615 and it reads:

> *"**Electronically Recorded**:*
>
> *PW1. ULF NILSON, 72 years, residence Kimweri Road, 52 Kinondoni Dar es Salaam, Christian.*
>
> *I made a statement, and pray that the statement be conducted (sic) as my statement (sic)*
>
> *I have a MEMART which shows to (sic) I am skeleton of Afriscan (sic). I pray to tender an exhibit."*

Quite clearly, the excerpts above indicate in no uncertain terms that PW1's witness statement was not made on oath or affirmation as required by rule 48 (1) (a) of the Commercial Court Rules. To make matters even worse, PW1 did not swear before giving his oral evidence in court which

raises a number of legal questions on the competence and validity of PW1's evidence on record.

This brings us to a brief discussion of the law relating to the requirement for witnesses to take oath before they give evidence. The requirement is provided under section 4 (a) of the Oaths and Statutory Declarations Act, Cap. 34 R.E. 2019 (the Act). For clarity, we wish to extract the relevant parts of section 4 (a) of the Act thus:

> *"4. Subject to any provision to the contrary contained in any written law* ***an oath shall be made by-***
> *(a)* ***any person who may*** *lawfully be examined upon oath or give or* ***be required to give evidence upon oath by or before the court****" (Emphasis added)*

Such is the law regarding the mandatory requirement for witnesses to take oath before they give evidence in court. Unfortunately, one thing is conspicuously clear as the record bears out that, PW1 did not swear before giving his evidence in court. With respect, the totality of the above clearly demonstrates that, PW1's evidence and its validity becomes questionable.

As to what is the effect of omitting to administer oath to witnesses before they give their evidence in court, the law is settled and clear. The is, in this regard, a long and unbroken chain of decisions of the Court which underscores the duty imposed on the court to ensure that every witness is

examined upon oath or affirmation, see, for instance **Nestory Simchimba v. Republic,** Criminal Appeal No. 454 of 2017, **Mwami Ngura v. Republic,** Criminal Appeal No. 63 of 2014 and **Jafari Ramadhani v. Republic,** Criminal Appeal No. 311 of 2017 (all unreported). The requirement is mandatory and the omission to do so vitiates the evidence of that particular witness. The spirit behind is to the effect that no witness will be examined without oath or affirmation and that any evidence recorded without oath or affirmation will have no value before any court of law therefore will be disregarded.

We, on our part, think the trial court, erred in respect of the failure to comply with the mandatory requirement to administer oath to PW1 before giving his evidence in court.

There can be no better words to express our view and conclude as we do that, the entire testimony of PW1 is invalid and consequently, we expunge it from the record.

Having expunged the evidence of PW1 which includes all exhibits tendered by him to wit, exhibit P1 (Memorandum and Articles of Association), exhibit P2 (Certificate of Incorporation), exhibit P3 (share transfer forms) and exhibit 4 (Agreement between David Mathias Nilson and David Mahende), we are, admittedly, left with a skeleton of the respondent's

case which is somehow too remote to have proved his case before the trial court. If anything, it is a mere speculation and not a very strong evidence to prove the case even at the standard required in civil case. It is a peremptory principle of law that, the court cannot decide a case based on speculation but rather it has to base on solid evidence on record.

In the upshot, and based upon the foregoing, we find that the appeal has merit and we allow it. The decision of the High Court in Commercial Case No. 86 of 2013 is accordingly reversed. Given the circumstances of this case, we make no order as to costs.

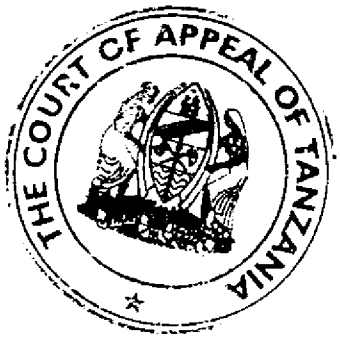
**DATED** at **DAR ES SALAAM** this 13th day of December, 2022.

R. K. MKUYE
**JUSTICE OF APPEAL**

P. F. KIHWELO
**JUSTICE OF APPEAL**

O. O. MAKUNGU
**JUSTICE OF APPEAL**

Judgment delivered this 15th day of December 2022 in the presence of Mr. Evodius Rutabingwa, learned counsel for the Respondent also holding brief for Mr. Samson Mbamba, learned counsel for the Appellant, is hereby certified as a true copy of the original.




S. P. MWAISEJE
**DEPUTY REGISTRAR**
**COURT OF APPEAL**