IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MWAMBEGELE, J.A., MAIGE, J.A. And MDEMU, J.A.)

CIVIL APPEAL NO. 630 OF 2023

MOHAMED ABDILLAH NUR ..... 1ST APPELLANT
UMMUL KHERI MOHAMED ..... 2ND APPELLANT
WINGS FLIGHT SERVICES LTD ..... 3RD APPELLANT
AFRICA FLIGHT SERVICES ..... 4TH APPELLANT

VERSUS

HAMAD MASAUNI ..... 1ST RESPONDENT
ARTHUR MOSHA ..... 2ND RESPONDENT
JUMA MABAKILA ..... 3RD RESPONDENT

[Appeal from the ruling of the High Court of Tanzania, Commercial Division at Dar Es Salaam]

(Magoiga, J.)

Dated the 8th day of July, 2022

in

Misc. Commercial Cause No. 33 of 2021

JUDGMENT OF THE COURT

16th & 26th February, 2024

MDEMU, J.A.:

Through a petition supported by an affidavit verifying the said petition, the three respondents herein, applicants by then, moved the High Court of Tanzania, Commercial Division at Dar es Salaam under the provisions of section 234 of the Companies Act, Cap. 212 (The Companies Act) for the following reliefs against the four appellants, respondents by then:

1. *A declaration that the 3rd respondent under the leadership of the 1st and 2nd respondents breached the joint venture agreement and the share transfer agreement.*
2. *A declaration that the 3rd respondent has unjustly enriched at the expense of the 4th respondent.*
3. *An order to the 3rd respondent to surrender 50% of the 65% of the shares allotted to the latter to be returned to the 4th respondent and for the same to be divided amongst the minority shareholders on pro rata basis.*
4. *An order appointing a fair, just and legal management to ran the affairs of the 4th respondent.*
5. *General damages against the 1st, 2nd and 3rd respondents.*
6. *An order invalidating the illegal change of the name of the 4th respondent by the 3rd respondent.*
7. *Any other reliefs that the court considers apt to meet the equitable exigencies raised by the petition.*
8. *An order for costs of this petition to be reimbursed by the 1st, 2nd and 3rd respondents.*

Facts giving rise to this appeal as gathered from the record of appeal are summarized as follows: The respondents formed a company which was incorporated on 16th September, 2009, they being sole shareholders. The incorporated company went by the name of Alliance Cargo Handling Company Limited before its name was changed to African Flight Services,

the 4th appellant herein. Later in the course, the 3rd and the 4th appellants executed a Joint Venture Agreement (JVA) and Share Purchase Agreement (SPA). It was agreed in the JVA and SPA that the 3rd appellant should deposit USD 4,000,000.00 in the account of the joint venture company as consideration for acquisition of 3,200,000 shares in the company. In such a share structure, the respondents thus became minority shareholders as opposed to the 3rd appellant.

According to the JVA and SPA, a joint management (the board of directors) was to be formed and that, operations and more so expenditure of the consideration be by a resolution of the said board of directors. It seems somewhere in the course; the joint venture encountered some operational challenges. There appeared some allegations on default in furnishing consideration and unilateral decisions by the 3rd appellant which, in the respondents' argument, affected the interests of the 4th appellant. As we alluded to above, the respondents, being minority shareholders, preferred a derivative action in terms of section 234 of the Companies Act, having preferred the necessary leave of the High Court. The High Court (Magoiga J.) heard both the appellants and the respondents in that petition and in the end, found the respondents to

have proved their claims because the 3rd appellant breached the JVA and SPA. The High Court thus awarded reliefs as hereunder:

1. *I declare the 3rd respondent under the leadership of the 1st and 2nd respondents breached the joint venture agreement and the share purchase agreement for failure to deposit USD. 4,000,000.00 as agreed rendering the entire JVA and SPA void ab initio for want of consideration.*
1. *I declare as well that the 3rd respondent has at all material time unjustly enriched itself at the expense of the 4th respondent.*
2. *I further order the 3rd respondent to surrender the 65% of the shares allotted to her and same be returned to the 4th respondent and the same be divided among the minority shareholders on a pro rata basis and immediately hand over the management of the 4th respondent to the petitioners.*
3. *I further direct parties after complying with item (3) above, the petitioners and other members continue with management of the 4th respondent in a fair, just and legal manner.*
4. *The 1st, 2nd and 3rd respondents are condemned to pay general damages to the tune of USD. 500,000.00 to the 4th respondent.*
5. *I further order the change of the name of the 4th respondent was illegally done and petitioners, by the*

order of the court, are hereby directed to notify and present to the REGISTRAR of the Companies this court order directing him/her to delete the illegally changed name of AFRICA FLIGHT SERVICE and substitute with the former name of ALLIANCE CARGO HANDLING COMPANY LIMITED.

6. *The 1st, 2nd and 3rd respondents to bear costs of this petition."*

Aggrieved by the said findings of the learned trial Judge, the appellants herein lodged to the Court a memorandum of appeal containing the following remaining grounds of appeal appearing at page (viii) of the record of appeal after the learned counsel for the appellants had abandoned the 7th ground of appeal:

1. *That, the trial Judge erred in law and in facts in finding that the petition was in law a derivative action under the Companies Act, Cap.212 R.E. 2022 and that the reliefs sought were for the benefit of the 4th respondent.*
2. *That, the trial Judge erred in law and in facts in finding that the petition was preceded with the statutory notice as mandatorily required under section 234(1) of the Companies Act, Cap.212 R.E. 2022.*

3. *That, the trial Judge erred in law and in facts in granting the reliefs which were not pleaded, prayed for and without evidence adduced in their support.*
4. *That, the trial Judge erred in law and in facts in finding that there was no evidence that the investment to the 4th appellant under the joint venture and share purchase agreement was not made and that shares allotted to the 1st, 2nd and 3rd appellants were without any consideration and that the 1st, 2nd and 3rd appellants had enriched themselves.*
5. *That, the trial Judge erred in law and in facts in directing the surrender of the 65% shares by the 3rd appellant in favour of the 4th respondent.*
6. *That, the trial Judge erred in law and in facts in awarding the sum of USD 500,000.00 as general damages to the respondent by the 1st, 2nd and 3rd appellants without any material evidence to support it.*
7. *The trial Judge erred in law and in facts in determining the petition in Miscellaneous Commercial Cause No.33 of 2021 on the basis of the pleadings and submission without formal hearing of the petition.*

At the hearing of this appeal on 16th February, 2024, the four appellants were represented by Messrs. Deogratius Lymo Kiritta and Reginald Martin, both learned advocates whereas Mr. Alex Mgongolwa, learned advocate also represented all the three respondents. Parties

adopted their respective written submissions filed to the Court and also had an opportunity to amplify orally at the hearing of the appeal.

Beginning with grounds 1 and 2 of the appeal, Mr. Kiritta submitted that the action as per the pleadings is not a derivative action within the prescripts of section 234 of the Companies Act and instead, the respondents' action was to be preferred under section 233 of the said Act. He added that, even if the action is a derivative one within the meaning of section 234 of the Companies Act, yet the petition was incompetent for want of a mandatory statutory notice required under section 234 (1) of the Companies Act. The learned counsel thus referred us to page 99 of the record of appeal insisting that, the said notice was to be served to directors and not to Wings Flight Services Ltd. as appearing in the record of appeal. He thus argued that there was no notice so legally served.

Mr. Mgongolwa replied briefly that, following breaches to the JVA and the SPA by the 3rd appellant, the respondents, being minority shareholders, were legally mandated to institute a derivative action under section 234 of the Companies Act to salvage the viability of the company and protect the 4th appellant's interests. He therefore faulted the counsel for the appellant for raising the issue of statutory notice at this stage because, in his understanding, the same was considered and in effect,

was a precondition in granting leave to institute a derivative action in Miscellaneous Application No. 164 of 2020. In his argument therefore, unlike what Mr. Kiritta submitted to have this petition be preferred under section 233 of the Companies Act, this to him is a fit undertaking under section 234 of the Act, and even if section 233 becomes operative, which to him is not, then it be taken as a technicality (wrong citation) curable by the principle of overriding objective.

We have considered the rival arguments of the counsel regarding whether or not there was a derivative action and if at all the requirement of a statutory notice was duly complied with. We think this should not detain us. We have one reason. In our view, since a suit for derivative action in terms of section 234 (1) of the Companies Act is preceded by leave of the trial court, then in the course of granting that leave, the granting court obviously has to determine the existence of two legal requirements. **One**, that an action preferred is indeed a derivative action and **two**, the applicant has given a reasonable notice for the purpose. These two cannot be determined, as the appellants' counsel intends, when the proper petition for derivative action is in place. We reproduce the said provision as hereunder:

"234 (1) Subject to subsection (2), a person (the applicant) may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company, ***apply to the court for leave to bring an action in the name and on behalf of the company*** *or any of its subsidiaries, or intervene in an action to which any such company or any of its subsidiaries is a party.*

(2) No action may be brought, and no intervention in an action may be made under subsection (1) unless the court is satisfied that;

(a) the applicant has ***given reasonable notice to the directors of the company*** *or its subsidiary of his intention to apply to the court under subsection (1) if the directors of the company or its subsidiary do not bring, diligently prosecute or defend, or discontinue, the action."*

[Emphasis ours]

Given the above provision of the law, it is on record and as Mr. Mgongolwa argued, this job was duly done by Nangela J. in Miscellaneous Application No. 164 of 2020 during leave stage. After having reproduced those provisions, as we did, the learned Judge made a finding that the notice was duly served and the petition, for all intent and purposes, was

a derivative action intending to protect the interest of the 4th appellant. At page 854 of the record of appeal, the learned Judge remarked that:

> *"According to paragraph 22 of the two affidavits, it has been made clear that the applicants have issued the notice to the defendants of their intendment to institute proceedings to protect the interests of the 4th respondent. This is evidenced by Annexture AM-7. Basically, section 234 (2) (a)-(c) of the Companies Act, Cap.212 set out the grounds upon which the jurisdiction of this court may be invoked."*

On that understanding, we are unable to agree with Mr. Kiritta that the petition is not for a derivative action and no reasonable notice was ever served to the appellants because; **one**, the notice was duly served. **Two**, the matter before us has already passed the stage of leave and therefore this is not a proper forum to determine competence of the application. **Three**, the appellants' forum to challenge the reasonableness of notice and whether the suit suffices for a derivative action was at the leave stage or else the appellants should have challenged the decision in Miscellaneous Application No. 164 of 2020 which granted leave for institution of a derivative action. **Four**, again, even the interpretation of

sections 233 and 234 of the Companies Act regarding which section between the two would be the enabling provision, may not be deliberated at this hour. We thus find the 1st and 2nd grounds of appeal unmeritorious and they are accordingly dismissed.

Regarding grounds 3 and 5 on granting reliefs not prayed and specific on complaints that surrender of 65% of shares to the 4th appellant was neither prayed for by the respondents nor backed up by any evidence. In this one, Mr. Kiritta argued that, the respondents' prayer was in respect of 50% shares and not 65% which the trial court granted. He added that, even the handing over of the management of the 4th appellant was granted without any specific prayer. Mr. Kiritta thus invited us to consider the position in **Unilever Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises,** Civil Appeal No.41 of 2009 (unreported) on misapprehension of evidence by the learned trial judge in granting the relief not prayed for and that of **Salim Said Mtomekela v. Mohamed Abdallah Mohamed**, Civil Appeal No.149 of 2019 (unreported) insisting that, parties must be bound by their pleadings.

On his part, Mr. Mgongolwa replied that, as the trial Judge found the 3rd appellant to have failed to deposit USD. 4,000,000.00 which to him was in breach of the JVA and the SPA, then the only justification was for

the granting of consequential orders, remission of 65% of the acquired shares inclusive. To Mr. Mgongolwa, that was a correct approach otherwise, rights of the parties would have been left undetermined, had the said consequential orders not made.

Having heard from the counsel, we are of the considered view that, the learned judge was justified to grant consequential orders, though did not clearly state the basis for so doing. We also hold that, section 7 (2) of the Civil Procedure Code, Cap. 33 permits the granting of such consequential orders regardless as to whether or not such consequential reliefs were claimed. This, in our view, followed his observation, which we entirely agree that, the JVA and the SPA were void due to failure by the 3rd appellant to pay consideration of USD. 4,000,000.00 agreed in the JVA and the SPA. Failure to furnish such consideration, in our view, is a total default in implementing the JVA and the SPA thus the title towards share acquisition did not pass to the 3rd appellant. The least to comprehend in the circumstances therefore is that, there was no share acquisition at all.

The High Court, having held based on evidence that the JVA and the SPA were *void ab initio* the status quo is automatically restored. The decree was thus merely consequential from that factual finding and we have no doubt that it falls under the exception of section 7(2) of the Civil

Procedure Code. Therefore, consequential orders on remission of the whole shares and management of the affairs of the 4th appellant to the respondents was thus justified in the circumstances. It was also sound for the trial Judge to order that the Registrar of Companies should delete, from the register, the company registered as African Flight Services and instead, the name of a company named Alliance Cargo Handling Company Limited be substituted in lieu thereof. The reason, which we fully subscribe, is this that the respondents were not involved in such changes.

In that regard therefore, complaints by the appellants that there is no evidence, in our view, has no factual backing. We are saying so because there is evidence that the 3rd appellant did not pay the 4,000,000.00 USD. in the account of the 4th appellant as per the JVA and the SPA. Essentially, argument by appellants' counsel regarding bill of quantities in respect of the prosed facility at Julius Nyerere International Airport (JNIA) at page 133 of the record of appeal and a report on valuation of a cargo warehouse at page 272 of the record of appeal being evidence for the investment, in our view, is not evidence that a consideration was paid. As we alluded to, even changing the name of the company was without the respondents' involvement. What else do we need besides this evidence?

Again, much as we are in all fours with Mr. Kirita that the respondents' prayer on remission of the shares was 50% and not 65%, remitting the whole of 65% shares by the trial court, in our view, was justifiable because the unpaid consideration of 4,000,000.00 USD was in respect of acquisition of all 65% shares and as we said, since no consideration was effected as per the JVA and the SPA, then all 65% shares, to that effect, have not been so far acquired thus, we hold, there was no sin for the trial Judge to order remission of all 65% shares. Grounds 3 and 5 of the appeal on that account thus fail too.

Ground 4 is specific on investment. We have partly discussed in grounds 3 and 5. The point of contention according to the learned counsel for the appellants is that, the trial Judge ignored heavy investment on shares allotted and that, the said investment did not enrich the 1st, 2nd and 3rd appellants. As we demonstrated in the foregoing grounds, the main thrust is on unpaid consideration of USD 4,000,000.00 which, according to the JVA and the SPA, was to be paid to the account of the 4th appellant, and to date, there is no evidence if such consideration was ever furnished. Those investments, if any allegedly evidenced through bill of quantities in respect of the prosed facility at JNIA and a report on valuation of a cargo warehouse, as we said, is not evidence that the

consideration was paid. We therefore agree with Mr. Mgongolwa that, as the appellants neither indicated to suffer any loss nor any dividend divided to shareholders and more so changed the name of the company and even went ahead to borrow USD.300,000.00 by mortgaging assets of the 4th appellant, this is evidence that they enriched themselves. The record is not suggestive to us regarding involvement of the respondents. Ground 4 of the appeal thus fails as well.

We now turn to consider ground 6 of the appeal in which the appellants complaint is levelled on the award of general damages of USD 500,000.00 to the respondents without material evidence. Mr. Kiritta submitted in twofold. One, that there must be evidence indicating damages suffered being the consequence of the appellants actions and two, that the trial judge should analyze on how the awarded general damages was arrived at. To him, these two have not featured in the trial Judge's findings. Reference was made by the learned counsel to the case of **Anthony Ngoo & Another v. Kitinda Kimaro**, Civil Appeal No.25 of 2014 and **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited**, Civil Appeal No.21 of 2001 (both unreported) to bolster his assertion.

Replying to this ground, Mr. Mgongolwa's reaction was that as there is evidence that the company was on business operations and reaped profit thereon and as no any dividend was ever divided to the shareholders, then such operation was at the expense and to the detriment of the respondents and the 4th appellant. In this regard therefore, it was his argument that, the respondents suffered damages of which he could not see any injustice for the trial court to award such general damages. The learned counsel based his assertion on principles stated in **Reliance Insurance Company (T) & Two Others v. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (unreported) that courts have discretion to award general damages.

To begin with in this ground, the jurisprudence is clear that general damages need not be pleaded and courts have discretion on the quantum of damages. See **Reliance Insurance Company (T) & Two Others v. Festo Mgomapayo** (supra). As observed in **Anthony Ngoo & Another v. Kitinda Kimaro** (supra), the trial court has to assign reasons for exercise of that discretion in quantum of damages so awarded. In the instant appeal, we are in all fours with Mr. Kiritta that the trial judge never assigned reasons in the grant of general damages. However, this being the first appellant court, in terms of rule 36 (1) (a) of the Tanzania Court

of Appeal Rules, 2009 we are seized with the duty of re-appraisal of the evidence and make a finding on quantum of damages basing on such re-appraisal. See also in **Pendo Fulgence Nkwenge v. Dr. Wahida Shangali**, Civil Appeal No. 368 of 2020 (unreported) regarding re-appraisal of evidence by the first appellate court.

It is clear from the record of appeal at page 1 through 3 that, the respondents, being minority shareholders, invited the 3rd appellant through the JVA and the SPA in which a consideration of USD 4,000,000.00 was to be realized. According to paragraphs 5, 8 and 10 of the petition, the said consideration was not paid. The petition in paragraphs 11, 12, 13, 14, 15 and 16 is to the effect that the 1st, 2nd and 3rd appellants unilaterally controlled the affairs of the 4th appellant by, **first**, changing the name of the 4th appellant from Alliance Cargo Handling Company Limited to African Flight Services Limited. **Second**, the appellants continued to conduct business and, in the course, there is nowhere they indicated to make loss. **Third**, the appellants did not divide dividends to the minority shareholders, that is, the respondents herein. **Forth**, the minority shareholders were not involved all thorough in the affairs of the 4th appellant. Looking at all these, we take the view that, much as the learned trial judge did not take into account this evidence,

awarding USD. 500,000.00 in the circumstance, justifies the interest of justice on what the respondents and the 4th appellant endured regarding violation of the JVA and the SPA. We thus find this ground too devoid of merits and we accordingly dismiss it.

The last ground of appeal is in respect of what the learned Judge did by determining the petition relying on pleadings without formal hearing. We did not in the first place understand what Mr. Kiritta intended of us to resolve. After hearing him and after having duly taken into account his written submissions, his argument was twofold. **One**, that the trial judge did not frame issues and as such, the appellants were condemned unheard. On this aspect, the learned counsel referred us to the case of **Christian Makondoro v. Inspector General of Police & Another**, Civil Appeal No. 40 of 2019 (unreported) urging us to nullify the decision for being arrived at in contravention of the principles of natural justice. **Two**, he made reference to the case of **Bruno Wenceslaus Nyalifa v. Permanent Secretary, Ministry of Home Affairs & Another**, Civil Appeal No. 82 of 2017 (unreported) on account that, the learned Judge based his decision on submissions regardless of precedents on settled position that submissions are not evidence in law.

Mr. Mgongolwa picked from here and replied that, this being an application instituted by way of a petition which is in compliance with part X of the Companies Act, determining the same through pleadings, that is the grounds in the petition and the affidavit, is the normal way of disposing such applications. This is **one**, and **two** he argued that, parties agreed to proceed with the hearing of the application by way of written submissions in which the appellants also duly filed their written submissions. Going to his shoes, we think he meant that, the appellants were heard. His **last** argument in this ground was that, this is a new matter and the appellants are raising it for the first time, as such, the trial court did not determine it. Mr. Mgongolwa thus implored us not to consider such new facts relying on the case of **Hassan Bundala @ Swaga v. Republic,** Criminal Appeal No. 356 of 2015 (unreported).

In resolving this ground, we find it to be undisputed that parties herein agreed to proceed disposing of this application by way of written submissions. The record of appeal at pages 736 through 737 on this speaks for itself as hereunder:

> "**Mgongolwa, Advocate**
>
> *My Lord, this matter is up for hearing and since there is a preliminary objection, we pray that the*

preliminary objection and main application be argued by way of written submissions".

S. M. Magoiga
Judge
11/5/2022

Mnyele, Advocate

No objection my Lord

S. M. Magoiga
Judge
11/5/2022

Court:

i) Mention for orders on 16/6/2022 at 9.00 a.m.

ii) The petitioner counsel to file submission in support of the petition on 25/5/2022.

iii) The Respondents counsel to fille submission in support of the preliminary objection on 25/5/2022.

iv) The petitioner counsel to file reply to submission in preliminary objection on 8/6/2022.

v) The respondents counsel to file submissions in reply to petition on 8/6/2022.

vi) Rejoinder by counsel to petition on 15/6/2022.

vii) Rejoinder of preliminary objection

15/6/2022

S. M. Magoiga
Judge
11/5/2022"

It is clear from the quoted part of the proceedings in the trial court above that, parties were given right to be heard through filing their written submissions. However, that notwithstanding, what calls for our attention at this stage to resolve is whether, this being not a normal suit, the trial court was justified to dispose the petition basing on the grounds in the petition, answer to the petition, the affidavit verifying the petition and affidavit verifying answer to the petition. Coming to this end, Mr. Kiritta, as said, dwelt on failure to frame issues to guide written submissions and reliance on written submissions of which the current jurisprudence does not recognize it to be evidence. Going by this understanding, there is no reference supplied to us by the learned counsel to the effect that in petitions of this nature, issues must be framed to guide parties prior to filing written submissions. By this argument therefore, there is concession by Mr. Kirita and thus there is a consensus, which in our view is a usual practice that, applications of this nature are determined through affidavits. In the Commercial Division of the High Court, for instance, rule 52 (1) of

the High Court (Commercial Division) Procedure Rules, 2012 GN No. 250 of 2012 require evidence be by way of affidavit. In the instant application for that matter, the affidavit verifying petition and the affidavit verifying answer to the petition are the evidence which the learned trial judge rightly relied on in reaching at his findings.

It follows therefore that, framing of issues before parties are heard, either orally or through written submissions as complained of in this appeal may be used but it is not a requirement. We said earlier that, this is not a normal suit in which framing of issues before parties are heard is mandatory. Even if it were as the learned counsel wants us to believe, which is not the case anyway, yet the leaned counsel did not convince us how the appellants were prejudiced following that believed anomaly in procedural aspect.

On that account, argument of the learned counsel for the appellants that the trial court proceeded to determine the petition without framing issues in as much as it is not a legal requirement and it prejudice nobody is without substance. This therefore concludes the other complaint that, the basis of the trial judge's findings was not on written submissions but rather the evidence on record through the affidavit verifying petition and

the affidavit verifying answer to the petition. We thus find this ground too without substance and we dismiss it.

Having said all, we are firmly of the view that this appeal has no merits and we hold so. The ruling and drawn order of the High Court of Tanzania, Commercial Division are thus upheld. In consequence thereof, the appeal stand dismissed with costs.

We order accordingly.

DATED at **DAR-ES-SALAAM** this 23rd day of February, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 26th day of February, 2024 in the presence of Mr. Kennedy Mgongolwa learned counsel for the Respondents who also took brief for Mr. Deogratius Lyimo Kiritta and Reginald Martin, both learned counsel for the Appellants, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL