

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB- REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 351 OF 2019**

**IN THE MATTER OF THE COMPANIES ACT, CAP 212**

**AND**

**IN THE MATTER OF JAPAN TANZANIA TOURS LIMITED (JATA)**

**BETWEEN**

**ASAMI NEMOTO ..... 1<sup>ST</sup> PETITIONER**

**YOKO IIZUKA ..... 2<sup>ND</sup> PETITIONER**

**ABDALLAH SEIF DICKEMLA ..... 3<sup>RD</sup> PETITIONER**

***VERSUS***

**ALEX DAVID SILAA ..... 1<sup>ST</sup> RESPONDENT**

**JAPAN TANZANIA  
TOURS LIMITED ..... 2<sup>ND</sup> RESPONDENT/NECESSARY PARTY**

**JUDGMENT**

10<sup>th</sup> June & 5<sup>th</sup> August, 2022

**KISANYA, J.:**

In this case, Asami Nemoto, Yoko Iizuka and Abdallah Seif Dickemla has by way of petition, prayed for judgment and decree as follows: -

- 1. For Declaratory Orders that the 1<sup>st</sup> Respondent has a duty to act according to the law, and to the express dictates of the Memorandum and Articles of Association of the 2<sup>nd</sup> Respondent.*

2. *Declaratory Order that the 1<sup>st</sup> Respondent has a duty to facilitate the smooth ascent of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners as shareholders of the 2<sup>nd</sup> Respondent.*
3. *For Orders compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to facilitate the smooth ascent of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners as shareholders of the 2<sup>nd</sup> Respondent.*
4. *For orders directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to release to the 1<sup>st</sup> and 2<sup>nd</sup> Petitioner all audited Accounts of the 2<sup>nd</sup> Respondents since August, 2013.*
5. *In alternative to No. 4 above, orders directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to conduct an audit of all the Accounts and property of the 2<sup>nd</sup> Respondent since August, 2013.*
6. *For Orders directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to call an extraordinary General meeting of the 2<sup>nd</sup> Respondent with a view to delivering on the affairs and Management of the 2<sup>nd</sup> Respondent with the inclusion of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners in the said Meeting.*
7. *For costs of this Petition to be borne by the 1<sup>st</sup> Respondent.*
8. *Any other order the Hon. Court will deem just and fit to grant.*

It is gathered from the petition that, the 2<sup>nd</sup> respondent, JAPAN TANZANIA TOURS LIMITED (also known as JATA) is a private company liability. It was registered under the Companies Act on 23<sup>rd</sup> September, 1998. In terms of the memorandum and articles of association (MEMARTS), the company's shareholders and directors were Nemoto Toshimichi, Iizuka Shunsuke and Salum Ngubi and the 1<sup>st</sup> respondent, Alex David Silaa. It is on

record that, Nemoto Toshimichi and Iizuka Shunsuke had 2000 shares each, while the shares of Salum Ngubi and the 1<sup>st</sup> respondent was 3000 shares each. Unfortunately, Nemoto Toshimichi, Iizuka Shunsuke and Salum Ngubi died at different times.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners claim to have been appointed as administrators of estate of the late Nemoto Toshimichi, Iizuka Shunsuke and Salum Ngubi respectively. It is their case that, the 1<sup>st</sup> respondent was duly notified about the passing of the deceased and urged him to facilitate the smooth transmission of the deceased's shares in the 2<sup>nd</sup> respondent to them as administrators of the deceased. The petitioners further allege that the 1<sup>st</sup> respondent has ignored their request despite the lawful demands of the petitioners. According to the petitioners, the said refusal violates the MEMARTS and expose them to unknown liabilities as administrators. From the foregoing, the petitioner approached this court praying for the judgment and decree as stated afore.

The respondents filed their reply to the petition. They contested the petitioners' claims. It was also stated that the petitioners had no *locus standi*.

In the premises of the above, the following issues were framed for determination of this matter: -

- 1. Whether the petitioners adhered to the procedures laid down in MEMARTS to become shareholders.*

- 2. Whether the 1<sup>st</sup> Respondent received the application from petitioner to become shareholder.*
- 3. If the 2<sup>nd</sup> issue is answered in affirmative, whether the 1<sup>st</sup> respondent denied/refused/failed to consider the application.*
- 4. Whether the finance of the 2<sup>nd</sup> Respondent have been managed properly by the 1<sup>st</sup> Respondent, and to what extent.*
- 5. To what relief(s) are the Parties entitled to.*

At the hearing of this petition, the petitioners enjoyed the legal services of Mr. Peter Kibatata, learned advocate. On the other hand, the 1<sup>st</sup> respondent was represented by Ms. Lucy Nambua, learned advocate, while Mr. Kisusi Rashid Chacha, learned advocate, appeared for the 2<sup>nd</sup> respondent.

In order to prove their case, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners testified as PW1, PW4 and PW2 respectively. They also called Hamis Abdallah Mkomwa (PW3), who worked as the Director of Finance of the 2<sup>nd</sup> respondent. The petitioners tendered four on documentary evidence (Exhibit P1 to P4).

On the other side, the 1<sup>st</sup> respondent testified as DW1. He tendered no documentary evidence for the defence. At the instance of the petitioners' counsel, DW1 tendered four documentary evidence (Exhibit P5 to P8) for the petitioners.

It is worth noting here that both parties filed the closing submissions through their respective counsel. Their submission will be referred to in the course of disposing the framed issues.

Before embarking on the framed issues, I find it appropriate to address first whether this petition was properly filed by the parties. This issue was raised by the Court, *suo mottu*, after noticing that, the title of the petition does not indicate that the petitioners were suing as administrators of estate of the respective deceased. In other words, the Court wanted to satisfy itself on whether the petitioners have *locus standi* to institute the petition at hand.

Responding to the said issue, Ms. Nambua and Mr. Kisusi submitted that the petition was filed by the petitioners in their personal capacity and not as personal legal representative of the deceased or administrator of the estate of the late ~~ø~~Nemoto Toshimichi, Iizuka Shunsuke and Salum Ngubi. It was also their further submission that the 2<sup>nd</sup> petitioner (PW2) did not prove that she was the administrator of estate of the late Iizuka Shunsuke. Referring to Order XXII Rule 5 of the CPC and the case of **Ally Ahmed Ally vs Wastara Kipati**, Land Case No. 126 of 2017 (unreported), the learned counsel argued that the petitioners have no *locus standi*. It was also their further argument that the 2<sup>nd</sup> petitioner has tendered evidence to prove that she is an administratrix of the deceased.

On his part, Mr. Kibatata argued that the petitioners' names were indicated due to the nature of reliefs sought in this petition. However, he conceded that the 2<sup>nd</sup> petitioner did not produce evidence to prove that she was the administrator of the estate of the late Iizuka Shunsuke. Yet, the learned counsel urged me to consider that DW1 admitted having dealt with PW4 as legal representative of the estate of the late Shunsuke. It was therefore, Mr. Kibatata's argument that in terms of section 123 of the Evidence Act and the cases of **Parvis Gulamali Fazal vs National Housing Corporation**, Civil Appeal No. 166 of 2018 and **Union Congress of Tanzania (TUCTA) vs Engineering Systems Consultants Ltd and 2 Others**, the respondents are estopped from denying the fact that the 2<sup>nd</sup> petitioner is an administrator.

Pursuant to section 70 of the Probate and Administration of Estates Act, the power to sue or prosecute any suit or act as representative of the deceased is vested in the person to whom the letters of administration was granted:-

*"After any grant of probate or letters of administration, no person other than the person to whom the same shall have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, until such probate or letters of administration shall have been revoked or annulled."*

It is further settled that the cause of action survived by the deceased is vested in his administrator. This is provided for under section 100 of the Probate and Administration of Estate Act which reads:

*"An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased and may exercise the same powers for the recovery of debts due to him at the time of his death, as the deceased had when living."*

In the light of the cited provision, one can conclude that, a person other than an administrator of estates of the deceased has no cause of action or *locus standi* to institute a suit.

It is also settled position that, where a person is suing an administrator of the estate of the deceased, that fact should be reflected in the title of the case. I am fortified by the decision of the Court of Appeal in the case of **Suzana S. Waryoba vs Shija Dalawa**, Civil Appeal No. 44 of 2017, in which the Court of Appeal held:

*"Before we pen off we wish to address one little disquieting aspect. This is that the appellant sued as an administratrix of the estate of the late Stanslaus Waroyba. However, that aspect did not reflect in the title of the case. We are of the considered view that the fact that Suzana Waryoba was suing in her capacity as an administratrix of the estate of the late Stanslaus Waryoba should have been reflected in the title of the case."*

Likewise, the fact that the petitioners were suing as administrators of the estate of the late Nemoto Toshimichi, Lizuka Nshunsuke and Salum Ngubi does not feature in the title of the petition. However, it was deposed in paragraphs 1, 2, and 3 of the petition that all petitioners are administrators of the estates of the respective deceased. Further to this, paragraphs 10, 11 and 14 of the petition shows that the petitioners instituted this case as administrators of estate of the deceased. For instance, paragraph 14 reads as follows:

*"That, the 1<sup>st</sup> Respondent's refusal/neglect to heed to the Petitioners' demand not only violate their right per the MEMARTS themselves, but also expose them to unknown liabilities as administrators since the MEMARTS hold that the liability of the shareholders are in perpetuity and may pass onto their estates."*

In view of the above, it is apparent that the petition manifests that the petitioners are legal administrators of the estate of a deceased person. As administrators of the estate of deceased persons, the petitioners have cause of action and locus stand to sue the respondents. Although such fact is not reflected in the title of the suit, I am of the view that such anomaly is not fatal. I am guided by the decision of the Court of Appeal in **Suzana Waryoba** (supra) where it was held that:-

*"...we haste the remark that the omission is not fatal given that it was clear throughout that she was suing in*



*that capacity and the judgment of the Primary Court which appointed her as such, was tendered in evidence at the very outset. We only wish to accentuate that when a litigant sues as an administrator or administratrix of estate, it is desirable that the same should be reflected in the title.”*

As it can be glanced from the above holding, I am satisfied that failure to indicate that the petitioners were suing as administrators of estate is not fatal because such fact was disclosed in the petition.

That notwithstanding, I am convinced that only, the 1<sup>st</sup> and 3<sup>rd</sup> petitioners tendered in evidence their respective letters of administration. Therefore, it was duly proved that the 1<sup>st</sup> and 3<sup>rd</sup> petitioners have cause of action or locus standi to institute the case at hand.

As regards the 2<sup>nd</sup> petitioner, Mr. Kibatata does not dispute that she (2<sup>nd</sup> petitioner) did not produce letters of administration in respect of estate of the late Iizuka Shunsuke. As indicated earlier, he urged this Court to consider that, the respondents had recognized the 2<sup>nd</sup> petitioner as administrator of the estate of the deceased. Indeed, DW1 admitted to have dealt with the 2<sup>nd</sup> petitioner. However, such fact is not sufficient to prove that the 2<sup>nd</sup> petitioner is the administrator of estate of the late Iizuka Shunsuke. The 2<sup>nd</sup> petitioner ought to have tendered in evidence the letters of administration or other evidence to such effect. From the foregoing, I am of the considered view that,

the 2<sup>nd</sup> petitioner has no *locus standi* to sue. Her suit is therefore struck out. I will proceed to determine the suit on the 1<sup>st</sup> and 3<sup>rd</sup> petitioners.

It is my considered views that the first and second issues can be addressed together. This Court is called upon to determine whether the petitioners adhered to the procedures laid down in the MEMARTS to become shareholders and whether the respondent received the petitioners' application.

Parties are at one that the 2<sup>nd</sup> respondent's shareholders were Nemoto Toshimichi, Iizuka Shunsuke, Salum Ngubi and the 1<sup>st</sup> respondent (DW1). In his evidence, DW1 did not dispute that Nemoto Toshimichi, Iizuka Shunsuke and Salum Ngubi are deceased.

It is also common ground that, the procedure for transmission of shares on death of shareholder are set out under Articles 26, 27 and 28 of the MEMARTS (Exhibit P2) as follows. *First*, Article 26 of the MEMARTS is to the effect that, upon the death of a Member, the executor or administrators of the deceased are the only persons recognized by the Company as having any title to his shares. *Second*, it is further provided for under Article 27 that a person entitled to a share after death of a member may produce evidence as to his title. Upon producing the said evidence, that person may register-himself as holder of the share or elect to have someone nominated by him registered as the transferee thereof. *Third*, in the event the person entitled to the share

decides to register himself, he is required to deliver or send to the Company a notice in writing stating that he so elects as stipulated in Article 28.

As alluded earlier, the 1<sup>st</sup> and 3<sup>rd</sup> petitioners (PW1 and PW2) are administrators of the estates of the late Nemoto Toshimichi and Salum Ngubi. This fact was duly proved by the letters of administration (Exhibit P1 and P4). Therefore, in terms of Articles 26, the second respondent is duty bound to recognize the 1<sup>st</sup> and 3<sup>rd</sup> petitioners as having any title to the share of Nemoto Toshimichi and Salum Ngubi. I agree with the counsel for the respondents that an administrator's duty is to collect the property of the deceased and distribute the same to the heirs. However, as far as shares of the deceased members are concerned, the 2<sup>nd</sup> respondent is duty bound to comply with its MEMARTS by recognizing the administrators. It does not matter whether the administrator has distributed the estate to the beneficiaries or heirs. He can decide to distribute the same after collecting it. I am persuaded by the case of **Janeth William Kimaro and 2 Others (As joint person legal representative of the estate of the late Melleo Auye Mrema) vs Joan Auye Mrema and Another**, Misc. Commercial Cause No. 59 of 2020, HCT Commercial Division at DSM (unreported) when my learned sister Philipps, J, underlined that:

*"It has to be noted that the petitioners being the administrators of the deceased estate acquire the title of being legal representative of the deceased. The heirs of*

*the deceased are declared by the Administrators of the deceased estate upon distribution of the deceased's estate among them (heirs). This means that the legal representatives start taking care of the properties/rights of the deceased before the distribution of the deceased's estate to the heirs... Therefore, the fact that the petitioners have not yet distributed the deceased's estate cannot be an excuse for not recognizing them as legal representatives of the deceased in the Company in respect of the shares that were held by the deceased and involving them in the management of the company."*

I fully associate myself with the above position which was referred to this Court by Mr Kibatata. Therefore, the contention by the respondents' counsel that the petitioners cannot claim to be issued with shares lacks merit. It will be the duty of the petitioners to account in the probate cause on how the shares were distributed to the beneficiaries or heirs of the deceased shareholders.

The main issue is whether the 1<sup>st</sup> and 3<sup>rd</sup> petitioners served the 2<sup>nd</sup> respondent with the written notice requiring the latter to cause their names to be registered in as holders of the deceased shareholders. The counsel for the respondents were of firm view that the 1<sup>st</sup> and 3<sup>rd</sup> petitioners did not produce evidence to prove that fact.

In their evidence, PW1 and PW2 testified to have submitted their respective letters of administration to the 1<sup>st</sup> respondent, the remaining shareholder and director of 2<sup>nd</sup> respondent. That evidence was not challenged during cross-examination. Therefore, the respondents are said to have admitted the same. In that regard, the 1<sup>st</sup> respondent was expected to guide them to write a written notice. As a result, evidence shows that that PW1 and PW2 issued an oral notice but in vain. PW1 and PW2 decided to engage an advocate who served the 2<sup>nd</sup> respondent with the demand notice dated 5<sup>th</sup> May, 2019 (Exhibit P3). Paragraph 3(iii) of Exhibit P3 reads:-

*"That, Clause 26 of the Memorandum and Articles of Association of Japan Tours Limited dictates clearly that the duly appointed Administrator of a Deceased shall acquire Title to the said deceased's share."*

The 2<sup>nd</sup> respondent was further notified as follows under paragraph 4 (e):

*"You will, jointly, liaise with the relevant authorities (i.e Business Licencing and Registration Authority) for alteration of official records to reflect the current shareholding and Directorship status."*

In her evidence in chief, the first petitioner testified to have applied to be included in the company as an administratrix of estate of her late husband. She went on testifying that:

*"I gave Alex Silaa copy of my letters of Probate Administration in order to transfer shares to me. It was in 2017...*

*I pursued the issue of share transfer several times up to 2019. Alex Silaa told me it is BRELA challenge that was from 2017-2019."*

In their final closing submission, the counsel for the respondent contended that the 1<sup>st</sup> respondent did not receive the Exhibit P2. However, such fact was not put to PW1 and PW2 who testified to have served the same to the respondents. It is on record that Exhibit P3 bears the 2<sup>nd</sup> respondent's stamp. DW1 did not dispute that the stamp on Exhibit P1 does not belong to the 2<sup>nd</sup> Respondent.

That aside, the 1<sup>st</sup> respondent (DW1) admitted to have authored a letter dated 4<sup>th</sup> May, 2017 (Exhibit P6) in which he moved the Registrar of Companies to endorse appointment of the 1<sup>st</sup> petitioner, Isawa Toshiaki and Hamis Abdallah. DW1 further admitted to have asked the petitioners' counsel to settle the matter out of court as per letter dated 27/11/2019 (Exhibit P7). As that was not enough, DW1 conceded that his letter made reference to the letter written by the petitioners' counsel.

On the foregoing evidence, it is the findings of this Court that the 1<sup>st</sup> and 3<sup>rd</sup> petitioners adhered to the procedures laid down in MEMARTS to

become shareholders and that the respondent received the petitioners' application. Thus, the first and second issues are answered in affirmative.

The above finding leads us to the third issue, whether the 1<sup>st</sup> respondent denied/refused/failed to consider the application. In their respective testimonies, PW1 and PW2 adduced that the 1<sup>st</sup> respondent did not work on their application to have their name registered as shareholders in lieu of the deceased members. I have shown herein that the 1<sup>st</sup> respondent admitted to have received the demand notice (Exhibit P3). He admitted that the shareholding structure has not changed to date. It follows therefore, that the third issue is also answered in affirmative.

Next for consideration is whether the finance of the 2<sup>nd</sup> Respondent have been managed properly by the 1<sup>st</sup> Respondent; and to what extent. It is trite law provided under section 110 of the Evidence Act that a person alleging on existence of certain fact must prove the same on the balance of probabilities. Since the 1<sup>st</sup> respondent is the remaining director and shareholder of the 2<sup>nd</sup> respondent, he was duty bound to prove that upon demise of the other shareholders and directors, the finance of the 2<sup>nd</sup> respondent is properly managed. In his evidence in chief, DW1 did not produce evidence showing the financial affairs of the 2<sup>nd</sup> respondent. During cross-examination, he admitted to have requested Stanbic Bank to stop operation of the 2<sup>nd</sup> respondent's accounts with that bank pending

investigation against the signatory. He also conceded that the company (2<sup>nd</sup> respondent) is not in operation and that it was evicted from its previous office after defaulting to pay rent. That being the case, the 1<sup>st</sup> respondent has not proved to have properly managed the accounts of the 2<sup>nd</sup> respondent's accounts.

In the final analysis, I find merit in the petition by the 1<sup>st</sup> and 3<sup>rd</sup> petitioners. Accordingly, the following judgment and decree are hereby entered in favour of the 1<sup>st</sup> and 3<sup>rd</sup> petitioners:

1. It is declared that 1<sup>st</sup> Respondent has a duty to act according to the law, and to the express dictates of the Memorandum and Articles of Association of the 2<sup>nd</sup> Respondent.
2. It is declared that the 1<sup>st</sup> Respondent has a duty to facilitate the smooth ascent of the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners as shareholders of the 2<sup>nd</sup> Respondent.
3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent are ordered to facilitate the smooth ascent of the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners as shareholders of the 2<sup>nd</sup> Respondent.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent are ordered to release to the 1<sup>st</sup> and 3<sup>rd</sup> Petitioner all audited Accounts of the 2<sup>nd</sup> Respondents since August, 2013: In alternative, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are directed to



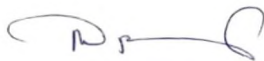
conduct an audit of all the Accounts and property of the 2<sup>nd</sup> Respondent since August, 2013.

5. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent are ordered to call an extraordinary General meeting of the 2<sup>nd</sup> Respondent with a view to deliberate on the affairs and Management of the 2<sup>nd</sup> Respondent with the inclusion of the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners in the said Meeting.

As regards the 2<sup>nd</sup> petitioner, her petition is hereby struck out for want of *locus standi* on the reasons stated afore. Considering the circumstances of this case, each party shall bear its own costs.

It is so ordered.

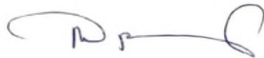
DATED at DAR ES SALAAM this 5<sup>th</sup> August, 2022.



S.E. Kisanya  
JUDGE

Court: Judgment delivered this 5<sup>th</sup> day of August, 2022 in the presence of Ms. Hadija Aron, learned advocate for the petitioners and Mr. Kisusi Rashid Chacha, learned advocate appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

Right of appeal explained.



S.E. Kisanya  
JUDGE  
5/08/2022