

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. 479 OF 2016

**HASSAN ZUBER (in the capacity of administrator
of the estate of the late ZUBERI CHAMKALI MZALIA 1ST PETITIONER**

RAHMA KH MZALIA 2ND PETITIONER

VERSUS

GO-LINK EXPRESS COMPANY LTD 1ST RESPONDENT

MAG MOTORS COMPANY LTD 2ND RESPONDENT

KEITH G. MAGINGA 3RD RESPONDENT

JUDGMENT

23rd November, 2022 & 13th February, 2023

KISANYA, J.:

The petitioners have brought this petition under sections 233 (1) and (2), 247(1)(a),(b) and (3) and 247(1) of the Companies Act, Cap. 212, R.E. 2002 (now R.E. 2019) inviting the Court to grant the following reliefs:

- (a) THAT the conduct of the respondents not recognizing the 1st petitioner as administrator of the Estate of the Late Zuberi Chamkali Mzalia who was the director of the 1st and 2nd respondents respectively, is unfairly prejudicial to the interest of the 1st Petitioner.*
- (b) THAT the conduct of the respondents not recognizing the 2nd petitioner as one among the Director of the 1st respondent is unfairly prejudicial to the interest of the 2nd petitioner.*

- (c) *THAT the administration order be given to the 1st and 2nd respondents respectively.*
- (d) *THAT one Bakari Athumani Mwezemba be appointed as administrator to run and manage the affairs of the 1st and 2nd respondents until and after the affairs of the 1st and 2nd respondents be in harmony to all beneficiaries.*
- (e) *THAT this Honourable Court be pleased to declare that the 1st petitioner is among the Directors of the 1st and 2nd respondents.*
- (f) *THAT this Honourable Court be pleased to order the 3rd respondent to sign accordingly and order the 1st petitioner to be registered as a director of the 1st and 2nd respondents.*
- (g) *THAT this Honourable Court be pleased to appoint inspectors to investigate the affairs of the 1st and 2nd respondents.*
- (h) *THAT this Honourable Court be pleased to order that the car that is Ford Ranger with Registration Number T329CGT be returned to the 1st respondent and be handed over to the petitioner.*
- (i) *THAT this Honourable Court be pleased to order the respondents to pay petitioners TZS 500,000 as Director's allowance which was paid by the companies to the late Zuberi Chamkali Mzalia for every week from 13th September, 2014 to the final determination of the case.*
- (j) *THAT the 3rd respondent be condemned to pay costs of this petition.*
- (k) *Any other relief(s) and/or order as the Honourable Court deems just and equitable so to grant.*

As set out in the petition, the petitioners' case is premised on the following facts. Zuberi Chamkali Mzalia was one of the shareholders and directors of the 1st and 2nd respondents. Pursuant to the record from the

Business Registration and Licencing Agency (BRELA), other directors and shareholders of the 1st respondent, at the time of instituting the instant petition, were Keith G. Maginga (the 3rd respondent), Lilian B. Maginga and Rahma KH Mzalia (2nd petitioner). As for the 2nd respondent, other directors and shareholders were Keith George Maginga, Zuberi Chamkali Mzalia and Daniel Mbogo.

It is common ground that Zuberi Chamkali Mzalia (henceforth "the late Mzalia") died on 13th September, 2014. It is in the petitioners' pleadings that, upon demise of the late Mzalia, the 1st petitioner (who happens to be the son of the late Mzalia) was appointed as the administrator of the estate of his late father. It is further claimed that the 1st petitioner notified the respondents of his appointment as administrator so as to be given chance of running the two companies and administer the estate of the late Mzalia.

The petitioners aver that the 1st and 2nd respondents are now supervised and managed by the 3rd respondent and his family in exclusion of the petitioners. Further to this, the petitioners allege to have been denied information regarding the affairs and status of the 1st and 2nd respondents. It is further alleged that, the late Mzalia's uncle one, Bakari Athumani Mwezemba who was responsible to file returns, was excluded by the 3rd respondent in order to hide information to the petitioners. According to them, the 3rd respondent confiscated a motor vehicle with registration No. T329 CDT

Mode Ford Ranger which was used by the late Mzalia as his personal property and sold it without any information to the petitioners.

It is further stated that the 2nd petitioner being the shareholder and director of the 1st respondent was stopped by the 3rd respondent to participate in the management of the company, including removal from the list of signatories to bank account. In general, the petitioners claim that the 1st and 2nd respondents are not managed in accordance with the law and their respective MEMARTS by the 3rd respondent and his family. Thus, they urged the Court to grant the reliefs as stated afore.

The respondents filed a joint reply to the petition and refuted all the petitioners' claims for being unfounded. The respondents contend that the petitioners seek to interfere with management of the 1st and 2nd respondents in view of meeting their personal benefits. It is their further averment that the management of both companies is under the respective Board of Directors and thus, the same cannot be interfered with. The respondents state, among others, that as administrator of estate of the late Mzalia, the 1st petitioner has no automatic right to the management and affairs of the company. The respondents further allege that the petitioners have been forcing the Board of Directors to meet the petitioners' personal needs. In the end result, the respondents have asked the Court to dismiss the petition with costs.

During the final pre-trial conference, the following issues were agreed and recorded by the Court:

- 1. Whether the 1st petitioner is entitled to be a shareholder and director of the 1st and 2nd respondents' company by virtue of being an administrator of the estate of the late Zuberi Chamkali Mzalia.*
- 2. Whether the allowances and other entitlement to the deceased director of the company can continue to be allowed and enjoyed by the petitioners.*
- 3. Whether the motor vehicles registration No. T329 CDT Mode Ford Ranger was confiscated by the 3rd respondent and sold it for his personal interest.*
- 4. Whether the affairs of the 1st and 2nd respondents are managed and conducted in a manner that is unfairly prejudicial to the interests of the petitioners.*
- 5. To what relief(s) are the parties entitled.*

At the hearing of this matter both parties were duly represented. Mr. Daimu Halfan and Ms. Loveness, learned advocates appeared for both petitioners, whilst Mr. Roman Masumbuko, also learned advocate appeared for all respondents.

Both parties brought witnesses to support their respective positions. The petitioners paraded three witnesses and tendered four exhibits to wit, death certificate of Zuberi Chamkali Mzalia and letters of probate administration (Exhibit P1), letter dated 2nd June, 2016 from Stanbic Bank to

Roylin Law Attorneys (Exhibit P2), letter dated 7th January, 2016 from Roylin Law Attorneys to Habib Bank Tanzania Ltd (Exhibit P3) and letter dated 31st May, 2016 from Roman Attorney to Rolyin Law Attorneys (Exhibit P4).

The first witness for the petitioner was Hassan Zuberi Mzalia (PW1). He informed the Court he was the son of Zuberi Chamkali Mzalia who died on 13th September, 2014. PW1 testified that his late father and the 3rd respondent were among the shareholders and directors in the 1st and 2nd respondents' companies. He stated to have been appointed to administer the estate of his late father in 2015. To fortify his oral testimony, PW1 tendered in evidence the death certificate and letters of probate administration issued by Kariakoo Primary Court on 16/04/2015 (Exhibit P1 collectively).

It was PW1's testimony that during his lifetime, his father shared with him on how the business was run and informed him about the affairs of the companies, including the assets like the motor vehicle make Ford Ranger and other trucks. PW1 further testified that after the death of his father, the 3rd respondent denied him to take over his duties. He went on to state that the 3rd respondent took possession of the Ford Ranger which was used by the late Mzalia. It was his further evidence that, the 3rd respondent sold the said vehicle but informed them that it had been attached by Majembe Auction due to the loan which the 1st respondent owed Stanbic Bank. PW1 told the Court that upon inquiring the matter with Stanbic Bank, he was informed (vide

Exhibit P2) that the loan had been repaid and the Ford Ranger handed over to the 3rd respondent.

PW1 further testified to have made a search at BRELA (Exhibit P1) which revealed that the late Mzalia was a shareholder in the 1st respondent's company. He went on to state that TRA was also consulted on the status of the two companies and that it was confirmed that both companies were operating well. PW1 stated that the family of the late Mzalia resolved to instruct a lawyer who served the respondents with a demand notice and that the latter responded to the demand notice through their lawyer as per Exhibit P4). He therefore stated that the petitioners filed the present petition. He prayed that the relief listed in the petition be granted.

During cross-examination, PW1 stated that the probate cause was pending in the probate court and that there are other beneficiaries of the estate of the late Mzalia. He further admitted that all trucks and Ford Ranger were in the name of the company and that he was not aware of other debts. It was his further evidence that though shareholders of the 1st and 2nd respondents are not the same, the respondents are one.

Rahma Ali Mzalia (2nd petitioner) testified as PW2. She told the Court that she is one of the shareholders and directors in the 1st respondent company and also wife of the late Mzalia. According to her, the 1st respondent was managed by the late Mzalia and the 3rd respondent. It was her further

testimony that she used to attend meeting and signing documents including the documents addressed to banks and TRA.

PW2 went on to testify that upon demise of her husband, her lawyer was instructed to write a letter to the 1st respondent who responded vide letter dated 31st May, 2016 (Exhibit P4). She stated on oath that after receiving Exhibit P4, she continued working with the 1st company. However, she stated that she was no longer a signatory to the bank and that she is neither involved in the companies' affairs nor called for the meetings.

As for the assets of the companies, PW2 stated that the 1st respondents had 35 trucks and one Ford Ranger, whereas the 2nd respondent owned 5 trucks. She went on testifying that the 3rd respondent sold the assets on the pretext of paying debts and that he (3rd respondent) had opened other bank accounts.

When cross-examined by the respondents' counsel, PW2 admitted that she had no knowledge of running a company. PW2 further admitted to have attended the company's meeting in 2016. She also admitted that Ford Ranger was the company's property, her claims were complained to other directors, and the fact that the company had debts. PW2 further stated that she was not aware of the status of the shares of his husband.

The last witness was Mzalia Waziri Hassan (PW3). He stated that he was a lawyer by profession who used to advise his brother, the late Mzalia. It was his evidence that the late Mzalia informed him about incorporating the 1st respondent's company and that he advised him to bring in his wife (PW2) as a shareholder. PW3 testified that the 1st respondent was incorporated in 2007 with four shareholders namely Zuberi Chamkali Mzalia, Keith Jot Maginga, Rahma Mzalia and Lilian Maginga and that the total value of its capital was TZS 100,000,000. According to PW3, the companies acquired about 40 vehicles. It was his further testimony that after the death of Mzalia, PW1 was appointed as an administrator of the estate of the late Mzalia and that the 3rd respondent agreed that he would work with him. He claimed that PW1 stopped working for want of cooperation. It was his further evidence that he was not aware of the status of the companies.

On cross-examination, PW3 stated that the claim is that the company is not in cooperation with other directors and that the 3rd respondent is running the company with his family excluding other shareholders. PW3 further admitted that he was not aware whether the company had debts and whether it was operating at loss.

On the adversary side, the respondents called three witnesses namely, Kaith George Maginga (DW3), Lilian Benard Maginga (DW2) and Abadulkarim Alyhamis (DW3). A total of eight documentary evidence were tendered to

support the defence case. These are MMEARTS and Certificate of Incorporation of Go-Link Express Co. Ltd (Exhibit D1), 15 vehicle registration cards (Exhibit D2), financial statement of Go- Link (Exhibit D3 & D4, annual employees register of Go- Link (Exhibit D5), lease agreement between Go-Link and Stanbic Bank (Exhibit D6), receipts and petty cash vouchers (Exhibit D7), transfer of share and BRELA's Annual Return of MAG Motors Co Ltd (Exhibit D8), certificate of incentives of Mag Motors Co. Ltd (Exhibit D9).

Keith George Maginga (DW1) testified in his capacity as the 3rd respondent. He also testified as the principal officer of the 1st and 2nd respondents. He stated that he was a Managing Director of the 1st respondent company. DW1 recalled to have worked with the late Mzalia at the defunct NASACO and that the 1st respondent was formed in 2007 as per Exhibit D1. According to him, their wives (PW2 and Lilian Maginga-DW2)) were invited as passive shareholders and directors on the ground that they had their own business, and also that they did not pay for their shares.

PW1 went on stating that the 1st respondent had no assets in 2008 and that it bought its first two vehicles from its cash flow. He further stated that they managed to get eight vehicles and bought 8 houses with a loan from Stanbic Bank. PW1 testified that the loan was secured by the registration cards of the relevant vehicle as per Exhibit D2.

It was his further evidence that after the death of the late Mzalia, the companies faced challenges such as insufficient capital and loss of customers but managed to sustain its service through the small profit. DW1 was firm that, no dividend was declared by the two companies and that he was only paid allowance. He went on to tell the Court that, PW2 was not entitled to any allowance like other directors because she was not an active director. However, DW1 stated that PW2 was paid allowance after the death of her husband. He relied on Exhibit D7.

DW1 further adduced that the 1st respondent has 8 employees. Furthermore, he stated that the company took loans from the banks for daily operations, whereby its assets were mortgaged. As for the Ford Ranger, DW1 adduced that it was the company's property and that it was sold after demise of the late Mzalia in order to pay the loan with Stanbic.

DW1 further testified that the company is run through meetings and in accordance with MEMARTS. However, he told the Court that the petitioners have been claiming demands without complying with the companies' meetings and that, while the 1st respondent is yet to be a shareholder the 2nd petitioner defaulted to appear for meeting.

As for the 2nd respondent, DW1 stated that it is a dormant company. He stated that the 2nd respondent was purchased for purposes of benefit from its certificate of incentives (Exhibit D) and that upon cancellation of the

incentives, the said company was not in operation or use. DW1 further stated that, the 2nd respondent's director one, Daniel Maginga who was not made a party to this case. He prayed that the petition be dismissed and that the petitioner be ordered to comply with the procedure. He also asked the Court to order the petitioners to sell the shares.

Upon being cross-examined, DW1 admitted that the contention that PW2 and DW2 are passive directors is not reflected in the MEMARTS. He also admitted that no written notice to attend meeting which was served to the 2nd petitioner and DW2. However, he told the Court that the duo were notified through mobile phone and that the 2nd petitioner defaulted to appear. He further admitted that the 2nd respondent is longer a signatory of the 1st respondent and that a bank account which has been opened after demise of the late Mzalia. DW1 did not dispute the fact that the 1st petitioner requested to be director and shareholder. However, he stated that the said application was not worked upon and that it was required to be submitted to the Board.

The second witness for the defence was Lilian Benard Maginga (DW2). She testified on oath that she is one of the directors and shareholders of the 1st respondent. It was her evidence that she had not paid for the shares and that she does receive remuneration, save for sitting allowance. DW2 further stated that the 2nd petitioner was paid allowance after demise of her husband in order to support her.

DW2 went on to testify that she has been attending the company's meetings and that the 2nd petitioner failed to attend the said meetings. It was her further testimony that the 1st petitioner did not qualify to be a director on the contention that he was still a student. However, DW2 stated that the company resolved to support him in his education.

When cross-examined, DW2 stated that the meetings were convened by the 3rd respondent, her husband. She admitted that some meetings were attended by two directors. DW2 admitted further that she was not aware whether the 1st petitioner had an automatic right to the share of the late Mzalia.

The next and last witness was Abdulkarim Allyhamis (DW3). He testified to have audited the 1st and 2nd respondents' companies from 2015 (Exhibit D3 and D4) and that the audited accounts were approved by Tanzania Revenue Authority. According to him, the 1st respondent is a going on concern and complaint while the 2nd respondent is a dormant company which relies on the 1st respondent. It was his further testimony that the companies are managed in accordance with the MEMARTS.

While under cross-examination, DW3 admitted that his evidence is based on the audited account reports. He also admitted that the issue of Ford Ranger does not feature in the reports.

After closure of the defence case, the learned counsel for both parties filed the final submissions. I will consider their respective arguments in the course of addressing the framed issues.

Before I delve into the consideration of the framed issues, I find it appropriate to restate the principles governing the matter. As rightly submitted by Mr. Masumbuko, it is cardinal principle of evidence set out under section 111 of the Evidence Act, Cap. 6, R.E. 2022 that he who alleges must as prove. This principle has been underscored in a number of cases including, the cases of **In re B (Children** [2009] 1 AC 11 and **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported) referred to this Court by Mr. Masumbuko. In the latter case, the Court of Appeal held that:

"...the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."

Another principle is on the standard of proof. This being a civil case, the standard of proving the same is on the balance of probability.

Having so stated, I now move to consider the first issue, whether the 1st petitioner is entitled to be a shareholder and director of the 1st and 2nd respondents' companies by virtue of being an administrator of the estate of the late Zuberi Chamkali Mzalia.

In terms of the pleadings and evidence adduced by both parties, it is not disputed that the late Zuberi Chamkali Mzalia was one of the shareholders and directors of the 1st and 2nd respondents' companies. It is also in evidence that and deduced from Exhibit P1 that, Zuberi Chamkali Mzalia died on 13th September, 2014 and that, on 16th April, 2015, the 1st petitioner was appointed to administer the estates of the deceased shareholder.

That being the case, the first part of this issue revolves on transmission of shares of the deceased shareholder. At the outset, I agree with Mr. Daimu that, pursuant to section 74 of the Companies Act, shares owned in the company are movable properties and thus, transferrable.

Referring to article 5 of the MEMARTS (Exhibit D1) and evidence of DW1, Mr. Masumbuko submitted that there is no automatic right to shareholder and that the Probate Court cannot count on shares unless the Board of Directors approve. It was his further argument that transfer of share

must be made when shares are fully paid. I respectfully disagree with him. It is my considered view that the article 5 of the MEMARTS relied upon by the learned counsel applies to transmission of share to a person who is already a holder of a share. Thus, it cannot apply in the circumstances of this case.

The 1st and 2nd respondents are private companies limited by shares. Their management is provided for under Part II of Table A to the Schedule to the Companies Act. According to regulation 1 of Part II of Table A, the regulations in Part I of Table A applies to the private company limited by shares, save for regulation. Since the procedures for transmission of shares of the deceased shareholder are provided for in regulations 26, 27 and 28 of Part I of Table A, they are applicable to case at hand. The said regulations provides as follows:

"26. In case of the death of a member, the survivor of survivors where the deceased was a joint holder, and the personal representatives of the deceased where he was a sole holder or the only survivor of joint holders, shall be the only persons recognised by the company as having any title to his interest in the shares; but nothing herein contained shall release the estate of a deceased member from any liability in respect of any share which had been jointly held by him.

27. A person becoming entitled to a share in consequence of the death or bankruptcy of a member may, upon such evidence being produced as may properly be required by

the directors and subject as hereinafter provided, either elect by notice to the company to be registered as holder of the share, or elect to have some person nominated by him registered as the transferee in which case he shall execute the appropriate instrument of transfer...

28. A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall have the rights to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as the holder of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

As it can be glanced from the above regulations, a company is required to recognize the legal representative of the deceased shareholder as the person having title to the interest in the shares of the deceased shareholder. Further to this, a person entitled to a share may produce evidence as to his title and that upon producing the said evidence, that person may register himself as holder of the share or decide to have someone nominated by him registered as the transferee thereof. If 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.

In the light of the foregoing, I agree with Mr. Daimu that the 1st petitioner is entitled to be a shareholder of the 1st and 2nd respondents. However, he must present a formal application for consideration by the Board

of Directors in accordance with the law and the MEMARTS of the 1st and 2nd respondents.

As for the second limb of the first issue on directorship, I am at one with Mr. Masumbuko that directorship is not a matter of succession. It is also not linked to shareholding. Reading from Article 14 of the Articles of Associations of the 1st respondent referred to this Court by Mr. Daimu, it is clear shareholding is not a qualification of becoming the company's director. Thus, any person may be appointed or employed as a director of the company. It is further provided for in articles 11 and 12 of the Articles of Associations (Exhibit D1) that the number of directors of the 1st respondent must not be less than two and not more than six, and that the General Meeting is enjoined to increase or reduce the number of directors. Furthermore, article 18 of the Articles of Association of the 1st respondent empowers the Board to Directors to appoint any person as director. Nothing to suggest that the deceased director must be replaced by his legal representative. Considering further the undisputed evidence that both companies have not less than two directors, I am of the view that the 1st petitioner has no automatic right of becoming the director of 1st and 2nd respondents.

In view of the above, the first issue is partly answered in affirmative and partly answered not in affirmative.

The second issue is whether allowances and other entitlement to the deceased director of the company can continue to be allowed or enjoined by the petitioners. It is my firm view that, to resolve this issue, one must understand the allowances and other entitlement of the directors. That being an internal matter, it is determined basing on the MEMARTS. I am fortified by the case of case of **Hutton vs West Cork Railway Co. Ltd** (1883) relied upon by Mr. Masumbuko in which Lord Justice Bowen (as he then was) held:

"But what is the remuneration of directors?...it is a gratuity....In some companies there is a special provision for the way in the director should be paid, in some others there is not. If there is special provision... you must look to the special provision to see how to deal with it. But if there is no special provision their payment is in the nature of a gratuity."

In the instant case, article 13 of the Articles of Association of the 1st respondent is to the effect that directors are paid such reasonable expenses incurred by him in attending and returning from meetings of the company or in or about the business of the company. It is also gleaned from article 18 of the Articles of Association that, the Board of Directors may remunerate any director for such work or labour or services as it may think proper and that the Board of Directors may enter into contract with him for that purposes. On that account, it is clear that the director is entitled to payment for the work done in the course of executing his or her duties related to company affairs.

The petitioners did not produce evidence to prove allowances and other entitlements which were accorded to the late Mzalia. However, PW1 and PW2 testified that the late Mzalia was given a vehicle by the company. That evidence was not disputed by the respondents. DW1 and DW2 went on testifying that the late Mzalia and the 3rd respondent were paid remuneration because they were active director who were involved in the operations of the company.

Owing to the facts that the late Mzalia is no longer dealing with the day to day operation of the company, I agree with Mr. Masumbuko that the petitioners are not entitled to allowance or entitlement which were accorded to him (the late Mzalia).

I am alive to the evidence by PW2, DW1 and DW2 that after the death of the late Mzalia, the widow (DW2) was paid some allowance of TZS 1,200,000. DW1 and DW2 testified that it is the Board which made a decision of paying the 2nd petitioner in order to support her. However, it is my considered view that the said allowance had nothing to with the allowance which was entitled to the late Mzalia. In the end result, the second issue is answered in the negative.

Next for consideration is the third issue whether the motor vehicles registration No. T329 CDT Mode Ford Ranger was confiscated by the 3rd respondent and sold the same for his personal interest. This issue should not

detain the Court. It is in evidence the said vehicle was one of the properties of the 1st respondent. According to DW1 and Exhibits D1 and D2, the vehicle was obtained through the bank. It settled principle that the company's assets do not belong to the members of the company. Therefore, upon demise of the shareholder, the properties which were in his possession must be returned to the company and not to the family of the deceased shareholder.

The petitioners did not demonstrate how the 3rd respondent confiscated the vehicle and sold it for his personal benefits. The fact that the company took possession of its vehicle did not amount to confiscation. As for the sale, DW1 admitted to have sold it. However, he expounded that the said recourse was taken in order pay the loan which the 1st respondent owed to Stanbic Bank. Indeed, the lease agreement (Exhibit D6) shows that the vehicle was leased to Stanbic Bank at the total rentals of USD 44,725.05 whereby final rental due was on 20th day January, 2017. However, it is deduced from Stanbic Bank's Letter dated 26th May, 2016 (Exhibit D6) served to the petitioners that the loan facility advanced to the 1st respondent was paid by way of settlement payment to the tune of USD 13,578.000. As stated earlier, DW1 adduced that the said loan was settled from the proceeds of selling the vehicle. Considering further such fact was deposed in the reply to the petition, the petitioner ought to have proved how the loan was not repaid from the sale proceeds. Since this was not done, I find no sufficient evidence to hold

that the vehicle was sold for the personal interest of the 3rd respondent. Thus, the third issue is answered not in affirmative.

The fourth issue is whether the affairs of the 1st and 2nd respondents are managed and conducted in a manner which is prejudicial to the interest of the petitioners. In view of the competing submissions of the learned counsel for the parties, first point for determination is on the person entitled to apply for an order in a case of claim of unfair prejudice. Making reference to section 233(2) of the Companies Act, Mr. Daimu contended that that both petitioners are entitled to apply for the foresaid relief. On his part, Mr. Masumbuko contended that, the 1st petitioner has mandate to apply for the same because he is an administrator of the deceased shareholder and not a shareholder in both companies.

It is a general position of law set out under section 233(1) and (2) of the Companies Act cited in the petition that, a person entitled to bring a petition for an order on the ground that the company's affairs is being or have been conducted in a manner that is prejudicial to the affairs of its members is a member or shareholder of a company. The respondents through, DW1 and DW2 did not dispute that the 2nd petitioner is one of the shareholders of the 1st respondent. It is also not disputed that the 2nd petitioner does not hold any share in the 2nd respondent. That being the position, I am satisfied that the 2nd petitioner was entitled to apply for an order of claim of unfair prejudicial of

her interest in the 1st respondent only. For that reason, I will not delve into considering whether the 2nd respondent is being prejudiced in the manner that is prejudicial to the affairs of the 2nd petitioner.

Reverting to the 2nd petitioner, it is not disputed that he is not a shareholder in the 1st or 2nd respondent. It was unveiled that the 1st petitioner is an administrator of the late Mzalia who held shares in the 1st and 2nd respondents. Now reading from section 233(2) of the Companies Act, it is clear that a petition for an order in case of unfair prejudicial may be brought by a person who is not a member of a company but to whom shares in the company have been transferred by operation of law. As hinted above, regulation 26 of Table A of the Schedule to the Companies Act provides that a legal representative of the deceased shareholder is the only person recognised by the company as having any title to his interest in the shares. In that regard, I don't find merit in Mr. Masumbuko's argument that the law does not disqualify the 1st petitioner from filing the present petition. It is my considered view that the legal representative of the deceased shareholder has locus standi to apply for the order related prejudicial of his or her affairs in the company.

Coming to the determination of the issue under consideration, it is settled position that unfairly prejudicial conduct may be established if the acts and omissions of other shareholders in the management of the company

diverges from the principles or standards governing the entity. This stance was taken in the case of **Jitesh Jayantilal Ladwa Vs Bhavesh Chandulal Ladwa**, Misc. Civil Application No. 148 of 2022, HCT at DSM (unreported). In that case, this Court cited with approval the case of **Elder v. Elder & Watson** [1952] SC. 49 where it was held that:

"Unfairly prejudicial conduct could exist where there was a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely."

Further to the above position, section 233 of the Companies Act provides that a petition for unfair prejudice must be well founded for the Court to make its decision on the impugned conducts. Apart from demonstrating that he has interest in the company affairs of the company, the petitioner must establish his or her rights under the MEMARTS is being or has been violated. I am fortified by the decision of this Court in **Jitesh Jayantilal Ladwa Vs Bhavesh Chandulal Ladwa**, Misc. Civil Application No. 148 of 2022, HCT at DSM (unreported), when my learned brother, Ismail, J stated:

"In our jurisdiction, the recourse for a disgruntled minority member of a company is catered for under the provisions of section 233 (1) of Cap. 212, under which the instant petition has been preferred, and widely

referred to by both counsel. This provision requires or sets a condition that a petition for unfair prejudice must be well founded before a declaration is made on the alleged impropriety. This means that conditions constituting a prejudicial conduct must exist, and that the objective test of unfairness must also be in place. In such a case, therefore, the petitioner must establish that he has interest in the company affairs of the company, and that there should be a breach of his rights under the memorandum and articles of association."

Having gone through the petition, I agree with Mr. Masumbuko that the unfairly prejudicial conducts pleaded in the petition are the following effect: *One*, that the 1st petitioner was denied chance of running the companies. *Two*, that the petitioners had no information on affairs of the companies. *Three*, that one, Bakari Athuman Mwezemba was barred from filing TRA Returns for the 1st and 2nd respondents. *Four*, the Ford Ranger was confiscated and sold for the interest of the 3rd respondent. *Five*, the 2nd petitioner was removed from the list of signatories to the bank's account. *Sixth*, the 1st and 2nd respondents are managed in contravention of the laws and MEMARTS.

In view of the settled principle that, parties are bound by their own pleadings, the petitioners and respondents required to produce their respective evidence on or against the above acts and omissions. This is also pursuant to Order VI, Rule, 7 of the CPC which bars a party to the suit to depart from the

pleadings by raising a new ground except by way of amendment. See also the case of **Yara Tanzania Limited vs Ikuwo General Enterprises Ltd**, Civil Appeal No. 309 of 2019, in which the Court of Appeal held that:

"O. VI R. 7 of the CPC requires that all material facts constituting the claim should be founded on pleadings and that new facts not pleaded cannot, unless by way of amendment of pleadings, be relied upon in determining the case."

In his final submissions, Mr. Daimu argued at length on the following; the 3rd respondent's failure to convene any general meeting or any meeting of the members of the 1st and 2nd respondent; the 3rd respondent's removal of the former auditor of the 1st and 2nd respondents contrary to the law; failure to lay before the 1st and 2nd respondents the annual accounts, directors' report and auditors' report; failure to declare and pay dividends to the shareholder; the 3rd respondent managing the 1st and 2nd respondent without there being company secretaries; and 3rd respondent borrowing and spending for and behalf of the 1st and 2nd respondent without involving other director. Given the facts the said conducts were not pleaded in the petition in order for the respondents to reply to them, I shall not consider the alleged conducts together with the submission and authorities thereto. I am going to stick to the conducts of unfair prejudice as pleaded in the petition.

On the complaint that the 1st petitioner has been denied chance of running the companies, I have shown in this judgment that parties are at one that, he (the 1st petitioner) is an administrator of the estates of the late Mzalia. The law does not empower the administrator of the estate of the deceased shareholder to take part in the running the company. As stated earlier on, the recourse available to the legal representative of the deceased shareholder is to have the shares registered in his name or transferred to the person named in his written notice to the Board of Directors.

Now, paragraph 8 of the petition suggests that the 1st petitioner was served to the respondents with a copy of letters of administration in order to be given chance of running the companies. Neither PW1 nor PW2 produced the written notice which were served to the 1st and 2nd respondents. His evidence was to the effect that, he was not given information on how to the companies are ran in order to know the properties of each company. Indeed, DW1 and DW2 testified that the 1st petitioner wanted to take part in running the companies. It is also deduced from the evidence of DW1 and Exhibit P4 that the 1st petitioner was duly notified of the required procedure. For instance, the relevant part of Exhibit P4 reads:

"That Mr. Hassan Zuberi Mzalia is a mere Administrator of the Estate of the late Zuberi C. Mzalia. This does not make him the shareholder or director of the companies. He needs to apply to the Board of Directors to be

recognized as the shareholder, and probably, be appointed as one of the Directors.”

The above excerpt shows that counsel the 1st petitioner was duly notified to apply to the Board of Directors for him to be a shareholder. In the absence of the evidence on written application to be registered as shareholder, I find no basis of holding that the 1st petitioner was denied the shares of the deceased shareholder in the 1st and 2nd respondents. As the law does not empower the administrator to take part in running the company in lieu of the deceased shareholder, there is no material evidence for this Court to hold that the 1st petitioner was treated unfairly on the foresaid complaint.

Another complaint is denial of the information on the affairs of the companies. Having resolved herein that the 1st petitioner has not submitted a written application for registration of the deceased shareholder in his name, I am of the view that he cannot claim to have been denied information on affairs of the company. That aside, neither the petitioners (PW1 and PW2) nor their witness (PW3), produced evidence to prove have requested information from the 1st and 2nd respondent.

With regard to the 2nd petitioner, it is common ground that she is not a shareholder of the 2nd respondent. Thus, information on the affairs of the companies could not be supplied to her. As for information on affairs of the 1st respondent, Exhibit P4 shows that the 2nd petitioner was notified to request

“any information on the affairs of the company through Board meeting”. As hinted above, PW2 did not testify to have requested any information from the 1st respondent. To the contrary, her evidence in chief shows that, she continued working with the company after receiving Exhibit P4. In the circumstances, I am of the view that this complaint lacks merit of being termed as prejudicial to affairs of the 1st and 2nd petitioner.

The third complaint is sale of Ford Ranger. Basing on the decision of this Court on third issue, I agree with Mr. Masumbuko that this complaint does not amount to unfair prejudicial.

The next complaint is on removal of the 2nd petitioner from the list of signatories. When cross-examined, DW1 admitted that the 2nd petitioner was one of the signatories and that last cheque was signed by her in 2015. That notwithstanding, nothing to suggest how that conduct was unfairly prejudicial to the 2nd petitioner.

On the complaint that Bakari Athuman Mwazemba was expelled from filing returns, neither PW1 nor PW2 tendered evidence to prove such assertion. Further to this, it was not proved that the said Mwazemba was an employee charged with that duty of filing returns. Considering further that filing of returns is an internal matter, I agree with Mr. Masumbuko that it is not an act of prejudicial affairs as held in **Borland vs Earle** [1902] A.C 83.

Last complaint is failure to manage the companies in accordance with the law and MEMARTS. The petitioners did not plead particulars regarding this complaint or produce evidence on non-compliance with the law and MEMARTS. For instance, PW2 did not give evidence leading to prove that fact in respect of the 1st respondent to which she is a shareholder. On the other part, DW1 testified that the 1st respondent was being conducted in accordance with the law. His evidence was supported by DW2 and DW3. Further to this, the Reports and Financial Statements (Exhibit D3 and D4) of the 1st respondent does not support the contention that 3rd respondent was operating the 1st respondent contrary to the Companies Act and the MEMARTS. As for the 2nd respondent, I considered the facts that the 2nd petitioner is not a shareholder of that company, while the 1st petitioner has not produced evidence showing that he applied to be registered as a shareholder in lieu of the late Mzalia. That being the case, the impugned conduct cannot be said to be prejudicial to the petitioners.

On basis of the foregoing, I find that it has not been proved that the affairs of the 1st and 2nd respondents are managed and conducted in a manner which is prejudicial to the interest of the petitioners. That marks the fourth issue answered not in affirmative.

Last for consideration is the reliefs on which the parties are entitled to. In view of this Court's decision that the claim for unfair prejudicial, the reliefs

prayed in paragraphs (i) to (l) lacks legal basis. I proceed to dismiss the same for want of merit. As regards the relief which this Court deems just and equitable so to grant, I have considered that the 1st petitioner is the administrator of the estate of the deceased shareholder. Therefore, upon receipt of the 1st respondent's application for registration of the shares of the late Mzalia, the Boards of Directors of the 1st and 2nd respondents are ordered to consider the same in accordance with the law and the respective MEMARTS. This Court was invited by Mr. Masumbuko and the 3rd respondent (DW1) to order the purchase of shares of the petitioners based on the nominal value at the time of incorporation. Given the fact that the 3rd respondent did not raise such claim in the reply to petition, I decline from entertaining the same. As to the costs of the suit, I have considered that both parties' relation and their respective interest in the 1st and 2nd respondent. Thus, I find it apposite to order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 13th day of February, 2023.



S.E. KISANYA
JUDGE