

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**

**CIVIL CASE NO. 77 OF 2021**

**KUANG JIAN BIN..... PLAINTIFF**

**VERSUS**

**KANAK INDUSTRIES DMCC.....1<sup>ST</sup> DEFENDANT**

**FORTUNE CEMENT (T) COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

**WENG TAK FUNG.....3<sup>RD</sup> DEFENDANT**

**PREM CHIMANLAL AHUJA.....4<sup>TH</sup> DEFENDANT**

**NIHAR SURESH AHUJA.....5<sup>TH</sup> DEFENDANT**

**MINAKSHI PREM AHUJA.....6<sup>TH</sup> DEFENDANT**

**SPANDAN PREM AHUJA.....7<sup>TH</sup> DEFENDANT**

**RULING**

*5/06/2023 & 16/06/2023*

**POMO; J**

The plaintiff, KUANG JIAN BIN, by way of plaint filed against the defendants the suit herein praying for: -

- (i) An order declaring the purported sale of 20,000 shares to Kanak Industries DMCC was fraudulent, unlawful and a nullity*
- (ii) An order that transfer made by the 4<sup>th</sup>; 5<sup>th</sup>; 6<sup>th</sup> and 7<sup>th</sup> Defendants were unlawful and a nullity*

- (iii) An order for recovery of 20,000 shares by the Plaintiff in the 1<sup>st</sup> Defendant's company worth Tshs. 2,000,000,000/-*
- (iv) An order that Kanak Industries DMCC is not shareholder of Fortune Cement (T) Company Limited*
- (v) An order 4<sup>th</sup>; 5<sup>th</sup>; 6<sup>th</sup> and 7<sup>th</sup> are not shareholders of Fortune Cement (T) Company Limited*
- (vi) An order that the 2<sup>nd</sup> Defendant's Register of members as maintained by the company itself (Fortune Cement Limited) be rectified to reflect Plaintiff name and 20,000 shares of the value of Tshs.100,000/- each*
- (vii) Compensation of the loss incurred by the Plaintiff due to Defendant's acts to the tune of Tshs.200,000,000/-*
- (viii) General damages of not less than Tshs.200,000,000/-*
- (ix) Interests on (iii and Vii) above at court rate from the date of judgment until the decretal sum is paid in full*
- (x) Costs of this suit*
- (xi) Any other relief this honourable court may deem fit to grant*

Briefly stated, the facts of the suit obtaining in the plaint are as follows. The plaintiff was a shareholder in the 2<sup>nd</sup> Defendant, Fortune Cement (T) Company Limited, possessing 20,000 shares valued Tshs 100,000/- each. The said company is at Vikindu Plot No.17 Block E Mkurunga District in Coast region.

That, on 30<sup>th</sup> September,2015 while the plaintiff was in China attending his family matters, the 1<sup>st</sup>; 2<sup>nd</sup> and 3<sup>rd</sup> defendants fraudulently did forge his

signature henceforth illegally transferred by way of sale his 20,000 shares in the 2<sup>nd</sup> Defendant company to the 1<sup>st</sup> Defendant. The alleged illegal sale of shares was followed by presenting to the Registrar of Companies an Annual Return together with a sale agreement that the plaintiff had sold his shares to the 1<sup>st</sup> Defendant while it was not true.

That, upon discovery of the forgery, the plaintiff reported the matter to police which led to commencing of Criminal Case No.138 of 2018 against the 3<sup>rd</sup> Defendant in the Resident Magistrate's court of Dar es Salaam at Kisutu followed by Criminal Appeal No.271 of 2018 before the High Court at Dar es Salaam in which the said 3<sup>rd</sup> Defendant was on 9<sup>th</sup> October, 2019 convicted of the offence of forgery and henceforth sentenced to serve seven years jail sentence.

Now the plaintiff has preferred the suit herein against the defendants under the above listed claims

Before hearing could take off, when the suit was called on for hearing on 2<sup>nd</sup> June, 2023, this court *suo motu* raised an issue on the competence of the suit, I quote: -

*"I have noted that the suit preferred by the plaintiff herein is on unfair prejudice which could be filed under section 233 of the Companies Act, [Cap.212 R.E.2002] by way of*

*petition for unfair prejudice. Since the same is filed as an ordinary suit, then parties should address the court on its competence or otherwise for the same to be filed in the manner preferred”.*

Parties addressed this court on 5<sup>th</sup> June, 2023 whereby Mr. Sabas Shayo, learned counsel appeared for the plaintiff while Mr. Augustino Ndomba, learned advocate represented all the defendants save for the 3<sup>rd</sup> defendant whom this court had already ordered *exparte* hearing against him.

Addressing the court, it was Mr. Shayo's submission that, as the issue stands, in view of S. 233 of Companies Acts, [Cap.212 R.E.2002] (hereinafter **the Act**) which provide for an order for unfair prejudice, the suit is properly before the court because the cited provision for it to apply to move the court for unfair prejudice order, the first qualification is that the person must be a member of that company. That, for one to be a member of a company must either be shareholder or director of a company. That, as per the plaint, under paragraph 11 and annexure thereto (VERT/2) and in the said Annexure there is annexed a copy of search report from BRELA dated 23/2/2021 in which the plaintiff is not a shareholder and is not a director of the company.

That, this suit was filed on 20/5/2021 therefore the time it was filed the plaintiff was neither a director nor shareholder of the company. That, in view of S. 233 of the Act, the plaintiff is not covered under the relief of unfair prejudice because at the time he filed the suit was not a member of the company as was neither a shareholder or director of the company.

Regarding subsection 2 of S.233 of the Act, provide for a person who is not a member to utilize this remedy of petitioning for an order of unfair prejudice. That, since the qualification set here is for him to have obtained shares by way of operation of law, for instance, having obtained share by way of transmission of shares which occurs upon death of the shareholder, thus has nothing to do with the plaintiff as is not covered.

That, looking the two provisions, the plaintiff is not covered, him as a member is not covered so is him as not a member. He is not covered by both scenarios and in support the case of **Sabri Muslim Karim (formerly known as Sabri Ally Saad) vs Muslim Shivji Kasim & 3 others, High Court (Commercial Division) at DSM (unreported)** at page 14 – 16 is referred and ***said this case supports the position submitted above that the plaintiff does not qualify in the two scenarios for unfair prejudice petitioning.***

That, even looking at the cause of action under para 9 the basis of the plaintiff's claim is that, the 20,000 shares sold to the 2<sup>nd</sup> defendant was fraudulently unlawfully and nullity. Paragraph 20 shows how the said shares were obtained by fraud.

That, had he still been a member of the 2<sup>nd</sup> defendant's company then he would have instituted the petition under S. 233 of the Act, but since he was not a member then is barred from utilizing that remedy. And since there is no remedy available under the Act prescribing the manner of bringing a suit for a person who is no longer a member then instituting the suit herein as a civil action by way of plaint is proper because all civil suits are instituted by way of plaint unless otherwise stated. Mr. Shayo, concluded by submitting that the suit herein is properly before the court

In reply, Mr. Ndomba argued that, the matter at hand is typically the concern of company's affairs. That, in summary, the plaintiff's claim is that he owns 20,000 shares and is claiming that other members in the company and directly mentioning the 3<sup>rd</sup> defendant and all other members have acted against him to transfer his shares in the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> defendant, therefore, he is claiming that he is being prejudiced by those acts and also is claiming the transfer of those shares to be nullity *ab initio*.



That, the plaintiff, in his all claims is as a member of the company; so, he is covered under S.233 of the companies Act arguing that, the word member as used under the section should not be construed literally. That, in the instant circumstance, the word member extends to the plaintiff and was supposed to lodge a petition rather than instituting a normal suit by way of plaint.

As to the cited caselaw, Mr. Ndomba argued that the case is distinguishable with facts in the matter at hand. That, in that case the 2<sup>nd</sup> respondent was not a member of the company and at no time in history she was not a member of the company and the matter at issue was not the transfer of shares of a member of a company by other members as it is in the matter at hand. That, the orders sought to be granted by this court are under the Companies Act and are enforceable by the Registrar of Companies. In the end Mr. Ndomba prayed the suit be struck out for want of proper filing.

In rejoinder, Mr. Shayo reiterated his submission in chief adding that the counsel for defendants responded nothing in respect of annexure VER/2 to paragraph 11 of the plaint which is a search report from Business Registration and Licensing Agency (BRELA) which shows the plaintiff is

neither a shareholder or a director hence reiterated the argument that for one to utilize the remedy under S.233 of the Act, one has to be a member at the time of instituting the suit.

As to the argument that the word member should not be interpreted literally, Mr. Shayo argued that the said argument is not backed up with any law arguing that the defendants' counsel is inviting the court to abandon the canon rules of statutory interpretation which demands literal rule of statutory interpretation to be used only where words of the statute are ambiguous or interpretation will lead to absurdity. That, as long as wordings are plain, the invitation by the defendants' counsel is misplaced.

Again Mr. Shayo reiterated his argument that the caselaw is appropriate in interpreting S.233 of the Act with regard who qualifies to bring an action under that particular provision. That, reading the plaint, claims are based on fraudulent transfer of shares, which emanates from forgery that is why there was a prior institution of criminal case and currently a subsequent claim for civil relief arising out of the said action. The orders which are claimed by the plaintiff has to be performed by the respective defendants. Even the prayer for rectification of register to include the plaintiff as a



shareholder has to be performed by the 2<sup>nd</sup> defendant as is the one maintaining the company member's register.

That, the reliefs claimed by the plaintiff, some are under Companies Act, and others are by way of tortious liability arguing that not all claims under the companies Act have to be instituted by way of petition unless the companies Act has so stated. That, since the plaintiff's cause of action is based on unlawful transfer of shares, then bringing the action by way of plaint is proper as long as the companies Act is salient on remedies of a person whose shares has been sold fraudulently or have been transferred illegally.

When Mr. Shayo was asked by the court what would be the fate of a normal suit filed by a person covered under section 233(1)&(2) of the Act, his response was that filing a suit by way of presenting a plaint instead of petition for unfair prejudice could led a suit to be incompetent before the court liable to be struck out

Having heard the parties' submissions, now is time to determine the *suo motu* issue raised. As I start, I find it worth reproducing the said section 233 of the Companies Act, [Cap.212 R.E.2002] (hereinafter **the Act**): -

"233(1) – **Any member** of a company may make an application to the court **by petition for an order on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interest** of its members generally or **of some part of its members (including at list himself)** or that **any actual** or proposed **act** or omission of the company (**including an act** or omission **on its behalf**) is or would be so prejudicial. If the court is satisfied that the petition is well founded, it may make such interim or final order as it sees fit for giving relief in respect of the matters complained of

(2) This section shall apply to 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 those provisions apply to a member of a company, and reference to a member or members are to be construed accordingly.

(3) Without prejudice to the generality of subsection (1), the court's order may:

- (a) regulate the conduct of the company's affairs in the future
- (b) require the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do

This court in **Yasimin Haji Vs Kenyatta Drive Properties Limited**  
**and Another,** Misc. Commercial Case No.14 Of 2022 High Court

(Commercial Division) at Dar Es Salaam (**Unreported**) had time to interpret unfair prejudice envisaged under the section 233 of the Act. In that case this court was facing a scenario similar to that of the plaintiff herein wherein the shares of the Petitioner were fraudulently transferred by the company. In deciding, my fellow learned brother, Hon. Dr. U. J. Agatho, J, at page 7, having reproduced s.233 of the Act, had this to state on the doctrine of unfair prejudice: -

*"The unfair prejudice doctrine has its own elements as echoed in Velisas Elizabeth Deflose (petitioning as legal representative under the Power of Attorney of Gordon McClymont) v Joseph Ignatius Noronha, Misc. Commercial Cause No. 20 of 2021, HCCD at pages 23-26. **The elements ought to exist are namely, that (1) the conduct of the company's affairs, (2) has prejudiced; (3) unfairly; (4) the petitioner's interest as a member of the company**".*

The learned judge went on to hold, at page 11, that: -

*"To begin with the (1) conduct of company affairs. Transferring of shares in the 1st Respondent's company, and **exclusion of the Petitioner while she was the shareholder of the 1st Respondent are the conduct of company's affairs.** That is the managing of company affairs*

And, lastly, the learned judge went on to hold, at page 11, that: -

***"Turning to (4) interests of the petitioner as the member of the 1st Respondent. Truly, the Petitioner had interests in the 1st Respondent company. She had shares in the company. But the conduct of affairs of 1st Respondents had inter alia indication of fraud in the transfer of shares that constituted unfair prejudice affecting the interest of the Petitioner."***

Now, having given due scrutiny to the plaint and the prayers thereto, plainly, what can be gathered in it is that the plaintiff is challenging his removal from the 2<sup>nd</sup> Defendant company, as a shareholder, his shares having been fraudulently transferred by the defendants.

While Mr. Shayo, the counsel for the plaintiff is of the assertion that, the time the plaintiff was removed as a shareholder of the 2<sup>nd</sup> defendant company, he became excluded from enjoying legal remedies provided under **s.233 of the Act**, on the ground that he ceased to be a member, on the other hand, Mr. Ndomba, the counsel for the defendants is of the argument that, s. 233 of the Act has to be interpreted not literally to cover the petitioner despite his removal as a shareholder in a company.

With due respect to Mr. Shayo, his interpretation cannot stand to be a correct one, and I may add, is uncalled for. In my view, it will be illogical and absurd to interpret that when a shareholder is fraudulently removed from the company then such act bars him from commencing an action against the company

for unfair prejudice to his interest in that company. Challenging such acts is within the meaning of section 233 of the Companies Act as treating otherwise the section renders it meaningless and inoperative of which, in my view, was not the purpose of the legislature in enacting it. This is founded on the reason that while the provision provides a room for challenging unfair prejudice, the ones befelling the plaintiff inclusive, on the other hand should not bar a person affected to seek redress under it. In so deciding I gain support from the decision of this court in **Yasimin Haji (supra)** to which I fully subscribe to. In that case, the petitioner had scenario similar to the one facing the plaintiff herein and petitioned for unfair prejudice instead of bringing a normal civil suit. In more specific way, I will let what was the prayer in that case speak by itself, I quote from the ruling of the court.

*"This ruling emanates from the petition brought **by the Petitioner** inviting the Court to grant the prayers she has advanced in her petition. She thus prayed for orders that:*

- (1) The Court declare that is unfair prejudice in the conduct of the affairs of the 1st Respondent company **against the Petitioner's interests.***
- (2) That **the Petitioner is a lawful shareholder** in the 1st Respondent Company.*
- (3) That **the 1st Respondent rectify her registers by including the 100 shares of the Petitioner and notify BRELA.***

- (4) *That **BRELA** reflect in her records the changes pursuant to above order."*

Therefore, as it can be seen, prayers in **Yasimin Haji** case, as hinted before, are similar to the one at hand, **Yasimin Haji** as a Petitioner, petitioned for unfair prejudice while his shares were already removed in the company's register and had thus a fit case for unfair prejudice. Under the circumstance, I can not buy the narrow interpretation by Mr. Shayo that the plaintiff is not covered to bring petition for unfair prejudice under section 233 of the Companies Act. The **Sabri Muslim Karim** case (**supra**) the to which reliance is sought by Mr. Shayo, having read it, in my view, as correctly so submitted by Mr. Ndomba, the defendants' counsel, the facts obtaining in it are distinguishable to the one at hand thus inapplicable herein. I thus find that the suit herein is a fit case for claims for unfair prejudice under section 233 of the Companies Act.

The next issue comes, is it proper to file a normal suit where the avenue for petitioning for unfair prejudice under section 233 of the Companies Act exist? On this, both sides are at one that, the proper forum is to petition for unfair prejudice under section 233 of the Companies Act instead of preferring a normal suit by way of plaint. In my view that is the



correct position. In so deciding I take inspiration from the Court of Appeal decision in **Elieza Zacharia Mtemi 12 Others vs Attorney General and 3 Others, Civil Appeal No.177 of 2018 CAT at Arusha** (Unreported) where at page 13 it had this to state: -

*The appellants' claims, **though actionable under some other laws of the land, do not fall under a branch of ordinary civil suit.** We are keenly aware that what the appellants were pursuing at the High Court falls under the realm of public law and could not be pleaded under the CPC which deals with private law. **It is, undoubtedly, settled that where the law provides for a special forum, ordinary civil courts should not entertain such matters.***

In the upshot, since the suit herein is filed as a normal suit by way of plaint instead of presenting a petition for unfair prejudice under section 233 of the Companies Act while the bases of claims by the plaintiff falls under unfair prejudice of his interests in the 2<sup>nd</sup> Defendant's company, I find the it to be incompetent before the court. It ought have been filed by way of petitioning for unfair prejudice. I therefore struck it out for being incompetent before the court.

The plaintiff is at liberty to channel his claims against the defendants through proper forum. I make no order as to costs since the issue was *suo motu* raised by the court. It is so ordered

Right of Appeal explained to any aggrieved party

Dated at Dar es Salaam this 16<sup>th</sup> day of June, 2023



**MUSA K. POMO**

**JUDGE**

**16.06.2023**

Ruling delivered in chamber on this 16<sup>th</sup> June, 2023 in presence of the plaintiff and Esther Msangi, learned advocate for the plaintiff but in absence of the Defendants and their advocate



**MUSA K. POMO**

**JUDGE**

**16.06.2023**