

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR-ES-SALAAM)

AT DAR-ES-SALAAM

LAND CASE NO. 34 OF 2016

BETWEEN

PARDEEP SINGH HANS PLAINTIFF

VERSUS

MEREY ALLY SALEHY.1st DEFENDANT

ISLAM ALLY SALEH 2nd DEFENDANT

DAR-ES-SALAAM CEMENT CO. LTD 3rd DEFENDANT

AMSONS INDUSTRIES (T) LTD 4th DEFENDANT

JUDGMENT

MRUMA J,

This case (i.e. Civil Case No. 34 of 2016), has a chequered history. Initially it was assigned to his Lordship Mwandambo J, as he then was and before his elevation to the Court of Appeal, Honourable Mwandambo J, conducted all preliminary stages of this case up to

framing of issues. Following his elevation to the Court of Appeal, the case was re-assigned to his Lordship Myambina J, who could not proceed with the trial before he was transferred to another working station and the matter was re-assigned to me in November 2021.

As this was already a back log case and as it transpired that some of the witnesses in this case were outside the country and in terms of Rule 2(1) of Order XVIII of the Civil Procedure Code (Amendment of the First Schedule) Rules 2021, on 1st December 2021 I ordered that evidence in chief in this case should be adduced by way witness statements. Accordingly trial of this case proceeded that way.

In these proceedings parties were represented. The Plaintiff enjoyed the service of Mr Joseph Rutabingwa and sometimes Mr Evodius Rutabingwa learned advocates, while 1st, 2nd, and 3rd Defendants were represented by Ms Hadija Aron, and 4th Defendant was represented by Dr Cuthbert Tenga who was assisted by Mr John James, also learned advocates

By a plaint dated 5th May 2016, the Plaintiff Pardeep Singh Hans hereinabove instituted a suit claiming against the Defendants jointly and severally for the following orders:-

- i. A declaration that the sale and transfer of landed property on plots number 62-64 Mbagala Industrial Area under certificate of title number 29787 by the first and second Defendants to the fourth Defendant without his involvement as a majority shareholder of the third Defendant is null and void;
- ii. Payment to the Plaintiff of the sum of TZS 7,250,000,000/= by the first and second Defendant being the amount paid by the Plaintiff for the purchase of the shares;
- iii. Payment of TZS 72,500,000/= by first and Second Defendants being the amount paid by the Plaintiff in the form of taxes toward the transfer of shares to him;
- iv. Payment of the sum of TZS 3,079,580,175/= being amount paid by the Plaintiff to Exim Bank (T) Ltd towards discharging loans and overdraft facilities extended to the third Defendant by Exim Bank;
- v. Payment of interest on the sum under (2) above at the commercial bank rate of 19% from September 2010 to the date of judgment.
- vi. Payment of interest on the sum of TZS 3,079,580,175/= under (iii) and (1v) above at a commercial bank rate of 19%

- compounded annually from September 2010 to the date of judgment;
- vii. Payment of interest on the sum of TZS 3,079,580,175 under prayer (IV) above against all Defendants jointly and severally at commercial bank rate of 19% compounded annually from 21st December 2012 to the date of judgment
 - viii. Costs of the suit.
 - ix. interest on the decretal sum at a rate of 12% from the date of judgment until payment in full.

It is the Plaintiff's case that on or about 7th August 2010, the first and second Defendants sold and transferred Five Thousand Shares each held by them in the third Defendant's company at a negotiated price of TZS 725, 000/= per share as confirmed by the head of agreement and first amending agreement dated 15th July, 2010. The total sum paid which the Plaintiff now claims against the first and second defendants as purchase price is TZS 7,250,000,000/= made up of TZS 1,600,000,000/= being cash payment and the balance basing on the assumed payment as per share purchase agreement.

The Plaintiff states further that pursuant to the sale and transfer agreement, he paid a total sum of TZS 72,500,000/= for stamp duty to

Tanzania Revenue Authority (TRA). The plaintiff asserts that on about 9th December 2010, the third Defendant Dar Es Salaam Cement Company Limited applied and got approval for a credit facility from Exim Bank (T) Limited in form of an overdraft and loan in the sum of TZS Eight Billion and Five Hundred Million (8,500,000,000/=) for the construction of the Cement Factory on Plot No 62-64 at Mbagala Industrial Area and as working capital. The said loan was personally guaranteed by the Plaintiff as primary guarantor with the first and second Defendants in their capacities as Directors of the third Defendant's company. According to the Plaintiff in the course of project implementation the third Defendant utilized TZS 3,079, 580,175/= .

Further to that it is the Plaintiff's contention that on or about 17th November 2011, without any justification the first and second Defendants purporting to act on their own through the third Defendant, Dar Es Salaam Cement Company Limited instituted Civil Case No. 189 of 2011 against the Plaintiff and Exim Bank (T) Limited and on 24th November 2011 obtained an ex-parte order restraining the two from dealing in any activity concerning the third Defendant's company.

He asserted that the act of the first and second defendants of instituting a suit through the third Defendant against the Plaintiff and Exim Bank

(T) Ltd prompted the said bank to recall the facility utilized and the Plaintiff as one of the guarantors and primary obligor had to pay the sum of TZS 3,079,580, 175/= which was confirmed by a forwarding letter and TISS transfer dated 20th December 2012.

It is further statement of the Plaintiff in his plaint that being armed with the Ex-parte order and without knowledge and participation of the Plaintiff, first and second defendants acting on their own and as directors and shareholders of the third Defendant and to the exclusion of the Plaintiff (who is also a director and majority shareholder), did on 7th November 2012 unlawfully sold the Landed property of the third Defendant which included the offices and factory on Plots No. 62-64 Mbagala Industrial Area to the fourth Defendant.

It is the Plaintiff's complaint that the purchase of the property by the fourth Defendant was solely based on status at the Land Registry without confirming the composition of the third Defendant (Dar Es Salaam Cement Company Ltd), which ought to have been confirmed at BRELA. It is the Plaintiff's contention that the first and second Defendant had no mandate to dispose of the property without the involvement of the Plaintiff. Accordingly it is his statement that both the sale and transfer are null and void.

He said that the money paid as purchase price and taxes of the shares that is to say TZS 7,250,000,000/= and TZS 72,500,000/= respectively would have benefited the Plaintiff if they had been used in any gainful use or business and by the actions of the first, second and third Defendants of selling the property has deprived the Plaintiff of a gainful use as a consequence of which he is praying for commercial interest on the sum calculated at a bank landing interest rate of 19% from the date of payment by the Plaintiff to the said bank that is to say 20th December, 2012 to the date of judgment and thereafter at the court rate of 12% from the date of judgment until payment in full.

In paragraph 18 of the plaint the Plaintiff avers that the money he paid to Exim Bank (T) Ltd towards discharging of the loan and/or credit facility extended to the third Defendant Dar Es Salaam Cement Company Limited, if used in other gainful activity by the Plaintiff would have profited him. He is therefore equally praying for payment by the Defendants of commercial interest at the rate of 19% from the date of payment to the said bank that is 20th December 2012 to the date of judgment and thereafter at court's rate from the date of judgment till payment in full.

Upon being served with copies of the plaint and its annexures thereto, the Defendants entered appearance. The first, second and third Defendants filed a joint written statement of defence denying the Plaintiff's claim and all the allegations contained in the Plaint. They stated that the third Defendant's shareholding structure had never changed throughout its existence. They said that there was executed an agreement between the 1st Defendant and the Plaintiff under which the Plaintiff was supposed to invest substantially in the third Defendant's company as a pre-condition for being afforded shares. They stated that the Plaintiff failed to meet the pre-conditions and instead he worked in conjunction with third parties to saddle the 3rd Defendant with debts amounting to TZS 757,500,000/= TZS 1,236,252,431.29 and USD 393,518.44 that were transacted through the third Defendant's Account No **0392010233** and **302010000** that were maintained at Exim Bank (T) Limited, Dar Es Salaam.

It is further statement of the first, second and third Defendants that instead of actually investing in the third Defendant's company, the Plaintiff worked with the third parties to obtain loans in the name of the third Defendant's company and then purported to clandestinely

withdraw the same and utilized it all to his own benefit leaving the third Defendant to saddle the resultant burden.

Explaining the background of the matter relating to Cement Factory, the first, second and third Defendants stated at paragraph 5 of their written statement of defence that the 3rd Defendant procured a syndicated loan agreement in 2007 involving the National Security Fund and Barclays Bank. Under that loan agreement USD 5,000,000.00 was extended to the third Defendant towards the construction of the cement factory. That Barclays Bank pulled out of the agreement at the last minute thereby putting the entire project in jeopardy. Eventually NSSF appointed a Receiver/Manager with respect to the 3rd Defendant and appointed Mr Rwechungura as such. That the receivership led to the taking over of the third Defendant cement factory thereby prompting the third Defendant to institute Land Case No.15 of 2011 for declaratory orders against the physical possession of the cement factory. The case was eventually settled out of court and a decree of the court ensued therefrom.

The Defendants averred that the Plaintiff didn't fully paid for the shares as envisaged under the Heads of Agreements and thus per very terms of the same vitiated all his proposed ascension into a shareholder.

The 1st, 2nd, and 3rd Defendants allege that Exim Bank didn't provide the loan as per the laws of the land but it exploited 3rd Defendant's predicament in conjunction with the Plaintiff to saddle the 3rd Defendant with debts without it actually benefiting from the same.

The fourth Defendant entered appearance through the firm of M/S Job Kerario & Co Advocates. She filed a written statement of defence dated 27th June 2016. She denied allegations contained in the plaint and averred that she bought the landed property from the lawful owner, third Defendant as evidenced by sale agreement and agreement of sale executed on 7th November 2012..

It is further statement of 4th Defendant that after the sale process of transfer of the purchased landed property was executed through Land Form No 35.

During the trial the Plaintiff Pardeep Singh Hans testified as PW1. In his evidence in chief the Plaintiff testified that he is a director and shareholder of several companies including the third Defendant's company, Dar Es Salaam Cement Company Limited. He testified that sometimes in May, 2010 he was approached by Islam Ally Saleh and Merey Ally Saleh the 1st and 2nd Defendants respectively. They wanted him to team up with them for construction of a cement producing

factory at Mbagala Area. By that time the two 1st and 2nd Defendants were sole shareholders and directors of Dar Es Salaam Cement Company Limited, the third Defendants' company herein. The Plaintiff was interested in the project and after some negotiations with the two first Defendants he agreed to buy shares. On 7th August 2010 he and the two Saleh brothers (1st and 2nd Defendants) executed a shareholders agreement, share purchase agreement and share transfer agreement under which he bought a total number of Ten Thousand Shares made up of Five Thousand share form each brother (Exhibits P1, P2, P3 and P4). He stated that pursuant to the share purchase agreement he paid a total sum of TZS 1,600,000/= to the first and second Defendants. That upon payment of the initial instalments and execution of the share transfer documents he paid necessary stamp duty to the TRA in the sum of TZS 72,500,000/=. He said that the balance of the purchase price of TZS 5,650,000,000/= was to be paid out of dividends to him from the profit earnings of the cement sales by the third Defendant's company. He tendered in evidence payment notice and deposit slip (Exhibit P5) indicating that TZS 72,500,000/= were paid to TRA on 2nd November 2011 being stamp duty for the purchase and share transfer agreement. The Plaintiff further tendered minutes of the shareholders meeting held on 7th August 2010 (Exhibit P6) which appointed him to be a director of

third Defendant's company. According to the minutes Resolution No 1 was "APPOINTMENT OF DIRECTORS" and it was resolved that PARDEEP SINGH HANS be appointed as Director of the Board of Directors of the company effective "from end of the meeting". The second resolution was about "TRANSFER OF SHARES": First it was reported by the Chairman (Islam Ally Saleh) that both Islam Ally Saleh and Merey Ally Saleh who each held Ten Thousand (10,000) shares in the company each wished to transfer part of their shares to the Plaintiff (Pardeep Singh Hans). It was resolved that the transfer be approved and that subject to transfer being stamped the name of the transferee be entered into register of members of the company as the holder of number of shares transferred to him.

It is the testimony of PW1 that he took over the day to day operations of the third Defendant's company as Managing Director on 14th August 2010. He also took over supervision of the construction of the Cement Factory at Mbagala. To prove this he produced in evidence project correspondences (Exhibit P7) between him and the Contractors SINOTECO Ltd. He testified further that on 18th August 2010 they lodged an application to their bankers Exim Bank (T) Ltd for credit facilities for construction of cement factory and working capital and successfully

negotiated a limit of TZS 8,500,000,000/=(Say Eight Billion and Five Hundred Million and because of his reputation with the bank the facility was approved. In the said facility the amount disbursed for local construction costs, paying local suppliers and importation of machinery and for paying the contractor M/S SINOTEC Ltd was TZS 3,079,580,175?=. That amount was disbursed through company's Accounts **No 0302010223** and **302010000** opened at Exim Bank (T) Ltd. It is his testimony that payment to the Chinese company was Dollars 437, 237.00 which was at the then exchange rate of TZS 1600/= to a dollar amounted to TZS 699,579,200/=. He said that the bank stationed one Mr Chandramuli to oversee the project implementation from the construction up to completion.

He said that the changes of shareholding and directorship of the third Defendant's company following the sale and transfer of shares were duly effected at the BRELA as it was confirmed by official search report dated 7th December 2011 (Exhibit P8). He told the court that he supervised the construction of the factory to completion and as they were about to commission the factory so as commence production of cement, the first and second Defendant purporting to act under the umbrella of the third Defendant filed Civil Case No 189 of 2011 before this court against the

Plaintiff and Exim Bank and on 24th November 2011 an ex-parte order was issued against him and the bank to vacate from the factory and hand over the operations to the 'so called owners' of the factory. That order was confirmed inter-parties on 7th March 2012. He said that the decision to bar him came at a time when production of the cement was about to commence and that if that had not happened payment of dividends would have started flowing within reasonable time thereafter.

It is further evidence of the Plaintiff that following his removal from the operations of the third Defendant's company, on 7th November 2012 the first and second Defendants acting on their own without his involvement sold the factory and transferred the land to the fourth Defendant. He said that that was done after the directors of the fourth defendant namely Abdallah Nahdi and Edha Nahdi had sought confirmation from him whether the property was on sale of which he categorically informed them that no sale could take place without his involvement.

He said that Civil Case No. 189 of 2011 was dismissed by this court on 19th April 2019.

In cross-examination by the 1st, 2nd, and 3rd Defendant's Counsel PW1 stated that this suit is against his co-directors in third Defendant's company and he conceded that there was no board resolution passed to

allow him to institute this case. He further conceded that he was a director of a different company and that he knows the law. He also conceded that he was the 1st Defendant in Civil Case No. 189 of 2011 and that he heard about the sale of the property between 2011 and 2012. When he was referred to exhibit P1 he stated that the document (1st amendment agreement dated 15th July 2010) is not stamped with stamp duty. When he referred exhibit P2 he stated that there was no stamp duty in the shareholders' agreement. When he was referred to exhibit P3 he responded that the share purchase agreement was signed on 7th August 2010 but it was dated 15th July 2010 and the main agreement was signed on 1st July 2010 and that he became the director upon signing the share purchase agreement on 14th August 2010. He could not recall when his name was registered in the company's register.

Another witness who testified for the Plaintiff is **Jacob Samuel Sanga @ Jacob Samuel PW2** an Accountant by professional and an employee of Exim Bank (T) Ltd at the position of Senior Recovery Manager in the Department of Special Assets Management of the bank. He told the court that the Plaintiff was among the bank's customers as he was the Managing Director and shareholder of the third Defendant company Dar Es Salaam Cement Company Limited. He recalled that on 3rd December

2010 his bank Exim Bank (T) sanctioned credit facilities made up of a term loan and an overdraft to the third Defendant's company to the tune of TZS 8.5 billion for purposes of construction of cement factory. He said that in order to facilitate the said loan third Defendant's company had opened bank accounts numbers **0302010223** and **302010000**. He tendered in evidence facility offer letter issued by the bank to the third Defendant's company (Exhibit P14) and bank statement of that company (Exhibit P15). He stated that disbursements of the funds were done upon execution of security documents. He said that out of the disbursed funds the third Defendant's company made payments to local and foreign suppliers, contractors and other operational expenses. He said that his bank had assigned bank officer one Chandramuli to oversee the construction process and report to the management on how the funds were being utilized for the intended purposes.

He said that following the filing of Civil Case No 189 of 2011 by the first and second Defendant against the Plaintiff and Exim Bank (T) Ltd, in which they managed to bar the Plaintiff and Exim Bank from engaging in the activities of the factory, the bank called upon the guarantors and particularly the Plaintiff who was the primary obligor to repay the entire amount disbursed and utilized by the borrower, Dar Es Salaam Cement

Company Ltd under the facility. According to the witness in order to maintain his integrity with Exim Bank and as a primary obligor/guarantor the Plaintiff opted to pay TZS 3,079,580,175/=being the amount due and utilized under the granted facility. He said that the bank demanded payments from the guarantor as there was no likelihood of borrower Dar Es Salaam Cement Company Ltd paying the same. He told the court that PW1 made the said payment on 20th December 2012 and that prompted bank to withdraw counterclaim in Civil Case No 189 of 2011. He said that the whole amount disbursed by the Bank was wholly utilized towards the construction of Cement factory for and on behalf of Dar Es Salaam Cement Company at the project site at Mbagala Industrial Area and was duly repaid to the bank by PW1 Pardeep Singh Hans.

In their defence the first, second and third Defendants called three witnesses. The first Defendant **Merey Ally Saleh** who testified as DW1 testified on 5th July 2022. He testified online as he was in Dubai. He adopted his witness statement dated 12th May 2022 as his evidence in chief. He told the court that he is the director and shareholder of the third Defendant's company. That the third Defendant's company has two shareholders and two directors who were himself and the second Defendant Islam Ally Saleh each holding 10,000 shares. He said that

sometimes in 2010 the Plaintiff executed a prospective investment agreement with the third Defendant whereby he was to substantially invest in the third Defendant's company as a pre-condition of being afforded shares. He told the court that the Plaintiff was obligated to inject the investment amount into the 3rd Defendant but contrary to the letters of agreement he failed to meet the pre-conditions of investing in the 3rd Defendant and the allocation and transfer of shares didn't eventually pass to the Plaintiff. He said that the Plaintiff was not among the shareholders and/or directors of the third Defendant's company. He further stated that the purported loans obtained by the Plaintiff in collusion with third parties have absolutely nothing to do with the first, second and third Defendants as there has never been a board resolution passed authorizing such transactions and that neither corporate nor personal guarantees were passed and registered in favour of the third Defendant in connection with the alleged debts.

He told the court that the purported loans as allegedly extended to the third Defendant were obtained by the Plaintiff in his personal capacity and were utilized for the Plaintiff's personal gain to the exclusion of the 1st, 2nd and 3rd Defendants. He informed the court that the 1st, 2nd, and 3rd Defendants were aggrieved by the injurious acts of the Plaintiff in

collusion with Exim Bank and they instituted Civil Case No 189 of 2011. He said that the 3rd Defendant arranged for a syndicated loan agreement in 2007 in the sum of USD 5,000,000.00 involving National Social Security Fund and Barclays Bank which was to be used by the third Defendant to finance construction of a cement factory but Barclay Bank pulled out of the agreement last minute exposing the 3rd Defendant into uncalculated risks and jeopardize the whole project. Consequently, NSSF appointed Mr Charles Rwechungura as the Receiver/Manager to the project. That following 3rd Defendant's exposition to receivership it filed land Case No 15 of 2011 which was eventually settled out of court. It is his testimony that being aggrieved by the acts of the Plaintiff 3rd Defendant instituted Civil Case No 189 of 2011 seeking several reliefs relating to the loan procured by Pardeep Sigh Hans (i.e. the Plaintiff herein) using the company's name.

When he was shown Exhibit P1 (i.e. Heads of Agreement) and cross-examined by Mr Rutabingwa for the Plaintiff, he conceded to have signed share purchase agreement and shareholders agreement (Exhibit P3). He however hurriedly added that they signed the two documents before they were paid. He told the court that transfer of shares was from them to the Plaintiff and actually it was effected. When he was

referred to Exhibit P3 (i.e. Transfer of Shares Agreement) he conceded that according to their agreement the balance of purchase price was to be paid through dividends. When he was cross-examined in relation to his signature in exhibit P7 (i.e. Project Correspondence) and that in his written statement of defence DW1 denied the signature in exhibit P7 but he recognized admitted the signature in the written statement of defence as being his. Apparently the two signatures are of the same person. When he was further cross-examined on how they paid for construction of cement factory, he first denied having secured any loan from Exim bank and stated that they paid the contractors by using their own funds and that payments were done through CRDB bank. When he was asked if he has any evidence of the said payments he said he had none. On how much they sold the factory, DW1 told the court that they sold it at 6,100,000.00. He conceded that they didn't involve Plaintiff in that sale He mentioned those who were involved as Islam and the Receiver/ Manager. He could not remember how many witnesses, witnessed the sale.

When DW1 was cross-examined by Mr John James advocate for the fourth Defendant, he told the court that he knows fourth Defendant Amsons Industries (T) Ltd as they signed an agreement with them in

which they sold to her Dar-es-salaam cement company Ltd. He said that by that time shareholders of the fourth Defendants (Dar-es-salaam Cement Company Ltd) were two, i.e. himself and Islam Saleh and that before selling the factory they obtained consent from all authorities and there were no objections for the transfer.

Like the first Defendant, the second defendant **Islam Ally Saleh** didn't call any witness save for himself. He testified as DW2. He testified online from South Africa. He adopted his witness statement as his evidence in chief. The big chunk of his evidence is repetition of what his brother Merey Ally Saleh had told the court. Like DW1 he told the court that he and his brother were the only shareholders and directors of the third Defendant's company holding 10,000 shares each. He denied the Plaintiff's contention that he (i.e. the Plaintiff) was one of the shareholders and directors of the third Defendant. He said that there was no proof of the said allegations.

When he was cross-examined by Mr Rutabingwa on how he signed his witness statement while living abroad, DW2 told the court that although he lives in Victoria South Africa he signed it online and 'sent copies thereof by plane'. When he was referred to exhibit P4 (i.e. Transfer of

Shares or Stock) he also admitted to have signed it. He also admitted to have signed exhibit P3 (i.e. Share Purchase Agreement).

The third Defendant called one witness, **Mr Merey Ally Saleh DW3** who is also the first Defendant and had testified as DW1. He adopted his witness statement in which he denied the Plaintiff's claim. He simply reiterated what he stated in his witness statement for himself as first Defendant. He also relied on pleadings (i.e. the Plaintiff) in Civil Case No 189 of 2011 (exhibit D1), Notice of Receivership (Exhibit D2) and a deed of settlement in Civil Case No. 15 of 2011.

The 4th Defendant AMSONS Industries Limited called two witnesses **Mr Charles Rutayugwa Burchad Rwechungura (DW4)** and **Mr Edha Abdallah Nahdi (DW5)**. Mr Rwechungura a senior advocate of this court adopted his witness statement dated 12th July 2022. He told the court that back on 25th January 2011 he was appointed by the Board of Trustees of the National Social Security Fund (NSSF) and on 16th February 2011 he was appointed by the Eastern and Southern Trade and Development Bank (PTA) bank in exercise powers conferred upon NSSF by a debenture signed on 12th November 2007 and registered on 15th January 2008 in favour of NSSF and in exercise of powers conferred upon PTA Bank by the Third Party Debenture dated 2nd June 2008 and

registered on 5th June 2008 issued to Dar Es Salaam Cement Company Limited in favour of TPA Bank to be Receiver and Manager of the assets charged under the mentioned debentures.

He said that as a Receiver and Manager looked at the question arose regarding the status of Pardeep Singh Hans (the present Plaintiff), but before he could resolve the issue third defendant herein instituted Civil Case No. 15 of 2011 which tighten his hands and ceased his responsibilities as Receiver Manager.

When cross-examined by Mr Rutabingwa, DW4 told the court that after his appointment as a Receiver Manager of the third Defendant's company he wrote an introduction letter to its directors namely Pardeep Singh Hans (i.e. the present Plaintiff), Merrey Ally Saleh (first Defendant herein) and Islam Ally Saleh (the second Defendant herein). He said that though he visited the factory but he never took over possession of the same. When he was referred to exhibit P8 (A report from BRELA showing date of incorporation of Dar Es Salaam Cement Company Limited, its shareholders and Directors and other particulars), DW4 told the court that he was not aware of such document and that had he been aware of the particulars therein he would have inquired on the matter. He added that his responsibilities as the Receiver Manager

ceased after a deed of settlement was recorded in Civil Case No 15 of 2011. He said that in the ensued decree there was an order suspending him from being a Receiver/Manager of the 3rd Defendant. He told the court that if there is any sale of the third Defendant to the 4th Defendant it must have been after he was removed from receivership.

Edha Abdallah Munif Nahdi (DW5), Managing Director of the 4th Defendant's company is another witness who testified for the fourth Defendant. He testified that fourth Defendant is directly connected with this matter because she is the proprietor of the designed land and assets on plots 62-64 located at Mbagala Industrial area. He said that his company obtained ownership of the property from the lawful owner of the company i.e. the third Defendant through the sale agreement and Agreement for sale executed by the third and fourth Defendants. He said that after receiving information about the sale of the properties from the third Defendant they conducted a normal purchasing procedures and cross checked the legit of the properties with related authorities including BRELA, Ministry of Lands and the Receiver Manager which gave them ok to proceed with the process of purchasing the property. He said that after the purchase of the property was completed

then transfer processes of the landed property were executed and Land Form No.35 was filled.

When he was cross-examined by Mr Rutabingwa for the Plaintiff, DW5 told the Court that Abdallah Nahdi who is his father a shareholder and co-director in the 4th Defendant's company informed him he was cautioned by the Plaintiff not to buy the third defendant's company because it was involved in a dispute. He said that when they visited the company in 2012 the factory was not completed but it was almost complete. When he was asked whether he has any evidence to prove that they conducted search before purchasing the factory he replied that he had none. When he was asked whether they visited and inquired from the Receiver Manager he replied that they did and when he was informed that the Receiver Manager has testified in this court and denied to have met them, he said that may be he had forgotten.

When he was referred to exhibit P8 (search report from BRELA) which indicates that on 7. 12. 2011 when the search was done, the Plaintiff Pardeep Singh Hans was the majority shareholder with 10,000 shares while first and second Defendant had 5000 shares each, DW5 told the court that if exhibit P8 is correct then they did a mistake to purchase

third Defendant's company without involving the Plaintiff Pardeep Singh Hans (PW1).

In re-examination by Dr Tenga for the fourth Defendant DW5 told the court that exhibit P8 was a search report of BRELA issued on 7. 11. 2011 and their report was issued in November 2012.

As stated at the outset of this judgment six issues were framed for determination by this court. The issues are:-

- (i) Whether the agreement for the sale of and transfer of part of shares held by the first and second Defendants to Plaintiff was subject to any preconditions.
- (ii) Whether precondition (if any) was met.
- (iii) Whether credit facilities extended by Exim bank and guaranteed by Plaintiff as a primary obligor were utilized for the benefit of the third Defendant.
- (iv) Whether the decision made by the third Defendant in the absence of Plaintiff was valid.
- (v) Whether the fourth Defendant lawfully acquired the third Defendant's property on Plot No. 62-64 in Mbagala industrial area construed in certificate No. 29787.
- (vi) What reliefs are the parties entitled to.

I will start with the first issue which asks whether the Agreement for Sale and Transfer of Shares held by the first and second Defendants in the third Defendant's company to the Plaintiff was subject to any pre-conditions. To resolve this issue parties adduced evidence and counsel for the parties made submissions for and against that proposition.

I have revisited the evidence of the parties and the submissions of their respective advocates. I have carefully scrutinized the First Amending Agreement in respect of the Heads of Agreement dated 1st July 2010 (exhibit P1), the Shareholders Agreement (Exhibit P2), and the Share Purchase Agreement (Exhibit P3), I find that the Agreement for Sale and Transfer of part of Shares was subject to some conditions and not preconditions as the Defendants will love this court to believe. /The alleged requirement of 'substantial investment before sale of shares to the Plaintiff' does not feature anywhere in the evidence adduced (i.e. Exhibits P1, P2 and P3) in this case. Both first and second Defendants admitted that they signed all documents exhibiting sale and transfer of shares to the Plaintiff. The search report (Exhibit P8) indicates that particulars of the third Defendant's company as at 7th December 2011 were to the effect that first and second Defendant had 5000 shares each while the Plaintiff had 10,000 shares. Thus he was the majority shareholder in that company. In my view if there were pre-conditions

which were to be met before transfer is effected BRELA would not have effected changes in the company. I therefore answer the first issue in the negative, that is to say sale and transfer of part of shares held by the 1st and 2nd Defendants in the third Defendant's company were not subjected to any pre-conditions. The allegation that the Plaintiff was required to invest substantially before acquiring shares in the company has not been substantiate, this finding also answers the second issue which asks 'whether the pre-condition (if any) were met. The evidence on record would suggest that there were three conditions for the sale and purchase of shares deal (and not pre-conditions). The conditions were met vide Exhibit P1. The second required there being a shareholders agreement and this was effected via Exhibit P2 and thirdly and as correctly submitted by the counsel for the Plaintiff all essential documents were to be availed to the Plaintiff to enable him carry out due diligence and take possession of the property. This was done according to undisputed evidence of PW1.

The third issue is whether credit facilities extended by Exim bank and guaranteed by the Plaintiff as a primary obligor were utilized for the benefit of the third Defendant. To prove that the said credit facility was granted for and utilized by the third Defendant's company on top of oral testimony of PW1 and PW2 to that effect the Plaintiff tendered in

evidence a Letter Offer (Exhibit P14) dated 3rd December 2010 and addressed to the Managing Director of M/s Dar Es Salaam Cement Company Ltd, i.e. third Defendant. In that letter names of guarantors are Mr Islam Ally Saleh (i.e. 2nd Defendant), Mr Merey Ally Saleh (i.e. first Defendant) and Mr Pardeep Singh Hans (the Plaintiff). These were shareholders and directors of the 3rd Defendant's company and they all signed to accept the terms and conditions of the letter of offer as stipulated therein. Purposes of the facility are stated in the letter offer (Exhibit P14) as being 'Loan for construction of the Cement Factory; OD for working capital requirements; G'TEE: For working capital requirements. The defence didn't dispute or challenge admission of exhibit P14. They simply denied to have received any loan from Exim Bank and said that they funded construction of the factory by using their own funds without disclosing its source or how it was paid to contractors. I thus, answer the third issue in the affirmative, that is to say the credit facility extended by Exim Bank and Guaranteed by the Plaintiff as a primary obligor was obtained and utilized for the benefit of the third Defendant.

The fourth issue which is whether the decision made by the 1st and 2nd defendant in the absence of the Plaintiff was valid will not hold me much. From the evidence of PW1 exhibits P4 collectively (i.e. transfer of

shares) and official search report from BRELA (Exhibit P8), the Plaintiff was majority shareholder of the third Defendant's company. As exhibited by the minutes of company's meeting (Exhibit P6) and the Project Correspondence Note the Plaintiff was also the Chairman of the Board and managing director of the third Defendant's company. This decision to sale the company without involving the majority shareholder, Managing Director and Chairman of the company cannot be valid. I thus answer the fourth issue in the negative by saying that the decision made by the 1st and 2nd Defendants (who were minority shareholders in the company) to sale the company to the fourth Defendant was invalid.

Having found that the decision made by the 1st and 2nd Defendant to sale the third Defendant's company without involving the majority shareholder was not valid, it follows therefore that the 4th Defendant's acquisition of the third Defendant's property on Plots No 62-64 cannot be lawfully because it originates in an invalid sale. Further to that there are contradictions on the Defendants' evidence on how the 4th Defendant acquired the said properties. Whereas DW1 and DW1 didn't say anything in their witness statements on how they sold the third defendant's company to the 4th Defendant, DW1 stated in cross-examination that they sold the company in 2012 through Receiver

Manager (DW4) but when he was testifying as DW3 for the third Defendant, the same witness Merely ALLY Saleh stated thus:-

"We sold the factory for USD 6,131,000.00...and all the money went to NSSF"

On his part the Receiver/Manager told the court in his evidence in chief (i.e. witness statement) that institution of Civil Case No 15 of 2011 technically tighten his hand as a receiver manager and ceased his responsibilities. When he was cross-examined by Mr Rutabingwa for the Receiver/Manager told the court thus:-

"My responsibilities were stopped after Land Case No 15 of 20111 was instituted. I cannot recall the date it was filed but there was an order suspending me from being receiver/manager. So my powers ended with the institution of that case"

It follows therefore that on the evidence on record, the receiver manager (DW4) is denying to have been involved in the alleged sale of the third Defendant's company to the fourth Defendant. Thus the fourth Defendant cannot be heard claiming that she validly acquire the third Defendant's property on Plot No 62-64 Mbagala Industrial Area

comprised in Certificate of Title No 19787 or any other property. This answers the 5th issue in the negative. That is to say the fourth Defendant's acquisition of the third Defendant's property on Plot No 62-64 Mbagala Industrial area comprised in Certificate of Title No 29787 was unlawfully.

The last issue is about reliefs. It reads; to which reliefs are the parties entitled. The first relief sought by the Plaintiff is a declaration that the sale and transfer of the landed property on Plots Numbers 62-64 Mbagala Industrial Area under Certificate of Title No 29787 to the fourth Defendant by the first, second and third Defendants is null and void. It has been established by evidence both oral and documentary that the alleged sale didn't follow procedure and the law. It was conducted by minority shareholders without involving the Plaintiff who was majority shareholder, Chairman and Managing director of that company. On the evidence adduced some of the Defendants' acts may constitute fraud. For instance, it has been proved that the Plaintiff was the majority shareholder in the third Defendant's company holding 10000 shares alone. The first and second Defendants were minority shareholders holding 5000 shares each after selling some their shares to the Plaintiff. According to BRELA's official search report (Exhibit P8) dated 7th

December 2011 current shareholders in the third Defendant's company were:-

1. Islam Aly Saleh (5000 Shares)
2. Merey Ally Saleh (5000 Shares) and
3. Pardeep Singh Hans (10,000 Shares).

Directors of the company were:-

1. Islam Ally Saleh
2. Merey Ally Saleh;
3. Pardeep Singh Hans
4. Pardeep Singh Hans and;
5. Spouse John Mushi

Thus, the filling of Land Cases No 15 of 2011 and 189 of 2011 both against the Plaintiff and Exim Bank (T) Ltd and their securement of deed of settlement which settled Land Case No 15 of 2011 and resulted into a decree of this court leaves a lot to be desired. These acts were done without involving the Plaintiff as the Managing Director and majority shareholder of the third Defendant's company. It is these acts and conducts of the first and second Defendants which may border fraudulent acts. In the case of **Morogoro Hunting Safaris Limited vs. Halima Mohamed Mamunya, Civil**

Appeal No.117 of 2011 (unreported), the Court of Appeal had this to say:-

"... any particular company carries out its management functions by its directors; and that the directors must act collectively..."

Secondly, the Deed of Settlement which was tendered in evidence as Exhibit D3, was signed by undisclosed principal officer of the company (i.e. the Plaintiff therein) and did not bare the Company seal as required by law (See Section 39 (1) to (4) of the Companies Act). The deed of settlement (Exhibit D4) is an official document of the company filed in court, therefore ought to have been executed by two (2) directors of the Company or by a director and the secretary of the Company. I am mindful of the fact that this court cannot annul the said deed of settlement (Exhibit D4), however it is entitled to form its opinions and reservations especially where the same is before itself as part of the Defendant's evidence. My opinion of that document is that it leaves a lot to be desired particularly so because it is said to be an out of court settlement which was adopted by the court. In that case, the present first and second defendants who were running the affairs of Dar Es Salaam Cement Company Ltd

(third Defendant herein) were suing NSSF (who is not a party to these proceedings) and the Receiver/Manager who in the present proceedings testified for the third Defendant as DW4.

That said this court finds, holds and declares that the sale and transfer of landed property on Plots Numbers 62-64 at Mbagala Industrial Area held under Certificate of Title No **29787** to the fourth Defendant AMSONS Industries (T) Limited was unlawfully and therefore null and void.

Secondly, the Plaintiff is praying for an order that the first and second Defendants be jointly and severally be ordered to pay him the sum of Tanzania shillings Seven Billion Two Hundred and Fifty Million being the amount paid to them by the Plaintiff for the purchase of shares in the third Defendant's company. There is evidence to the effect that parties had agreed that part of the share purchase price of Tanzania shillings 1000,000,000/= (Say One Billion) shall be paid by the Plaintiff to the first and second Defendant each by instalments and upon completion the vendor shall among other things hand over possession of the property to the purchaser. This was confirmed by oral testimony of PW, share purchase Agreement (Exhibit P3), Transfer of Shares Agreement (Exhibit P4) and Payment Notice and Deposit Slip (Exhibit P5) which indicates

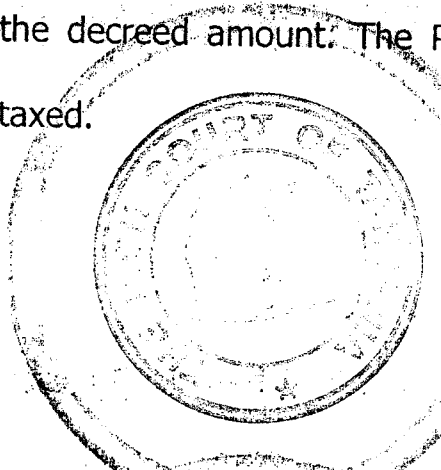
that the agreed share purchase price was paid in full and thus, the stamp duty paid was calculated thereof. This court therefore grants the second and third prayers and order that the 1st and 2nd Second Defendant shall jointly and severally pay to the Plaintiff Tanzania Shillings Seventy Two Million Five Hundred Thousand only being the amount paid by the Plaintiff to TRA in the form of Taxes towards the transfer of shares to him. Further to that it is hereby ordered that 1st and 2nd Defendants shall jointly and severally pay to the Plaintiff Tanzania Shillings 1,000,000,000/= (say One Billion) each being the amount paid to each for purchase of shares in the third Defendant's company.

As regards to payment of Tanzania Shillings 5,250,000,000/=(say Five Billion Two Hundred and Fifty Million) as part of share purchase price which was to be realized from dividends due to the Plaintiff, despite the fact that there is no evidence whatsoever of realization of such or any dividends in the company since the mandate of this court is to enforce what has been mutually agreed by the parties and as that is what was agreed by the parties in this matter and because it is the defendants who fraudulently frustrated the deal, this court grant the prayer and order that all Defendants shall jointly and severally pay to the Plaintiff Tanzania Shillings 5,250,0000/= being the balance of share purchase

price which were to be realized through dividends payable to the Plaintiff.

The Plaintiff is also claiming for payment of Tanzania Shillings 3,079,580,175/= being refund of the amount the Plaintiff paid towards discharging the loan and overdraft facilities extended to the third Defendant's company by Exim Bank (T) Limited. There is cogent evidence to the effect that the Plaintiff paid the claimed amount to discharge the loan advanced to the third Defendant's company. Having failed to acquire the third Defendant's company for reasons stated, the Plaintiff is entitled to the money he paid to discharge the third Defendant's loans. I therefore order all Defendants to jointly and severally pay to the Plaintiff Tanzania Shillings Three Billion Seventy Nine Million, Five Hundred and Eighty Thousand, One Hundred and Seventy Five (TZS 3,079,580,175/=) as a refund of the money he paid to Exim Bank (T) Limited in discharging loan advanced to the third Defendant. The plaintiff is also praying to be paid interest. He is entitled to interest on the decreed sum at the rate of 15% per annum from the date of filing this suit to the date of judgment and further interest at court's rate of 3% per annum from the date of judgment to the date of full payment of

the decreed amount. The Plaintiff will also have his costs as shall be taxed.

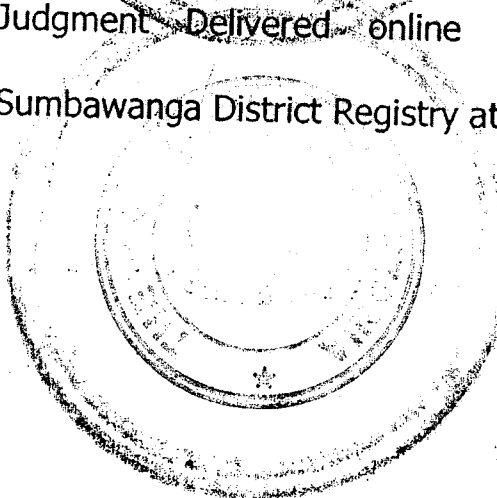



A.R. Mruma,

Judge

17/02/2023

Judgment Delivered online from the High Court of Tanzania
Sumbawanga District Registry at Sumbawanga this 17th February 2023.




A.R. Mruma

Judge

17/2/2023