IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CONSOLIDATED CIVIL CASES NOS. 142 OF 2020 AND 79 OF 2023

SHAHEEZA MOEZALI KARMALI……,,.. 1ST PLAINTIFF

ZARMIN MOEZALI KARMALI …… 2ND PLAINTIFF

RAHIM MOEZALI KARMALI……3RD PLAINTIFF

NASIM MOEZALI KARMALI……4TH PLAINTIFF

VERSUS

NOOR KARIM DIAMOND KARMALI alias

NOOR KARMALI……1ST DEFENDANT

NORTH MARA GOLD MINE LIMITED ……2ND DEFENDANT

JUDGMENT

13th & 22nd May, 2024

BWEGOGE J.:

The aforementioned plaintiffs (siblings) instituted simultaneous civil suits namely, Civil Case No. 142 of 2020 (henceforth "former suit") and Civil Case No. 79 of 2023 (henceforth "latter suit") against the defendants herein. In the former suit, the plaintiffs sued the 1st defendant herein

alone; and in the latter suit, the plaintiffs sued both the 1st and 2nd defendants herein.

In respect of the former suit (Civil Case No. 142 of 2020), the plaintiffs jointly and severally pray for judgment and decree against the 1st defendant as follows:

*(a) An order requiring the defendant to pay the plaintiffs a sum of United States Dollars (**USD**) **5,307,434.99,** being the difference between **USD 5,557,434.99** which the Defendant received regularly between December 2015 and June, 2020 from North Mara Gold Mine Limited as royalty payable to the estate of the deceased to deliver to the plaintiffs; and **USD 250,000** which he (the defendant) actually delivered to them;*

*(b) An order requiring the defendant to pay the plaintiffs a sum of United States Dollars (**USD**) **487,500,** which the Defendant received from North Mara Gold Mine Limited in satisfaction of the decree of this court in favour of the estate of the deceased in Civil Case No. 93 of 2017 between March and April, 2019;*

*(c) An order requiring the defendant to deliver to the plaintiffs the house and every unexhausted improvement on Plot No. 4, Block 73, Upanga, Dar es Salaam together with mesne profits accruing thereon from at least December 2015 when it came into the defendant's hands to the date of delivery of the same to the plaintiffs or **USD 1,000,000,** or money realized from its sale (if sold), whichever the higher;*

(d) An order requiring the defendant to pay to the plaintiffs a compound interest at 15% per annum on USD 250,000 as from 1/4/2016 when it was supposed to have been paid to 26/10/2019 when it was paid to the plaintiffs;

(e) An order requiring the defendant to pay to the plaintiffs a compound interest on USD 487,500 at the rate of 20% per annum as from 1/5/2019 when it was supposed to be paid, to the date the same is paid to the plaintiffs in full;

(f) An order requiring the defendant to pay to the Plaintiffs a compound interest at 15% per annum as follows:

(i) On USD 1,602,610.85 paid in 2016 from 1/1/2017;

(ii) on USD 1,354,471.38 paid in 2017 from 1/1/2018;

(iii) on USD 798,219.48 paid in 2018 from 1/1/2019;

(iv) on USD 1,046,007.57 paid in 2019 from 1/1/2020 and;

(v) on USD 510,265 paid in 2020 so far from 1/7/2020,

to the date the same is paid to the plaintiffs in full.

(g) General damages of the amount this court may assess to be fair and adequate in favour of the plaintiffs;

(h) Interest on the decretal sum at the rate of 7% per annum from the date of judgment to the date of full settlement of the decree;

(i) Costs of this case;

(j) Any other relief that to the court appears just in favour of the plaintiffs.

And in the latter suit (Civil Case No. 79 of 2023) the plaintiffs pray for judgment and decree against both defendants as follows:

*i) An order requiring the defendants jointly and severally to pay the plaintiffs a sum of United States Dollars (**USD**) **1, 565, 250. 73,** being the sum of the regularly declared quarterly plaintiffs' royalty money converted by the defendants for the period between July, 2020 and 29th April, 2023.*

*ii) An order requiring the defendants jointly and severally to pay the plaintiffs a sum of United States Dollars (**USD**) **100,000,** being the plaintiffs' money and part of decretal sum of the plaintiffs converted by the defendants to the 2nd defendant's use.*

*iii) An order for payment of a compound interest on the sum making up the total of **USD 1, 565, 250. 73** in prayer (a) above at the rate of 17% per annum from the date of each component of the sum making up this sum of Table 1 was due for payment to the date it is paid, such sums having the starting (due) date for computation of the interest as follows;*

- *i) On USD 119, 528. 48 from 01. 01. 2021*
- *ii) On USD 66. 484. 71 from 1.4. 2021*
- *iii) On USD 90,656.69 from 1.7.2021*
- *iv) On USD 70, 322.91 from 1.10.2021*
- *v) On USD 46, 631. 80 from 1.1. 2022*
- *vi) On USD 185,792.34 from 1.4.2022*
- *vii) On USD 176, 065.53 from 1.7.2022*

viii) On USD 213.760.89 from 1.10.2022

ix) On USD 260, 712.27 from 1.1. 2023

x) On USD 335,295.12 from 1.4.2023.

iv) An order requiring the defendants jointly and severally to pay the plaintiffs jointly and severally interest of 17% per annum on the sum of ***USD 100,000*** *in prayer (b) above from August, 29th 2022 when it was converted to the date it is paid to the plaintiffs;*

v) An order requiring the defendants jointly and severally to declare in writing any sum of money not mentioned in this plaint which they might have held and converted for the period starting from July, 2020 onwards and pay it to the plaintiffs jointly and severally with immediate effect plus compound interest on it at the rate of 15% per annum from the date the same was due for payment to the plaintiffs to the date it is paid to them;

vi) An order perpetually restraining the defendants jointly and severally from deducting, receiving, touching, spending, converting or any manner tempering with the 50% of the plaintiffs' dues arising from their royalty money payable by the 1st defendant under or arising from the agreement dated 1.7.1995 involving the deceased and the 2nd defendant as modified by the agreement of 9.5.2002 save with the written authority of the plaintiff jointly;

vii) An order compelling the 2nd defendant from today onwards to pay to the plaintiffs jointly and severally the whole of 80% of dues otherwise payable to the deceased rising from their royalty money under the agreement dated 1.7.1995 as modified by the agreement of 9.5.2002 including not limited to

the 50% of which the 1st defendant has in the past transactions paid to the 1st defendant;

viii) *The defendants jointly and severally to pay the plaintiffs general damages of* ***USD 100,000****.*

ix) *The defendants jointly and severally to pay interest on the judgment debt at the rate of 7% per annum from the date of judgment to the date of full settlement of the decree;*

x) *The defendants jointly and severally to pay costs of this case;*

xi) *Any other relief that to this court appears just in favour of the plaintiffs.*

In the interest of brevity, the facts of this case are thus: The plaintiffs herein are siblings and the children of the late Moezali Rahim Karmali also known as Moez Rahim Karmali and, or Moez Karmali**.** The 1st defendant herein is the cousin of the plaintiffs herein born by the plaintiffs' paternal uncle namely, the late Diamond Rahim Karmali. And the 2nd defendant is a company incorporated in Tanzania engaged in the mining business in Mara region.

The said Moezali Rahim Karmali (hereinafter "the deceased") was the elder brother of Diamond Rahim Karmali. The duo coexisted amicably. And the deceased person, out of love and affection, had taken custody of the 1st defendant since his childhood.

The deceased person (the late Moez Rahim Karmali) engaged in a gold mining business in Nyabirama, Nyamongo in Tarime District and was associated with mineral claims Nos. 41297, 41298 and 41299. Later on, the deceased engaged with the 2nd defendant (formerly known as East African Gold Mines/Africa Mashariki Gold Mine) in what was referred to as "*the Option to Purchase Agreement of 1995*" whereas the 2nd defendant appropriated the deceased's mineral rights on the agreement to make quarterly payment of royalty of 1% of the (minable) gold produced from the respective mineral claim areas. The deceased died intestate on 7th April, 2004 at the Madras Medical Mission, in India. Likewise, the deceased's brother, the late Diamond Rahim Karmali demised in 2014.

Allegedly, in 2015, the 1st defendant instituted probate proceedings *(Probate and Administration Cause No. 134 of 2015)* in respect of the deceased's estates in the Primary Court of Ilala at Kariakoo/Upanga, herein Dar es Salaam petitioning for grant of letters of administration of the estate without the knowledge of the plaintiffs herein. Allegedly, the 1st defendant presented himself as the sole living deceased's heir. Eventually, on December 17, 2015, the primary court mentioned above

granted the probate and appointed the 1st defendant as the administrator of the deceased's estate.

Allegedly, the 1st defendant, in his position as administrator of the deceased estate, received a royalty of 80% out of 1% of the gold produced by the 2nd defendant in respect of the mineral claim Nos. 41297, 41298 and 41299 paid quarterly by the 2nd defendant. It was not until 2019 that the plaintiffs got wind of the allegedly unjust enrichment of the 1st defendant and opted to claim their right in the estate of their deceased father illegitimately appropriated by the 1st defendant. Hence, the former and latter suits aforementioned were commenced herein.

It is the plaintiffs' case, as gathered from the pleadings filed in both cases and evidence adduced in this court that: Sometime before 1995, their deceased father had some mining rights in the gold mines in Nyabilama Village, Nyamongo Ward, Tarime District in Mara Region, holding therein 3 licences vide Nos. 41297, 41298 and 41299, the rights which in 1995 were transferred to North Mara Gold Mine Limited (then known as East Africa Gold Mine Limited, and later Afrika Mashariki Gold Mine Limited) in an arrangement on which the deceased received some lump sum payments from the company/investor and remained with a right to

constant payments in the form of royalties of 1% of the total value of gold produced by the investor from the parcel of land held under his mentioned licenses, the payments which would be, and which were being, made quarterly (once in every 3 months). Later, on 9/5/2002 the deceased decided to give 20% of his royalty rights in North Mara Gold Mine Limited to his former servants namely, Enock Isaack Mwita (10%) and Charles Bartholomew Machage (10%), and remained with 80% of his share payable directly to him. From the above-mentioned date (9/5/2002) to the date of his death (7th April, 2004) the deceased was entitled to 1% royalty from North Mara.

It is likewise the plaintiffs' case that, allegedly, the 2nd defendant having instituted probate proceedings (Probate and Administration Cause No. 134 of 2015) for grant of probate in the Primary Court of Kariakoo, he declared that the assets from that deceased's estate comprised of two properties, namely, the deceased shares in North Mara Gold Mine Limited (then East African Gold Mine Limited) and 1 house on Plot No. 4, Block 73, Upanga, Dar es Salaam.

In the same vein, allegedly, the 1st defendant declared that the deceased was not survived with any dependant and, or near relative. That consequent to the grant of letters of administration of the deceased

estate, the 1st defendant received from the 2nd defendant a total of USD 6,044,934.99, which accrued in the form of royalty payable to the deceased's estate in respect of the mineral claims owned by the deceased during the period between December 2015 and mid-2020 when his administration of the estate was closed and taken over by the lawful deceased's heirs. Similarly, it is alleged that the 1st defendant appropriated a house on Plot No. 4, Block 73, Upanga, Dar es Salaam, the property of the deceased person.

And it is also the plaintiffs' case that between the years 2015 to 2019, the period in which the 1st defendant received payment from the 2nd defendant in the sum mentioned above, the same remitted USD 250,000 only to the plaintiffs herein, the lawful heirs, leaving the balance of USD 5,794,934.99 unpaid to the same to this very date.

In tandem with the above, it is the plaintiff's case in the latter case (Civil Case No. 79 of 2023) that: The administration of the deceased's estate was closed on 16.7.2020 upon filing inventory (*Form No. V*) and accounts (Form No. VI) of the estate by the administrator. And the assets of the respective estate now are in the possession of the lawful heirs of the deceased person. Hence, the previous administrator (1st defendant) of the

deceased's estate is no longer the legal representative of the deceased's heirs.

The plaintiffs enlightened this court that among the assets left by the deceased which fell under the administration of the 1st defendant was the royalty money (to the tune of 80%) payable by the 2nd defendant herein by virtue of an agreement entered between the deceased person and the 2nd defendant (East Africa Gold Mine Limited /Afrika Mashariki Gold Mine Limited now North Mara Gold Mine Limited) in respect of mineral rights claims Nos. 41297, 41298 and 41299 in Nyabilama Village, Nyamongo Ward, Tarime District, Mara Region, aforementioned.

Hence, through the correspondence vide No. ACA/G/C89/20 dated August 27, 2020, served on the 2nd defendant on 28/8/2020, the plaintiffs informed the 2nd defendant that the probate proceedings in respect of the deceased's estate were closed on 16/7/2020 and the deceased's assets were vested under the plaintiffs herein who are the deceased's lawful heirs; hence, the administrator of the deceased's estate is no longer the legal representative of the deceased's heirs. And through the respective correspondence, the plaintiffs informed and directed the 2nd defendant not to effect any payment due to the deceased estate to the 1st defendant herein as of July, 2020. The 2nd defendant was likewise instructed to make

subsequent quarterly payments directly to the heirs. And the power of attorney was executed by the 2nd, 3rd, and 4th plaintiffs to that effect in favour of the 1st plaintiff herein, to be their representative in all matters pertaining to the dealing between her and the 2nd defendant; and the letter to that effect dated 8/9/2020 was issued to the 2nd defendant instructing her to pay the royalty money due through the 1st plaintiff's bank account.

Allegedly, contrary to the express instructions and directives mentioned above which were effectively communicated to the 2nd defendant, the same only effected quarterly payment to the plaintiffs (through the 1st plaintiff) of the entitled royalty share of 50% otherwise payable to the deceased, and continued to pay the remaining 50% royalty share to the 1st defendant of which he is not entitled.

Hence, allegedly, the defendants herein have been engaged in conversion of the plaintiffs' entitled 50% royalty share between the period of July, 2020 and March, 2023, amounting to USD 1,565.250.73.

Further, it is the plaintiffs case that the 1st defendant knowing that he was no longer holding the office of the administrator of the deceased's estates, clothed himself with power vested to the administrator of the deceased's

estate and claimed from the 2nd defendant, on 30/10/2022, jointly with other persons, through Civil Case No. 10 of 2022, in the High Court of Musoma a sum of USD 324,363 among other reliefs. The case was concluded on 28/10/2022 with a consent decree for payment of USD 250,000 from which the 1st defendant pocketed USD 100,000/. Consequently, to stop the deprivation of their entitlement by deliberate acts of the defendants, the plaintiffs issued demand notices requiring the defendants to make good on their claim whereas both defendants responded that the claim was frivolous. Hence, the latter suit.

It suffices to say that both defendants herein have vehemently disputed the claim. It is the 1st defendant's case that the late Diamond Rahim Karmali and the late Moez Rahim Karmali were brothers and had jointly engaged in the mining business whereas they procured mineral claims at the area known as Nyabirama, Nyamongo in Tarime vide Mineral Claims Nos. 41297, 41298 and 41298. The respective mineral claims were held by them under the names "Moez Rahim Karmali and Partners" owned jointly by two brothers and two other partners namely, Sadru Alibhai Valla and Amiral Alibhai Valla who have migrated from Tanzania and left the mineral claims to the siblings. And the deceased represented his young brother in the signing of an Option to Purchase Agreement dated 1995

(Exhibit P11). Upon the demise of the deceased person, the 1st defendant, under the permission of the plaintiffs herein commenced the probate in good faith as the eldest son, for their interests. Likewise, the deceased blessed the 1st defendant to be the legal representative of his family vide the duly executed document (exhibit D2). It is likewise, the defence case that as the inventory and accounts were not challenged, neither appealed; hence, there is no ground to question the 1st defendant's action at this 11th hour.

Further, it is the 1st defendant's case that the addendum contract (exhibit D6) entitles the 1st defendant to receive 50% share of royalty otherwise payable to his demised father who was one of the partners to the deceased's mining claim right appropriated by the 2nd defendant under the agreement for payment of quarterly royalties. Hence, the suit herein and claims thereon are misconceived and doomed to be dismissed with costs.

In tandem with the above, it is the 2nd defendant's case that the payment made to the 1st defendant was justified as the same is an heir to one of the partners under the Moez Karmali and Partners, as per their record, whose previous mineral claim rights were appropriated by the 2nd

defendant on the agreement of payment of quarterly royalties. Likewise, it is the 2nd defendant's case that the proceedings of the probate court and addendum agreement sanctions the impugned payment made to the 1st defendant irrespective of the purported instructions made by the 1st plaintiff to halt the payments.

During the hearing of this case, the plaintiffs were represented by Messrs Audax Kahendaguza Vedasto and Joseph Rugambwa, learned advocates; the 1st defendant was represented by Messrs Shehzada Walli and Aliko Mwamanenge, learned advocates; and the 2nd defendant had the services of Mr. Faustine Anton Malongo and Ms. Carolyne Kivuyo, learned advocates.

At the commencement of the hearing of this case, the issues raised by the counsel of both parties herein and certified by this court for determination in respect of the former case are as follows:

(a) *How much money from royalties of the deceased from North Mara Gold Mine Ltd did the defendant realize and when?*

(b) *How much did the defendant distribute among the plaintiffs from the deceased's royalties from North Mara Gold Mine Limited and when?*

(c) *Whether the house described as No. 73, Plot No. 4, Upanga is part of the Probate and Administration No. 134 of 2015 in the Primary Court of Kariakoo.*

(d) *Whether the defendant was justified in not distributing the house at Upanga among the Plaintiffs?*

(e) *To what reliefs are the parties entitled?*

And in respect of the latter suit, the issues raised by parties and certified by this court are thus:

(a) Whether the Plaintiffs are entitled to 50% shares of royalty payments received by the 2nd defendant from the 1st defendant out of 100% shares of the 80% of the royalty arising from 1% shareholding in the 1st defendant's company;

(b) If the 1st issue is answered in the affirmative, in favour of the Plaintiffs, whether the defendants are engaged in the conversion of the Plaintiffs' 80% shares of royalty payments to the 2nd defendant from July 2020 to April, 2023;

(c) To what reliefs are the parties entitled?

Primarily, I find it pertinent, for convenience, to commence with discussion of the issues raised in the latter case (Civil Case No. 79 of 2023). And, foremost, I find it pertinent to highlight the following tenets of the law of our jurisdiction: **One,** as rightly asserted by Mr. Walli, counsel for the 1st defendant, it is trite law of this land that the burden of proof

lies on the party who alleges anything in his favour in terms of the provisions of section 110 of the Evidence Act [Cap. 6 R.E 2022]. The cases; **Godfrey Sayi vs. Anna Siame (as Legal Representative of the Late Mary Mndolwa),** Civil Appeal No. 114 of 2014, CA (unreported) and **Barelia Karangirangi vs. Asteria Nyalwamba,** Civil Appeal No.237 of 2017**,** CA (unreported), among others, speak volumes of this principle. **Two,** it is likewise, the law of this land that the standard of proof in civil proceedings is on preponderance of evidence and, or balance of probabilities in terms of the provision of section 3 (2) (b) of The Evidence Act. See also the cases; **Jackson Sifael Mtares & Others vs. The Director of Public Prosecutions** (Criminal Appeal No. 180 of 2019) [2021] TZCA 612; **Attorney General & Others vs. Eligi Edward Massawe & Others,** Civil Appeal, No. 86 of 2002, CA (unreported); and **Anthony Masanga vs Penina (Mama Mgesi) & Another**, Civil Appeal No. 118 Of 2014, CA (unreported)**,** among others, in this respect.

That said, I now revert to the case at hand and proceed to canvass the 1st issue on whether the plaintiffs are entitled to 50% shares of royalty payments received by the 2nd defendant from the 1st defendant out of 100% shares of the 80% of the royalty arising from 1% shareholding in the 1st defendant's company. In this respect, the burden was cast on the

plaintiffs to prove that the 1st defendant was not entitled to 50% shares of the royalty payable to him out of 100% shares of the 80% of the royalty arising from 1% shareholding in the 1st defendant's company.

I would now revisit the evidence tabled before this court for determination of the disputes between the parties herein. The 1st plaintiff herein is the key witness for the prosecution. The same testified as PW1. It is her testimony that the 1st defendant filed inventory and accounts on 16/07/2020 and the probate was eventually closed on 18/08/2020. Upon conclusion of the probate proceedings, she instructed her lawyer (Audax and Company) to instruct the 2nd defendant that the 1st defendant was no longer the administration of the estate of Moezali Rahim Karmali. Likewise, she instructed her lawyer to inform the 2nd defendant to refrain from making any further payments to the 1st defendant in his former capacity as administrator of the estate. The letter to that effect written on 27/08/2020 was admitted in evidence as exhibit P18.

PW1 conceded the fact that the 2nd defendant had required an addendum agreement between her and the 1st defendant authorizing direct payment of entitled quarterly royalty to her. This is an addendum agreement

executed on 06/01/2020 between her and 1st defendant which was tendered and admitted in evidence as exhibit P20/D6.

Further, PW1 deponed that upon inquiry, she became aware of the following facts: **First**, the 1st defendant had conceded the fact that he was receiving royalties from the 2nd defendant on the pretext that he was one of the beneficiaries thereof withholding their share in the payment. **Secondly,** the 40% of the share in the royalty payment was not entitled to the 1st defendant as the 1st defendant's father was not a party to the contract entered between her deceased father and the 2nd defendant herein executed on 01/07/1995 (exhibit P11). Likewise, PW1 asserted that the agreement to apportion royalty (exhibit P12) doesn't mention the name of the 1st defendant's father as one of the beneficiaries of the contract to be entitled to receive royalty from the 2nd defendant.

In the same vein, PW1 deponed that the name Moezali Karmali and partners features in the Quarterly Production Royalty and Statement of 31st December, 2017 at the first instance. Previously, from 2015 to September, 2017 the payment of royalty was made in the name of Moezali Karmali. However, the name of the payee changed to Moezali Karmali and partners in the document issued by the 2nd defendant on 31st December, 2017. Therefore, it is the 2nd defendant who knows better where exactly

the name "Moezali and Partners" came from. Hence, she doesn't know exactly to whom the name refers.

It suffices to point out that PW1 (1st plaintiff herein) alleges that the 1st defendant is not entitled to a share in the royalty payment payable to her deceased father and the 2nd defendant ignored her instruction to stop the payment for reasons better known to herself; hence, prayed the intervention of this court in safeguarding the inheritance entitled to the plaintiffs herein, the lawful heirs of the deceased, against pervasive acts of the defendants herein. The same testimony was shared by the rest of the plaintiffs herein who testified as PW2, PW3, and PW4 respectively.

Contrariwise, the 1st defendant who testified as DW1 vehemently contested the assertion made by the PW1 in that he was a stranger to the benefit accrued from the agreement executed by the deceased and the 2nd defendant herein. DW1 had this to say; that the deceased and his demised father were engaged in the mining business and acquired mining pits at Nyamongo Tarime and secured the mining permit to that effect. That the deceased person worked jointly with his late father in the mining business and proceeded to join other two partners in their partnership namely, Moez and Partners. Hence, the partnership in question was comprised of persons namely, Moez Karmali (deceased), Diamond Karmali

(likewise demised); Sadru Valla and Amillal Valla. The two partners namely, Sadru Valla and Amillal Vala had left the country previously. And, in 1995, a contract (option to purchase agreement) was executed between the deceased on behalf of his father and the 2nd defendant herein whereas they were required to surrender their mineral claim rights certificate vide Nos. 41297, 41298 and 41298 to the responsible Commissioner for Mining. Hence, the original mining claim rights on which his father's name appears in what was referred to as *"Moez Karmali and Partners"* had been submitted to the Mining Commissioner. That there was an agreement between the partners in that anybody could sign on behalf of the other. Hence, the deceased person had executed the agreement entered with the 2nd defendant (*Optional Agreement to Purchase*) in his own name on behalf of his late father; that is why his father's name doesn't feature thereon.

DW1 attempted to tender the copy of the primary mining licence and, or precious mineral claims vide Nos. 41297, 41298 and 41299 for proof of partnership in ownership of the mineral right between the deceased and his late father which, unfortunately, was objected by plaintiffs' counsel and found inadmissible by this court. Otherwise, DW1 tendered the documents namely, **one,** minutes of agreement between the deceased

and his late father which purported to confer right to share on 1% royalty paid by the 2nd defendant to his father; **two,** the document purporting to confer DW1 the legal representation of the deceased estate in respect with the deceased's entitlement in the 2nd defendant mining business; **three,** the document purporting to confer charge of the deceased's royalty share paid by the 2nd defendant's during the period the deceased would be out of the country for medical grounds. The above-mentioned documents were admitted in evidence as exhibits D1, D2, and D3 respectively.

It suffices to point out that the submission of the 1st defendant's counsel augments the testimony of the 1st defendant at lengthy in that as his father (Diamond Karmali) was a party to the contract/agreement (*Optional Agreement to Purchase*) executed by the deceased and the 2nd defendant herein; hence, his father was entitled to receive the royalty from the time the agreement was signed on which the 1st defendant is entitled to benefit from by virtue of being an heir.

In the same vein, one Christopher Charles Chichake (DW3), a financial analyst and former employee of the East Africa Goldmine (Africa Mashariki Goldmine) now known as North Mara Goldmine, the 2nd defendant herein, for 15 years testified that his role was a company secretary working with

the board of directors looking after the corporate affairs and taking custody of the company affairs such as mining rights, land rights and agreements that the company had signed with various mineral rights owners. He told this court that he knows well the 1st defendant herein as the son of Diamond Rahim Karmal who was one of the partners of Moez Rahim Karmali and Partners. That the said partnership involves the persons namely, Moez Rahim Karmal and Diamond Rahim Karmal and other two people who jointly represented Moez Rahim Karmal and Partners. They had three mineral rights at Nyabirama in Tarime District. In 1993 and 1994 they signed an agreement; Option Purchase Agreement with the company (East Africa Gold Mine/ Africa Mashariki Gold mine) in 1993/94, to allow the company to carry out exploration activities in search of gold and if successful, to develop a gold mine.

In 1995, after a successful exploration program, gold was found, a minable gold deposit spread over several mineral rights at Nyabirama. Then the company opted to exercise the option. The company asked the deed partners to team up with other neighbouring mineral owners to merge their mineral rights and in place put an application to the prospecting licence and transfer it to the company upon grant. So, the prospecting licence application was completed and mineral claims were

surrendered, surrender forms were completed and original mineral claim certificates were returned. All those documents were taken to Dodoma Madini for processing. And, it was necessary at that stage to surrender mineral rights and return mineral claim certificates as a condition for the issuance of the prospecting licences according to the law of this land. In 1996 the prospecting mineral licence jointly owned by Nyabilama Mineral right was granted to Nyabilama mineral claim owners to pave the way for the development of a large-scale gold mine that today is namely, North Mara Goldmine.

DW3 enlightened this court that his role in *the Option to Purchase Agreement* entered was the custodian of the surrendered forms/document comprising mineral rights certificate while waiting for the finalization of the process. The *Option to Purchase Agreement* is what is labelled as exhibit P.11 herein. It was the document signed in 1995. And Moez Rahim Karmal came forward as the leader of the partnership of what was known as *Moez Rahim Karmal and Partners*. And whenever there was something to be signed, the other partner would be called to execute the document. However, in this document, the late Moez Rahim Karmal signed the document on behalf of other partners.

Hence, DW3 concluded that Diamond Karmal was paid royalty based on the agreement made by the parties. That to his knowledge, the mineral claim belonged to the partnership of two people namely, Moez Rahim Karmali and Diamond Rahim Karmali. Hence, their beneficiaries should continue to enjoy the entitlements of their hard-working parents.

Now, I would pose here to assess the evidential value of the evidence above revisited. Unarguably, the documentary evidence namely, the primary mining licence and, or precious mineral claims vide claim Nos. 41297, 41298 and 41299 attempted to be tendered by DW1 in proof of the partnership in the mining business between the deceased (Moezali Rahim Karmali) and his brother (Diamond Rahim Karmali) which unfortunately, was found inadmissible, would have resolved the issue herein swiftly. It goes without saying that both DW1 and DW3 made reference to the mineral claim rights of which had been previously surrendered to the government authority upon execution of the *Option to Purchase Agreement* in establishing partnership of the deceased brothers. However, none of them took the initiative to request the same from the ministry responsible, including the plaintiffs herein who have a burden of proof in this suit.

Arguably, the documentary evidence tendered by DW1 is of diminished evidential value for reasons that: **One,** the document (exhibits D1) namely, *Minutes of Agreement* between the deceased and his late father which purported to confer the right to share the 1% royalty paid by the 2nd defendant was not pleaded. This issue was raised by the plaintiffs' counsel during the hearing of the defence case. It was admitted in evidence merely by virtue of being mentioned in the notice of additional documents validly filed hereto by the defence. **Two,** the document (exhibit D2) purporting to appoint the 1st defendant to take charge of the deceased's royalty share paid by the 2nd defendant when he would be of majority age purports to have been executed solely by the deceased person. There is no means to ascertain the validity of the document. **Three**, the fact that there was no disclosure of the documents by the beneficiaries since the demise of the deceased person until the institution of this suit, further, invites a host of queries on the same.

The above observations notwithstanding, I would not fold my hands, but further explore the evidence from the prosecution in search of truth for a just and conclusive determination of the issue in question. One Nasim Moezali Karmali is the deceased surviving spouse. The same testified as

PW4. When PW4 was cross-examined by Mr. Walli, the 1st defendant's counsel, she had this to say:

> *"Diamond Karmali was the deceased's brother. They were close to each other and trusted each other….. Sadru Alibhai Valla resided in Mwanza. Amillal Alibhai Valla was the brother of Sadru Alibhai Valla. Both were in the mining business with my deceased husband in Mara region. The above-mentioned brothers, Diamond Moezali Karmali and my deceased husband were partners in the mining business in the 1980's. They carried their mining business at Nyamongo."* [Emphasis mine].

The above excerpt extracted from the deceased's surviving spouse speaks volumes of the fact that the deceased person, 1st defendant's father and two brothers namely, Sadru Alibhai Valla and Amillal Alibhai Valla were partners in the mining business at Nyamongo area in Mara region in 1980's. This piece of evidence augments the testimonies adduced by DW1 and DW3, notwithstanding wanting documentary evidence from the defence side.

Last, but not least, I have taken cognizance of the PW1's testimony in this respect. In her testimony, she conceded the fact that the 2nd defendant required the addendum agreement between her and the 1st defendant authorizing the 2nd defendant to make direct payment to her. This is an

addendum agreement executed on 06/01/2020 between the 1st plaintiff and 1st defendant herein. The said addendum agreement was tendered and admitted in evidence as exhibit P20. The same document was tendered by DW1 and admitted as exhibit D6. I find it convenient to reproduce part of the covenant executed by parties hereto viz:

> *"This addendum agreement (the agreement") is made and entered into as of the 06th January, 2020, by and between Noorkarim Diamond Karmali and Shaheeza Rahim Karmali on behalf of themselves and their respective heirs (collectively the "partners")* ***with reference to 80% of 1% royalty payments from North Mara Gold Mine Limited (the "Company") in relation to gold produced from their former mineral claims 41297, 41298, and 41299 located at Nyabirama.***
>
> *The partners, for good consideration, do hereby confirm to have resolved all the disputes between them amicably as a family. And going forward, the partners make the changes and additions outlined below and request the company to implement forthwith.* ***These changes and additions shall be made valid as if they are indeed in the original stated Agreement.***
>
> 1. *Split the current royalty entitlement of 80% of 1% equally which may be due and payable to Diamond Rahim Karmali and Moez Rahim Karmali into two (50:50) in favour of Partners Noorkarim Diamond*

Karmali (40% of 1%) and Shaheeza Rahim Karmali (40% of 1%) respectively and remit funds to their respective banks accounts ……..” [Emphasis mine].

Upon scrutiny of the above presents, I am of the view that the terms of the agreement are but the reiteration of what was deponed by the PW4, DW1, and DW3 herein. The agreement speak volumes in that the parties thereto made reference to the previous mineral claims rights surrendered in favour of the 2nd defendant for consideration of payment of royalty of 1% of minable gold. They are the same mineral rights which DW1 and DW3 spoke volumes that they were possessed in partnership of the deceased brothers.

PW1 had attempted to insinuate that the reference made to original agreement merely referred to other agreement entered by the same parties simultaneous to the said instrument not original mineral claims rights. This fact was repeated by the counsel for the plaintiffs in his final submission. I vehemently refuse to purchase this argument. I am of the view that the terms of the agreement revisited above are so plain needing no further interpolation. Likewise, PW1 had insinuated that she was coerced to execute the relevant document by the 2nd defendant. The 2nd

defendant denied the allegation. And I lack material upon which I would purchase this argument as well.

As rightly submitted by the 1st defendant's counsel, once parties to a contract reduce their agreement into writing, the written agreement prevails against oral alterations in terms of section 101 of the Tanzania Evidence Act [Cap. 6 R.E 2022]. See in this respect the cases of **Joseph Mbwilwa vs. Kobwa Mohamed Msukuma (as the Administratrix of the late Rashid Mohamed Lyeselo) & Others,** Civil Appeal No. 227 of 2019, CA (unreported); and **Leah D. Kagine vs. The Registered Trustees Of Bugando Medical Centre**, Civil Appeal No. 327 Of 2021, CA (unreported). In particular, in the case **Joseph Mbwilwa vs. Kobwa Mohamed Msukuma (as the Administratrix of the late Rashid Mohamed Lyeselo) & Others** (supra) the Apex Court held:

> *"Where there is a written contract, any subsequent oral agreement is not part of the contract, especially where there is no variation of the terms of the written agreement."*

In the same vein, in the case of **Abualy Alibhai Azizi vs. Bhatia Brothers Ltd** [2000] TLR 288 it is held:

> *" The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance **where there is no***

> ***incapacity, no fraud (actual or constructive) or misrepresentation, and not the principle of public policy prohibiting enforcement****."* [Emphasis mine].

Moreso, the certificate of registration, extract from the register issued by BRELA, and taxpayer identification number (TIN) tendered by PW1 and admitted in evidence as exhibit P.8 collectively, likewise, speak volumes in that the 1st plaintiff (PW1) conducts her business in the same impugned business name; *"Moez Rahim Karmali and Partners".*

All said, I would answer the 1st issue in negative. Likewise, as the 2nd issue and other remaining issues depended on the 1st issue being answered in the affirmative, the same collapse. Consequently, the later suit (Civil Case No. 79 of 2023) collapses in its entirety. Regarding to costs of the relevant suit, the 1st defendant denounced his entitlement to costs. Hence, no order as for costs would be issued, save for the 2nd defendant herein who shall have her costs of litigation.

Now, at this juncture, I proceed to tackle issues raised in the former (Civil Case No. 142 of 2020) and pertinent case herein. I would commence with the 1st issue as to how much money in royalties was paid to the deceased's estate by the 2nd defendant through the 1st defendant herein and when.

I would revisit the substance of the evidence deponed by the key witnesses in this court, commencing with the 1st plaintiff (PW1) herein. She deponed thus: The 1st defendant is his brother. They knew each other very well. But she was not aware that he commenced probate proceedings petitioning for grant of administration of her father's estates. It was not until sometime in 2019 that she became aware of the respective probate proceedings commenced by the 1st defendant. Then she had a face-to-face conversation with the same. And the 1st defendant had conceded the fact. Further, PW1 deponed that the 1st defendant told her that he received money from her father's shares in the royalty paid by the 2nd defendant to the tune of USD 10,000,000; but sometimes would change version and say he received about USD 8,000,000 only. The information was given orally. Likewise, PW1 deponed that the 1st defendant admitted that he has already converted to his use the house belonged to her father, located at Upanga.

Consequently, PW1 requested documents from the 1st defendant pertaining to the probate proceedings and administration of the deceased estate. He didn't respond immediately but rushed to close the probate proceedings in the trial court having issued a letter to the trial Court in that the beneficiaries of the deceased estate had emerged. And, he

eventually closed the probate proceedings. The correspondence dated 23/10/2019 was admitted in evidence as exhibit P3.

Further, PW1 enlightened this court that she entered the agreement (memorandum of understanding) with the 1st defendant which was executed mutually on 25/10/2019. The agreement was tendered and admitted in evidence as exhibit P4. The document (exhibit P4) was signed by PW1 and the 1st defendant. It was an admission as to the amount of money received by the 1st defendant from the 2nd defendant from 2015 to 2019. The 1st defendant promised to make monetary compensation to the plaintiffs to the tune of USD 4,000,000 in respect of the money he squandered. And from then onward the 1st defendant further covenanted with PW1 in that that he would be giving her 50% of deposits made by the 2nd defendant in every quarterly payment within a period of four months. Likewise, PW1 enlightened this court that she executed another document namely, a letter of acknowledgement in respect of the amount of money received by the 1st defendant from the 2nd defendant from 2015 to 2019. This is the document admitted in evidence as exhibit P5**.**

Lastly, PW1 told this court that she executed the so called out of court settlement (exhibit P6) with the 1st defendant on 14/11/2019 (exhibit P6). All the documents mentioned above were said to have been executed on

the instruction of the trial magistrate who presided the probate proceedings. Having executed the document, they appeared in court in 2019 and filed the same as inventory and statement of the account and closed the probate. The ruling of the trial court in Probate and Administration Cause No. 134 of 2015 dated 15/11/20219 was admitted in evidence as exhibit P7.

However, notwithstanding the covenants executed, the applicant changed his mind and instituted an application (Revision Application No. 25 of 2020) seeking to annul the closure of probate which imposed liability on him to pay the sum he conceded to have converted into his own use. The action succeeded and the District Court of Ilala quashed the orders entered by the trial court on the closure of probate proceedings and required the 1st defendant to revert to the Primary Court of Kariakoo, to file a proper inventory and statement of account (Form No. 5 and 6) and close the probate proceedings. The parties herein complied with the instruction of the District Court and filed inventory and accounts of the estate (collective exhibits P10).

Following the closure of probate and execution of the addendum agreement (exhibit P20/D6), PW1 has been receiving 40% of the royalty entitled to his deceased father since the last quarter which ended on 31st

December, 2019 to date. However, as earlier mentioned, PW1 lamented that of all the quarterly payments of royalty entitled to her deceased's father she was merely refunded with USD 250, 000/ only. Hence, the amount due is USD 5, 307, 434. 99. Likewise, PW1 claimed restoration of USD 487, 500 paid to the 1st defendant in respect of the satisfaction of the decree of this court in favour of the deceased's estate in Civil Case No. 93 of 2017**.**

Apart from the above, DW2 (Erick Raymond Sambara) deponed in this court that upon their visit to the 2nd defendant's premises, their finding revealed that the 1st defendant's father (Diamond Karmali) was the sole beneficiary of payment made by the mining company (2nd defendant) until the addendum agreement was executed by parties herein.

Likewise, DW2 enlightened this court that during the investigation of the allegation of fraud levelled against the 1st defendant, they found that the same continued to use the bank account of his father (Diamond Karmali) until when he supplied his bank account to the 2nd defendant in tandem with submission of addendum agreement.

In the same vein, DW1 (1st defendant) testified in this court that he received payment from the 2nd defendant through his father's bank account between the period of 2015 to 2019.

Based upon the above revisited factual matrix, I will not tarry but hasten to make the following observations: **First,** it is common ground that the plaintiffs' deceased father died intestate at Madras Medical Mission in India on 07th April, 2004. It was not until 2015 that the 1st defendant petitioned and granted probate in respect of the deceased person on 17/12/2015. **Secondly,** the proceedings of the trial court (Kariakoo Primary Court) in respect of Probate and Administration Cause No. 134 of 2015 (exhibit P.1) entails that the 1st defendant declared that the deceased person died intestate and had neither a child nor wife surviving him as he never married. Likewise, the 1st defendant declared that the deceased had two assets namely, a goldmine plant at Nyamongo Tarime shared with his father and a house at Upanga on Plot No. 04 Block 73. And, he declared himself and his young brother the sole surviving beneficiaries of the deceased's estates. **Third**, it is apparent on the record/proceedings of the trial court that the 1st defendant deponed in the trial court that being the mature beneficiary of the deceased estate he had already taken possession of the real property (house) in his own name and that he was the appointed legal representative of the deceased estates by the deceased's person himself. **Fourthly,** it was until 23/10/2019 that the 1st defendant informed the probate court that the

deceased's heirs have surfaced and prayed the resident magistrate in charge to acknowledge the found heirs of the deceased's estate and make changes in respect of the previous beneficiaries enlisted who were not actual/biological beneficiary of the deceased's estate. It is in the record that the record pertaining to remission of the payment share in respect of the deceased's entitlement made by the 2nd defendant was attached, though is not seen at present. **Fifthly,** by virtue of his position as administrator of the deceased's estate, the 1st defendant was the beneficiary of the royalty payment made by the 2nd defendant in favour of the deceased estate from the period of grant of probate in 2015 to 2019 when the lawful heir(s) contested the probate. I would add that PW1 admitted to have been beneficiary of the royalty payment entitled to her deceased parent on behalf of her siblings since the last quarter which ended on 31st December, 2019 to date.

Mr. Walli, counsel for the 1st defendant, submitted that the 1st defendant had commenced probate proceedings on approval of the deceased beneficiaries for their best interest. With due respect, the above revisited factual materials don't suggest so. Likewise, the delay of disclosure of probate proceedings for nearly four years, among other falsity deponed by the 1st defendant in the probate court, doesn't augur well. It seems,

that had it not been the personal inquiry initiated by the 1st plaintiff, the 1st defendant would have kept silent for good.

Hence, I would conclude in respect of the 1st issue that the 1st defendant received the royalty payment from the 2nd defendant in favour of the deceased estate since the grant of probate in the last quarter of 2015 to 2019.

As to the amount received, I would revert to the quarterly production royalty and statement for period of 31/12/2015 to 30/09/2019 (exhibit 13).

Admittedly, this document is not the evidence of direct payment as it is responded by subsequently raising tax invoice to effect the payment. However, it is the exact statement of the net payable sum to the payee on record. There is a query raised by defence as to who was the actual payee. This query need not detain me. It was ascertained above that the payee was the 1st defendant's father (Diamond Karmali) who demised in 2014 whereas the 1st defendant had an access to the respective bank account and he utilized the deposits until 2019 when he supplied his personal account for payment of the royalty share payable to his father's estate.

It is undisputed that the amount claimed by the plaintiff as per the pleading and evidence led by PW1 is USD 5,557,434 being quarterly payment of royalties for the period from 31/12/2015 to 30/06/2020; plus, payment accrued from the decretal sum in respect of the consent settlement orders in respect to claims made by the 1st defendant in his position as the administrator of the deceased's estate to the tune of USD 487, 500. Hence, the grand total of money received by the 1st defendant stands to the tune of USD 6,044,934.99.

However, the 1st plaintiff (PW1) conceded that she has been the beneficiary of the royalty payment entitled to her deceased parent on behalf of the deceased's lawful beneficiaries since the last quarter ending the 31st December, 2019 to date. Hence, the quarterly payment of royalty for the three quarters of 31/12/2019; 31/03/2019 and 30/06/2020 to the tune of USD 759,991.73 should be subtracted from the claimed amount. Hence, based on quarterly production royalty and statement, I would conclude that from the period the 1st defendant became the administrator of the deceased's estate (17th December, 2015) to the period PW1 became beneficiary of the royalty payment entitled to her deceased father (31st December, 2019) the 1st defendant received a total amount of USD 5, 284, 943.26.

I would proceed to tackle the 2nd issue as to how much the 1st defendant distributed among the plaintiffs from the deceased's royalties from North Mara Gold Mine Limited and when. This issue need not detain me as well. It has been established by the PW1 (1st plaintiff) that for the whole period, the 1st defendant became the beneficiary of the quarterly payment of royalties paid by the 2nd defendant in his capacity as the administrator of the deceased estate, she received USD 250,000 only (between 26/10/2018 and 20/01/2020) from the 1st defendant.

The 3rd issue is whether the house described as No. 73, Plot No. 4, Upanga is part of the Probate and Administration No. 134 of 2015 in the Primary Court of Kariakoo. I would not tarry on this issue as well. I have already stated that the proceedings of the trial court (Kariakoo Primary Court) in respect of Probate and Administration Cause No. 134 of 2015 (exhibit P1) entail that the 1st defendant declared that the deceased person died intestate and had neither a child nor wife surviving him as he never married. Likewise, the 1st defendant declared that the deceased had two assets namely, the goldmine plant at Nyamongo Tarime in share with his father and a house at Upanga on Plot No. 04 Block 73. And, he declared himself and his young brother the sole surviving beneficiaries of the deceased's estates. And it is apparent on the record/proceedings of the

trial court the 1st defendant deponed in the trial court that, being the sole mature beneficiary, he had already taken possession of the real property (house) in his name and that he was the appointed legal representative of the deceased estates by the deceased's person himself.

However, when he filed the final accounts, the real property was not accounted for. It should be noted that the above statements were the declarations made under oath by the 1st defendant who was an adult person, of sound mind and well educated as he professed himself (in that he received better education services under the care of the deceased person). Hence, he was well acquainted with facts he deponed under oath before the trial court. The rule of estoppel precludes him from denouncing what he declared under oath. Mr. Walli, the 1st defendant's counsel, insinuated in his final submission that the proceedings might have been tampered with. However, he could not produce the copy of the proceedings supplied to the 1st defendant for scrutiny by this court. Likewise, it is noteworthy that before PW1 procured court proceedings in respect of the probate case commenced by the 1st defendant, the 1st defendant had previously told her that the house was part of the probate and in his possession. I have no reason to question the credibility of the PW1 in this respect. On the contrary, I would doubt the credibility of the

1st defendant based on what transpired in the probate court. I would answer the 3rd issue in the affirmative.

The 4th issue is Whether the defendant was justified in refraining from distributing the house at Upanga among the Plaintiffs. I would hasten to answer **"no**" to the question. The 1st plaintiff, in my settled opinion, had no legal justification for not distributing the property to the lawful beneficiaries. The answer to this issue is negative.

Lastly, I would canvass the 4th issue as to the reliefs the parties herein are entitled to. In the 1st prayer, the plaintiffs prayed for an order requiring the defendant to pay a sum of **USD 5,307,434.99,** being the difference between **USD 5,557,434.99** which the defendant received regularly between December 2015 and June, 2020 from North Mara Gold Mine Limited as royalty payable to the deceased's estate to deliver to the plaintiffs and **USD 250,000** which he actually delivered to them. As I found earlier, the 1st plaintiff (PW1) conceded that she has been the beneficiary of the royalty payment entitled to the deceased on behalf of the deceased's lawful beneficiaries since the last quarter ending 31st December, 2019 to date. Hence, the payment for three quarters of 31/12/2019; 31/03/2019 and 30/06/2020 to the tune of USD 759,991.73

should be subtracted from the claimed amount. Hence, the grand total of the unpaid amount remains to the tune of **USD 4, 547, 443.26**. This amount, based on my previous discussion and conclusion, the plaintiffs are entitled to recover.

In the 2nd prayer, the plaintiffs prayed for the order requiring the defendant to pay the plaintiffs a sum of **USD 487,500,** which the defendant received from North Mara Gold Mine Limited in satisfaction of the decree of this Court in favour of the deceased's estate in Civil Case No. 93 of 2017 between March and April, 2019. This prayer, the plaintiffs herein are entitled to be granted, as I hereby do.

In the 3rd prayer, the plaintiffs prayed for the order requiring the 1st defendant to deliver to the plaintiffs the house and every unexhausted improvement on **Plot No. 4, Block 73, Upanga**, **Dar es Salaam** together with mesne profits accruing thereon from at least December, 2015 when it came in his possession by virtue of his position as administrator and purported heir of the deceased estate's to the date of delivery of the same to the plaintiffs, or pay **USD 1,000,000,** or money realized from its sale (if sold), whichever the higher. Based on the time elapsed since the 1st defendant took possession of the property and

lacking facts pertaining to the status of the same, I find that the payment of the monetary sum of **USD 1,000,000** as compensation, would meet the justice of this case.

In the 4th prayer, the plaintiffs prayed for the order requiring the 1st defendant to pay to the plaintiffs a compound interest at 15% per annum on USD 250,000 from 1/4/2016 when it was supposed to have been paid to 26/10/2019 when it was paid to the plaintiffs. It goes without saying that the respective amount of money had been amicably paid by the 1st defendant and well received by the 1st plaintiff prior to the commencement of this suit. Therefore, I would decline this prayer.

The plaintiffs prayed for the order requiring the defendant to pay to the plaintiffs a compound interest on USD 487,500 at the rate of 20% per annum as of 1/5/2019 when it was supposed to be paid to the date the same is paid to the plaintiffs in full. Likewise, the plaintiff prayed for the order requiring the defendant to pay the plaintiffs a compound interest at 15% per annum as per the particularized figures constituting the decretal sum from the diverse dates specified to the date of payment in full. Upon scrutiny, I found that previously, the parties herein entered an amicable settlement whereas the 1st appellant was required to make payment of

the compromised amount in 2019. However, the 1st defendant dishonoured the agreement; hence, this suit was preferred. Considering that endeavour, and the difference in the timing of payment of the ascertained amount, I find it just that interest (regular) of 15% should lie on the decretal amount of **USD 4, 547, 443. 26** from 01/01/2020. Likewise, interest (regular) of 15% should lie on the decretal amount of **USD 487,500.**

The 5th relief prayed for against the 1st defendant is the payment of general damages for the amount this court may assess to be fair and adequate in favour of the plaintiffs. It is trite law that the award of general damages is intended to restore the successful party to the same position he would have been if the wrong complained of had not occurred. In the case of **Antony Ngoo and Another vs. Kitinda Kimaro**, Civil Appeal No. 25 of 2014, CA (unreported) the Apex Court provided the following guidance;

> *"The law is settled that general damages are awarded by the trial court after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in awarding general damages although the judge has to assign reasons in awarding the same.* See also the case of **Vodacom Freight Co. Limited vs.**

I have taken into consideration the following facts; **First,** the 1st defendant herein had, by false representation and, or without approval by the plaintiffs herein, petitioned and obtained letters of administration of the estates of the late Moezali Rahim Karmali, the plaintiffs' parent. **Secondly,** the 1st defendant had received the quarterly payment of royalty paid by the 2nd defendant to the deceased estates which was entitled to the plaintiffs herein for consecutive four years without disclosure, to the financial detriment of the plaintiffs which amounts to unjust enrichment. **Thirdly**, it has been found that the 1st defendant herein has misappropriated the property falling under the deceased estates which was entitled to the plaintiffs herein having misrepresented himself as the sole heir of the deceased person. **Fourthly,** the mental distress, anguish and pain suffered by the plaintiffs since the period of disclosure of the 1st defendant's injurious acts in 2019 and throughout the pendency of this case.

In view of the foregoing considerations and the circumstances of this case altogether, I find that the payment of general damages to the tune of **USD 400,000** would meet the justice of this case.

The 6th prayer made by the plaintiffs herein is for payment of interest on the decretal sum at the court rate of 7% per annum from the date of judgment to the date of full settlement of the decree. This prayer is hereby granted.

Lastly, the plaintiffs prayed for costs of this case. It is trite law that a successful party in a suit should be entitled to costs. I hereby grant the plaintiffs the costs of litigation of this suit.

In passing, I find it pertinent to address that previously, the plaintiffs instituted an application (Misc. Civil Application No. 203 of 2023) praying to this court for an injunction order restricting the 2nd defendant from effecting payment of 50% share of royalty entitled to the 1st defendant pending the hearing and determination of the later case (Civil Case No. 79 of 2023). This court allowed the application. Hence, from June, 2023 to date, the 2nd defendant has not paid the 1st defendant his entitled 50% share of royalty pending determination of the latter case. As the relevant case has been determined in favour of the defendants; it follows that the injunction order should be lifted, as I hereby do. And the 1st defendant should be paid his entitled 50% share of royalty which had been withheld by the 2nd defendant in compliance with the order of this court.

In sum, I hereby find that the plaintiffs have succeeded in establishing their claims in respect of the former case (Civil Case No. 142 of 2020) but failed in the latter case (Civil Case No. 79 of 2023). Hence, I hereby enter judgment and decree in favour of the plaintiffs for reliefs as follows:

1. *The 1st defendant to pay the plaintiffs a sum of* ***USD 4, 547, 443.26*** *being the amount of quarterly payment which the 1st defendant received regularly between December, 2015 and September, 2019 from the 2nd defendant as royalty payable to the deceased's estate.*

2. *The 1st defendant to pay the plaintiffs a total of* ***USD 487, 500*** *which he received from the 2nd defendant in satisfaction of the decree of this court in favour of the deceased's estate in Civil Case No. 93 of 2017 between March and April, 2019.*

3. *The 1st defendant to pay the plaintiffs* ***USD 1,000,000,*** *being restitution for the property on* ***Plot No. 4, Block 73, Upanga, Dar es Salaam*** *which he misappropriated in his capacity as the administrator of the deceased's estate.*

4. *The 1st defendant to pay interest (regular) of 15% per annum on the decretal sum of* ***USD 4, 547, 443.26*** *from 01/01/2020 to the date of full payment of the same. Likewise, the 1st defendant to pay interest (regular) of 15% per annum on the decretal sum of* ***USD 487, 500*** *from 01/01/2020 to the date of full payment of the same.*

5. *The 1st defendant to pay general damages to the plaintiffs to the tune of **USD 400,000/=** for his wrongful acts.*

6. *The 1st defendant to pay interest on the decretal sum at the court rate of 7% per annum from the date of judgment to the date of full settlement of the decree.*

7. *The plaintiffs shall have the costs of the litigation of this suit.*

And in respect of the latter case (Civil Case No. 79 of 2023), this court hereby enters orders as hereunder;

1. *The latter suit is hereby dismissed in its entirety.*
2. *The 2nd defendant shall have her costs of litigation from the plaintiff.*
3. *The injunction order entered by this court in the latter suit is hereby lifted. The 1st defendant to retain his entitled 50% share of royalty which had been withheld by the 2nd defendant in compliance with the order of this court.*

So ordered.

DATED at **DAR ES SALAAM** this 22nd May, 2024

O. F. BWEGOGE

JUDGE