IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
AT ARUSHA

COMMERCIAL CASE NO.2 OF 2010

1. DR. CHRISTOPHER JAMES DABORN.....1ST PLAINTIFF

2. MS. SANDRA E. WOOD.....2ND PLAINTIFF

3. CRATER HIGHLANDS COMPANY LIMITED.....3RD PLAINTIFF

VERSUS

1. MR. RASHID ALI SEVINGI ..... 1ST DEFENDANT

2. MRS. FLORA K. SEVINGI .....2ND DEFENDANT

Dates of hearing: 6th, 7th & 9th of May 2013

Date of last Order: 09/05/2013

Date of Judgment: 23/08/2013

JUDGMENT

MAKARAMBA, J.:

This is judgment on a claim brought by **Dr. CHRISTOPHER JAMES DABORN**, the 1st Plaintiff, and **M/s. SANDRA E. WOOD**, the 2nd Plaintiff against **Mr. RASHID A. SEVINGI**, the 1st and, and **Mrs. FLORA K. SEVINGI** that, the affairs of the 3rd Plaintiff, **CRATER HIGHLANDS COMPANY LIMITED,** have been and are being conducted in a manner that is discriminatory and unfairly prejudicial to the pecuniary and proprietary interests of the Plaintiffs. The 1st and 2nd Plaintiffs as it is the

case with the 1st and 2nd Defendants are husband and wife who live and do business in Tanzania. The 1st and 2nd Plaintiffs as well as the 1st and 2nd Defendants are subscribers of the 3rd Plaintiff, **CRATER HIGHLANDS COMPANY LIMITED (CHC). CHC** was registered on the 14th August 2003 following a decision the 1st Plaintiff and 1st Defendant had earlier taken of incorporating a company by that name, to be owned by the 1st Plaintiff and the 1st Defendant and their nominees in equal shares of 50% respectively. On the 7th of October, 2003, **CRATER HIGHLANDS CO. LTD LIMITED**, held an Extra Ordinary General Meeting of its Board of Directors cum members to further develop and define the business relationship between the 1st Plaintiff and the 1st Defendant. At that meeting it was resolved and unequivocally agreed among other things that, **100,000** shares worth **TZS 100,000,000/=** be allotted to **Dr. Christopher Daborn** and **Mr. Rashid Sevingi** each, for purposes of recapitalization of the Company. It was further resolved that, in consideration of part of the said **100,000** shares allotted to **Mr. Rashid Sevingi,** he, that is, Mr. Rashid Sevingi, shall transfer to the Company, the whole of his immovable property, cum unexhausted improvements thereon, comprised in and situate on Plot No.20 Block "G" at Karatu, without prejudice to and bearing in mind and admitting that 50% of the unexhausted improvements aforesaid was contributed for by **Dr. Christopher Darbon**. The value of the immovable property-cum unexhausted improvements was **TZS 92,485,000/=.** It was further resolved that, the Registrar of Companies be notified of the allotment of shares and that, **Mr. Rashid Sevingi** and **Dr. Christopher Daborn** shall jointly and or severally present or cause to

be presented, a Deed of Transfer, duly prepared by the Company Secretary, to the Land Development Office, Karatu District Council, for perfection of documents thereat to reflect the Company's name as the new owner of the property. A Transfer Deed of Plot 20, Block 'G', Karatu Urban to Crater Highlands Company Limited was accordingly prepared, signed and sealed with the Common Seal of C.H.C Limited. The Transfer Deed was duly signed by the 1st Defendant, Mr. **Rashid A. Sevingi**, the 1st Plaintiff, **Dr. Christopher J. Daborn,** the 2nd Defendant, **M/s Flora Sevingi** and the 2nd Plaintiff, **M/s Sandra Wood**. The value of the property on Plot 20, Block'G', Karatu Urban area together with the un-exhausted developments thereon, was **TZS 92,485,500/-** (*Say Tanzanian Shillings Ninety Two Million Four Hundred and Eighty Five Thousand*), 50% of which was **TZS 46,242,500/=.** The amount of TZS 46,242,500/- per the Board Resolution was to be contributed for by the 1st Plaintiff, **Dr. Christopher J. Daborn.**

The 1st, 2nd and 3rd Plaintiffs have now come to this Court claiming that the affairs of the 3rd Plaintiff, **CRATER HIGHLANDS CO. LTD LIMITED** (C.H.C), have been and are being conducted in a manner that is discriminatory and unfairly prejudicial to the interests of the 1st and 2nd Plaintiffs as members of C.H.C. They further claim that, the 1st Defendant conspired with the 2nd Defendant herein to among other things, that;

i. *Following the incorporation of C.H.C after investment by the Plaintiffs, the 1st Defendant, Rashid Ali Sevingi intentionally*

refused to transfer Plot 20, 'G' Karatu Urban to C.H.C, which was enthused by a malicious and fraudulent intent.

ii. *That on the 24th April, 2007, the 1st Defendant, Rashid Ali Sevingi voluntarily and knowingly issued a cheque with number 000199 NBC, Karatu for TZS 1,826,040/=, the said cheque was marked "**refer to drawer**" for reason of insufficient funds. That the said cheque was issued as part payment of fuel supplied by Crater Highlands Co. Ltd to the 1st and 2nd Defendant's business.*

iii. *That on about January 2009, the 1st Defendant, Rashid Ali Sevingi and 2nd Defendant, Flora K. Sevingi maliciously dumped over twenty (20) lorry loads of stones and rocks, blocking the clientele's access to Bytes internet Pub and Restaurant owned and managed by Tanzania Veterinary Services Limited (a tenant of C.H.C) and also blocking all clientele parking thereby severally blocking all business operated by the 3rd Plaintiffs.*

iv. *That, the 1st Defendant, Rashid Ali Sevingi is operating a "tire puncture repair and service bay" within premises mentioned and has not and is not paying the Crater Highlands Co. Ltd any rent and/or electricity charges taking an unfair pecuniary advantage over the 1st and 2nd Plaintiffs.*

v. *That, the 2nd Defendant, Flora K. Sevingi without any agreement and without paying any rent and/or electricity charges, is using 3rd Plaintiffs C.H.C Limited property Plot 20, Block 'G', Karatu Urban by taking an unfair pecuniary advantage over the 1st and 2nd Plaintiffs by running a shop.*

vi. *That on 13th June, 2009, the 1st Defendant put in new padlocks and closed down the business that the Tanzania Veterinary Services Limited (Bytes Internet Pub) and further thereby entirely an illegally locking up the 3rd Plaintiffs businesses cum operations and thereby seized stock therein.*

vii. *On 15th June, 2009, the 1st Defendant maliciously and illegally seized stock of the 3rd Plaintiff worth TZS 23,097,047/= and equipment worth over Tanzanian Shillings Four Million estimated at cost replacement. And as of 16th July, 2009 the Defendants sold the mentioned seized stock and no remittance is made to the 3rd Plaintiff's Bank account, depriving the Plaintiffs pecuniary rights.*

viii. *That the Defendants are causing frustration of the tenancy agreement with Tanzania Veterinary Services Limited and that the Crater Highlands Co. Ltd risks being sued by Tanzania Veterinary Services Limited*

ix. *The Defendant did block and prevent a Bank Overdraft facility from National Bank of Commerce to enable Crater Highlands Co. Ltd to purchase stock and expand its operations.*

x. *In all circumstances referred herein, the Defendants have acted and are acting in a manner prejudicial to the interests of the Plaintiffs.*

The facts as garnered from the pleadings and as outlined above made the Plaintiffs to file the present suit in this Court on the 19th April, 2010 seeking for the following reliefs;

1. *A Declaration Order be granted that the 1st and 2nd Defendants intentionally and maliciously acted adversely prejudicial to the interests of the 1st and 2nd Plaintiffs.*

2. *A Declaration Order be granted that the 1st and 2nd Defendants intentionally and maliciously acted adversely prejudicial to the pecuniary and proprietary interests of Crater Highlands Company Limited.*

3. *A declaration Order be granted that the 1st and 2nd Defendants intentionally and maliciously breached the mutual trust cum investment agreement.*

4. *An Order that the 1st and 2nd Defendants be dismissed as Directors of the Crater Highlands Company Limited.*

5. *An Order be granted against the 1st and 2nd Defendants, their servants, agents and any persons claiming interest under or from the Defendants to be permanently prohibited from interfering with the smooth running and operations of Crater Highlands Company Limited as a company.*

6. *An Order(s) for Special Damages be granted to the Plaintiffs as pleaded in Paragraph 12A.*

7. *An Order(s) for General Damages as pleaded in Paragraph 12B be awarded/granted to the Plaintiffs being:*

   (i) Consequential loss/general damages, damages to business reputation and business goodwill of 3rd Plaintiff, conservatively estimated by Plaintiffs.

   (ii) General Damages arising from fraud, mispresentation and breach of trust by the 1st Defendant Rshid A. Sevingi failure to transfer Plot "20", Block "G" Karatu Urban to 3rd Plaintiff, conservatively estimated by Plaintiffs to be assessed by the Court.

(iii) *General Damages for causing mental anguish and frustration arising from issue of a dishonoured cheque be awarded to the 1st and 2nd Plaintiffs respectively being beneficiary /members of Crater Highlands Company Limited.*

(iv) *General Damages occasioned to the 1st and 2nd Plaintiffs as natural persons and as members cum Directors of Crater Highlands Company Limited following the malicious acts and deeds of the Defendants respectively.*

8. *Interest on the decretal amount from date of filling suit until date of Judgment at 25% per annum current bank rate and further interest from date of Judgment until payment in full at Court rate 12% per annum.*

9. *Exemplary damages to be assessed by the Court for the illegal and/or malicious deeds by the Defendants, jointly and severally.*

10. *Costs of this suit.*

11. *Any further or other relief(s) as this Honorable Court may deem fit and just.*

The Defendants have jointly vehemently disputed the Plaintiff's claim.

The Plaintiffs, represented by **Mr. OMARY**, Advocate from Law Bridge Advocates brought two witnesses, **DR. CHRISTOPHER JAMES DABON** as **PW1** and **Mr. MPAYA ADALBERT KAMARA** as **PW2**. The Defendants who are being represented by Mr. **TARIMO**, Advocate from Legal Link Attorneys also brought two witnesses, **Mr. RASHID ALLY SEVINGI** as **DW1** and **M/s FLORA K. SEVINGI** as **DW2.** The learned Counsels for the parties pursuant to an order of this Court of 9th May, 2013 filed their closing submissions.

On the first day of hearing of the suit this Court recorded a total of seven issues for determination, which I propose to address when analyzing the evidence on record and hence I need not reproduce at outset.

The first issue is ***whether there is a mutual agreement between 1st Plaintiff and 1st Defendant for transfer of property described as Plot No.20 block 'G' in Karatu Urban to Crater Highlands Company LTD.***

It was the argument of Mr. Omary in his closing submissions that it is beyond doubt that parties herein executed an agreement, first as between the 1st Plaintiff and the 1st Defendant and later between all the Plaintiffs herein and Defendants on incorporation of the company namely Crater Highlands Company Limited, and all these two agreements relates to the Plot No.20, Block 'G', Karatu Urban. All these Agreements and the necessary documentation to support their agreement were admitted in this Court and marked as **Exhibits P1, P2 and P3**. Mr. Omary argued further that, it is beyond doubt also as evidenced by **Exhibit P4** that, immediately after incorporation of the Company, Crater Highlands Company Limited the

parties made their covenant freely as such that, **Exhibit P5** came into existence.

Mr. Tarimo Counsel for the Defendants responded by arguing that, **Exhibit P4,** which is the document the 1st Plaintiff ntend to rely upon as evidence of the agreement that would have made the 2nd Defendant obliged to transfer his property to the company known by the name of Crater Highland Company Limited has no any force of law that makes the 1st Defendant to abide to it. Mr. Tarimo relying on the definition of "***resolution***" in ***Black's Law Dictionary*** 7th Ed. at page 133 submitted further that, a resolution is *just an authorization of a particular transaction or act to be done* and it cannot at any point of time amount to an agreement between the 1st Plaintiff and the 1st Defendant. Mr. Tarimo argued further that there is no any evidence whatsoever produced to prove that the 1st Plaintiff and 1st Defendant had an agreement to transfer the 1st Defendant's property to the Crater Highlands Company Limited. According to Mr. Tarimo, **Exhibit P4** does not fall within the qualification of an agreement. Mr. Tarimo argued further that, the resolution was so vague to allow various interpretations and nothing was therefore certain on the matters resolved. There was no agreement known in law that can be attached to the resolution admitted as **Exhibit P4,** Mr. Tarimo surmised**.**

In his closing arguments Mr. Tarimo maintains that there was no any agreement as to the transfer of the landed property located at Plot No. 20, Block 'G', Karatu to C.H.C., and further that, the Board Resolution, **Exhibit P4,** which is a mere resolution, uncertain as it is, does not constitute a binding contract obliging the 1st Defendant to abide by it. In my considered

view, and with due respect to the argument by Mr. Tarimo apart from **Exhibit P4**, there is also the Transfer Deed, **Exhibit P5,** which was signed by the 1st Defendant on the 21st October, 2003 for the transfer of Plot No.20, Block 'G', Karatu to Crater Highlands Co. Ltd. The evidence on record shows that, **Exhibit P5** was prepared in good faith with the intention to transfer the property to the company in compliance to the Company's Board Resolution, **Exhibit P4**. I am therefore of the firm view that there was a mutual agreement between 1st Plaintiff and 1st Defendant for the transfer of the property situated at Plot No.20 Block 'G' in Karatu Urban to Crater Highlands Company Ltd.

In the upshot and for the above reasons, the first issue *whether there is a mutual agreement between 1st Plaintiff and 1st Defendant for transfer of property described as Plot No.20 block 'G' in Karatu Urban to Crater Highlands Company LTD,* is answered in the affirmative.

The second issue is, ***whether the preparation of transfer document of the said property was done maliciously and fraudulently by the Plaintiffs with intention to defraud the Defendants.***

It was the argument of Mr. Tarimo in his closing submissions that, PW1 did not tell this Court what the consideration for the 1st Plaintiff to be allotted with 100,000 shares worth 100,000,000 was. Again, Mr. Tarimo further argued, PW1 did not tell this Court whether he (PW1) had paid the value of the shares or any part thereof to the Company. But PW1 has clearly admitted that, there was no any share certificate that was issued to

him as evidence of paying for the shares, Mr. Tarimo further argued. Mr. Tarimo submitted further that, **Exhibit P4,** the Board Resolution, casted various duties on the Company to be done so as to facilitate the transfer of the 1st Defendant's property to the Company. The 1st Defendant has explained those duties including issuing of share certificate to the 1st Defendant, and also to notify the Registrar of Companies of the allotment of the shares. However, Mr. Tariumo further submitted, in his testimony the 1st Plaintiff conceded that he (1st Plaintiff) had ever issued share certificate to the 1st Defendant or that he notified the Registrar of Companies about the allotment of the shares. According to Mr. Tarimo, the law under section 55(1) (a) & (b) and section 82 (1) of the Companies Act Cap. 212 R.E 2002 is very clear that once shares are allotted they should be presented to the Registrar of Companies for registration.

Mr. Tarimo submitted further that, the presentation of the Deed of Transfer by the 1st Defendant to the relevant authority for approval of the transfer of his property was to be preceded by being given a share certificate, which was a consideration for the transfer. Mr. Tarimo submitted further that PW1 and PW2 conceded that there was no any share certificate that was ever issued to the 1st Defendant. Mr. Tarimo further argued the 1st Defendant maintained that it was dangerous and not safe for him (1st Defendant) to totally transfer his property to the company without having first being granted with share certificate.

Mr. Tarimo submitted further that, it is not in dispute that the consideration for the transfer of the property to the Company was shares

allotted to the 1st Defendant. It is therefore important to know what share certificate is all about as per the provisions of section 83 (1) & (2) of the Companies Act, which under section 82(1) casted duties to the company on the necessity of issuing share certificate.

Mr. Tarimo argued further that, the language of the law in all the provisions are mandatory in that the word used is "shall", and therefore it was not an option for Crater Highlands Co. Ltd to register the allotment of shares and issue of share certificate. There is nothing else in law that can evidence possession of shares in company because the law requires all allotment and paid up shares to be registered, Mr. Tarimo further argued.

Mr. Tarimo argued further that the 1st Plaintiff was a person to act for the Company as he was the Managing Director and the Board Chairman of C.H.C. Mr. Tarimo submitted further that the 1st Plaintiff caused the transfer documents of the 1st Defendant to be prepared and executed by the 1st Defendant while on his (1st Plaintiff) side did not do anything which was required by the Board Resolution and which mandatory needed to be done according to law. Mr. Tarimo submitted further that the 1st Plaintiff never caused the consideration to be given by the Company for the transfer of the property to be done by the 1st Defendant and there was no reason for the failure. The act of the 1st Plaintiff of pushing for preparation of transfer documents whilst himself not doing what he was supposed to be done amounts to malice and fraud, Mr. Tarimo surmised.

On his part Mr. Omary for the Plaintiffs responded by arguing that, on account of the evidence in **Exhibits P2, P3, P4** and **P5**, the issue of fraud not only it does not exist but it has also not been supported by any

statement and/or documentation by the Defendants. It therefore remains to be mere allegations Mr. Omary concluded and invited this Court to look at the definition of "fraud" under section 17(1) of the ***Law of Contract Act***, Cap.345 R.E. 2002. On account of the testimony of PW1 and PW2, Mr. Omary further argued, the alleged fraud did not arise or at all and referred this Court to the case of **BARTHOLOMEW NDYANABO VERSUS BI PETRONIDA NDUAMUKAMA (1968) HCD No. 339** in which it was held that:

> *"As the respondent's consent to the contract was induced by fraud she was entitled to repudiate on discovering the true position."*

As a matter of general principle, the burden of proof in an allegation of fraud lies with the person who alleges such facts to exist. In this case it is the Defendants who alleged the existence of facts as to fraud and therefore the burden of establishing those facts, which is slightly higher than in ordinary civil cases, lies on them. As Mr. Omary rightly submitted, fraud for civil matters is defined in section 17(1) of the Law of Contract Act, Cap.345 R.E. 2002 in the following terms:

> *"(1) "Fraud" means any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract–*

(a) *the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;*

(b) *the active concealment of a fact by one having knowledge or belief of the fact;*

(c) *a promise made without any intention of performing it;*

(d) *any other act fitted to deceive; or*

(e) *any such act or omission as the law specially declares to be fraudulent.*

On the Court record there is no scintilla of evidence marshaled by the Defendants to prove that the Plaintiffs acted with intent to deceive or induce the Defendants to enter into an agreement for the transfer of the property to **Crater Highlands Co. Ltd**. The main allegation by the Defendants is that, the 1st Defendant having realized that the certificate of his shares had not been issued by the Plaintiffs for a certain period of time, this is what made the Defendants to conclude that the Plaintiffs intended to defraud the Defendants. This fact alone cannot, in my respectful considered view suffice to establish facts as to the alleged fraud as the Defendants would wish this Court to believe. In this suit it has not been established whether it is only the Plaintiffs who were obliged to issue a certificate of shares. In my considered view, since the Company being an artificial person cannot act on its own but it acts through its directors, which accordingly would also include the Defendants as being among the Directors in the 3rd Plaintiff's Company. The legal position as to the company not being able to act in its own person but through its directors

finds judicial pronouncement in the English case of **FERGUSON V WILSON (1866) LR 2 Ch. App.77** thus:

> *"The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent".*

It is trite legal principle that it is the company's directors who therefore are under legal obligation to issue certificate of shares on behalf of the company. It is without doubt therefore that, in the present suit, the Defendants who are also among the Company's Directors were also under obligation to participate in the process of issuing the certificate of shares. They cannot therefore be heard to say now or complain that it is only the Plaintiffs who had that obligation. Similarly, the allegation by the Defendants that it is the Managing Director of the Company who was vested with the powers to issue a Certificate of Shares on behalf of the Company cannot hold water. In any event a Managing Director of a company is entrusted with substantial powers of day to day management of the company which in any case are exercisable on direction of a duly passed Company resolution at its general meeting or by its Board of Directors or by virtue of the Company's Memorandum or Article of Association. The powers of the Managing Director of a company to do administrative acts of a routine nature when so authorized by the Board such as affixing the common seal of the company to any document(s) or

drawing and endorsing any cheque(s) on the account of the company in any bank or drawing and endorsing any negotiable instrument(s) or **signing any share certificate(s)** or directing **registration of transfer of any share(s)**, cannot be deemed to be included within the substantial powers of management vested in the Managing Director. This legal position finds succinct explaination in the book by N.D. Kapoor, ***Elements of Company Law*, 28th Ed, 2010 at pages 373-374**. The Managing Director therefore exercises his powers subject to the superintendence, control and direction of the Board of Directors. In the present suit it has not been established whether the 1st Plaintiff being the Managing Director of the Company was vested with powers to issue, sign and register share certificate for the shares allotted by the 3rd Plaintiff's Company to the 1st Defendant. It was also not established in this suit whether the Defendants took any action against the Plaintiffs after discovering that the Plaintiffs have committed the alleged fraudulent acts maliciously. The allegations of fraud being such a serious matter, the Defendants ought to have taken immediate action against the Plaintiffs, but they did not.

The burden of proving the allegations of fraud being slightly higher than in ordinary civil cases, which falls squarely on the shoulders of the Defendants and which burden the Defendants have miserably failed to carry to establish whether the Plaintiffs had any intent to deceive the Defendants, this boils down to only one conclusion which is that, the second issue *whether the preparation of transfer document of the said property was done maliciously and fraudulently by the Plaintiffs with intention to defraud the Defendants* is to be answered in the negative.

The third issue is ***whether Defendants intentionally and maliciously breached the agreement for transfer of the said property to Crater Highlands Co. Ltd.***

In his closing arguments Mr. Omary submitted that, the existence of **Exhibit P6** collectively proves that the Defendants intentionally and maliciously breached the Agreement for transfer of Plot No.20 Block "G" Karatu Urban. Mr. Tarimo responded by arguing that, there is clear evidence on record as to what made the 1st Defendant not to comply with the Board resolution because the Company did not do what it was resolved and also what it is required to do by the law before the 1st Defendant could transfer its property to Crater Highlands Company Limited. It is for that reasons, the 1st Defendants states that, he did not breach any agreement being intentionally, maliciously or accidentally, Mr. Tarimo surmised.

On the Court record, undoubtedly the 1st Defendant intentionally breached the agreement for transfer of the said property to Crater Highlands Company. This is so because in their testimonies in Court during the trial, both DW1 and DW2 admitted that, they signed the Transfer Deed by their own free consent believing that they could immediately be issued with a share certificate for the shares allotted to them. It was the further testimony of DW1 at the trial that, he (DW1) rejected to proceed with the transfer of his property to the Crater Highlands Co. Ltd because the Company had refused to issue a share certificate for the shares allotted to him.

Essentially the issue of issuance or non issuance of certificate of shares has its remedy resulting from non-performance of a formal agreement by a

Company, which falls squarely under the ambit of the procedures provided for in the Companies Act. The Defendants were required to follow the procedures under the Companies Act of compelling a company to issue share certificates to its shareholders. The Companies Act provides very clearly the procedure which a member of a company who thinks that the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members including at least himself has to follow to get a remedy from a court of law. This procedure is clearly stipulated in section 233(1) of the Companies Act, No.12 of 2002. Accordingly, the Defendants could cause any action by way of petition against the Plaintiffs for non-performance. The Defendants could not, in my respectful opinion, unilaterally rescind the formal contract duly entered into by the parties to this suit of their own free will and consent, and then come to Court to complain about non performance by the Plaintiff's company. Such action in the eyes of company law was wrong.

It is also the further allegation of the Plaintiffs that the Defendants have maliciously breached the agreement of the Plot No. "20" Block "G" Karatu Urban. "Malice" is defined in ***Black's Law Dictionary*** 8th Ed at page 976 to mean: (1) *the intent, without justification or excuse, to commit a wrongful act. (2) reckless disregard of the law or of a person's legal rights. (3) ill will.* According to Mr. Omary, the existence of **Exhibit P6** collectively proves that the Defendants maliciously breached the Agreement for transfer of the Plot No. "20" Block "G" Karatu Urban.

I have had a closer look at Exhibit P6, a letter from the Karatu District Council addressed to Dr. Christopher Darborn, the 1st Plaintiff herein; responding to a letter by Dr. Christopher Darbon of 7th March, 2006. In Exhibit P6, the Karatu District Council stated as follows:

"....I told you, that if Rashidi is not willing to surrender his land as part of his capital contribution to your joint business of which he formally agreed, you were supposed to revisit the agreement you made before advocate. Land office was not involved in any case either by you or Rashidi nor has it been consulted during the due course of your contract. After all, Rashid being the owner of the plot is supposed to request for a transfer....."

During the trial, the 1st Defendant told this Court that, he (1st Defendant) does not see why he (1st Defendant) should part with his land while he (1st Defendant) is not getting an equitable return for it and therefore he (1st Defendant) has not proceeded with the registration of the transfer of the land to Crater Highlands Co. Ltd. with the District Council. The 1st Defendant stated further that, he wished to go back on the signed agreements concerning transfer of the said land from Mr. Rashid Sevingi to Crater Highlands Co. Ltd in order to regain his role as landlord and, instead, find other means with which to pay for his shares in the Company.

I am of the firm view therefore that, since the agreement for the transfer of Plot No.20 Block "G" Karatu Urban to the Company was made formally by the parties its rescission ought also to have been formal and

according to the law. The 1st Defendant just decided to rescind the agreement unilaterally and informally, and without any justification or excuse whatsoever. The testimony of the 1st Defendant at the trial that he wished to go back on the signed agreements concerning transfer of the said land from Mr. Rashid Sevingi to Crater Highlands Co. Ltd in order to regain his role as landlord is conclusive evidence of malicious breach by the Defendants of the agreement for the transfer of the said property to Crater Highlands Co. Ltd. Clearly the 1st Defendant did not intend to proceed with the registration of the said land to Crater Highlands Co. Ltd as agreed. There could therefore not be better evidence of intentional and malicious breach of *the agreement for transfer of the said property to C.H.C Ltd.*

It is for the above reasons that, the third issue *whether Defendants intentionally and maliciously breached the agreement for transfer of the said property to C.H.C Ltd* is answered in the affirmative.

The fourth issue is, ***if the answer in (3) above is in the affirmative, whether 1st Defendant was obliged to transfer the said landed property mentioned above to Crater Highland Co. Ltd.***

In his closing submissions Mr. Omary argued that, since the third issue has to be answered in the affirmative, it goes without saying that the fourth issue is also to be answered in the affirmative that, the Defendants were obliged to transfer the said Land Property mentioned to Crater Highland Company Limited. Mr. Omary supported his argument by the existence of **Exhibit P2, Exhibit P3, Exhibit P4** (Board Resolution) and **Exhibit P5 (***Transfer Deed)***.** Mr. Tarimo for the Defendants responded that, the 1st Defendant was not obliged to transfer the said property

because there was no binding agreement, save only for the Company's Board resolution which however, its terms and condition were not observed by the Crater Highlands Company Limited. The 1st Defendant was therefore not obliged to transfer his property to Crater Highland Company Limited, Mr. Tarimo surmised.

During the trial, the testimony of DW1 and DW2 is that, they signed the Transfer Deed (**Exhibit P5**) of their own free consent believing that they could immediately be issued with a share certificate for the shares allotted to them. Evidently, the 1st Defendant also signed the Board Resolution, (**Exhibit P4),** and the *Transfer Deed*, (**Exhibit P5**), of his own free consent, thus he consented to the transfer of his property to Crater Highlands Co. Ltd. Undoubtedly, therefore the Defendants were obliged to transfer the said property to Crater Highlands Co. Ltd.

It is for the above reasons that the fourth issue, *whether 1st Defendant was obliged to transfer the said landed property mentioned above to C.H.C Limited* is answered in the affirmative.

The fifth issue is, ***whether 50% of Capital Costs of running Crater Highlands Co. Limited was contributed by 1st Plaintiff and 1st Defendant had to contribute 50% of landed property as its share to Crater Highlands Co. Ltd.***

In his closing submissions Mr. Omary argued that, with the existence of **Exhibit P4** (Board Resolution) the fifth issue has to be answered in the affirmative. Mr. Tarimo responded that, the Plaintiffs have never proved that the 1st Plaintiff had contributed 50% of capital cost of running Crater Highlands Company Limited, apart from the Board Resolution (**Exhibit P4**)

whereby it was resolved that the 1st Respondent is to be allotted with **100,000** shares worth **TZS 100,000,000/-.** Mr. Tarimo submitted further that, PW1 never stated whether he (PW1) paid for the shares allotted to him. Further that, PW1 just vaguely stated that he (PW1) paid for shares in kind and there was no explanation how the payment in kind was made and to what extent. According to Mr. Tarimo, section 55 of the Companies Act requires that, whoever is allotted with shares must, within sixty days, deliver for registration of the same. Further, section 82 of the Companies Act requires the allotment of shares to be lodged with the Regustrar of Companies, complete and have ready for delivery certificate of all shares. The 1st Plaintiff did not tell the Court if he had complied with the requirement of the law after being allotted with shares. There is therefore no evidence to substantiate the claim by the 1st Plaintiff that he had contributed 50% of capital costs of running Crater Highland Company Limited, Mr. Tarimo surmised.

Mr. Tarimo further argued that, the company on its part did not do what it was resolved to be done, the fact which make the intended transfer to fail for lack of consideration. The 1st Defendant therefore cancelled the existing arrangements for the transfer of his property to the Company, Mr. Tarimo further reasoned. Mr. Tarimo added that it is therefore quite clear that the 1st Defendant did not contribute 50% of his landed property as his share to Crater Highland Company Limited. And therefore neither the 1st Plaintiff nor the 1st Defendant contributed anything to the Company as consideration for the 100,000 shares allotted to them, Mr. Tarimo surmised.

As Mr. Tarimo clearly conceded, the 1st Defendant did not contribute the 50% of his landed property as share to Crater Highland Company Limited as agreed, which was for the 1st Defendant to contribute 50% of his landed property to Crater Highlands Co. Ltd as his share. The evidence on record points clearly to no other finding than that, the 1st Defendant did not contribute the 50% to the Crater Highlands Company Ltd as agreed.

It seems clearly that, as between the parties in this suit, the question whether *50% of Capital Costs of running Crater Highlands Co. Limited was contributed by 1st Plaintiff* is still highly controversial. The Plaintiff has relied on the Minutes of the Extra-Ordinary Meeting of the Board of Directors of the Crater Highlands Co. Ltd held at Arusha on the 7th October, 2003, **Exhibit P4.** It is stated in paragraphs 2(a), (b) (c) (d) & (e) of the said meeting as follows:

(a) That 100,000 shares worth TZS 100,000,000/= be allotted to Dr. Christopher Daborn and Mr. Rashid Sevingi, each, for purposes of the Company's re-capitalization.

(b) That in consideration of part of the said 100,000 shares allotted to Mr. Rashid Sevingi, he (Mr. Rashid Sevingi) shall transfer to the Company, the whole of his immovable property (cum unexhausted improvements thereon) comprised in and situate on Plot No. 20 Block "G" at Karatu, ***without prejudice to and bearing in mind and admitting that 50% of the unexhausted***

improvements aforesaid was contributed for by Dr. Christopher Darbon.

(c) That the current value of the immovable property-cum unexhausted improvements mentioned in Resolution 2 (a) hereinabove TZS 92,485,000/=

(d) That the Registrar of Companies be notified of the allotment of shares vide Resolution 2 (a) hereinabove.

(e) That the Mr. Rashidi Sevingi and Dr. Christopher Darborn shall, jointly and or severally present or cause to be presented, a deed of Transfer, duly prepared by the Company Secretary, to the Land Development Office, Karatu District Council for perfection of documents thereat to reflect the Company's name as the new owner of the property mentioned in paragraph 2 (b) hereinabove.

During the trial, DW1 admitted having participated in the said meeting, which resulted into the said minutes which DW1 duly signed and that he is aware of the existence of such minutes. Under paragraph 2(b) of the said minutes, the Board of Directors admitted that 50% of the unexhausted improvements were contributed by Dr. Christopher Darbon. There could be no better evidence for this Court to make a finding that indeed the 1st Plaintiff has contributed 50% of capital costs of running the Company as per the said Board Resolution.

It is for the above reasons that, the fifth issue *whether 50% of Capital Costs of running Crater Highlands Co. Limited was contributed by 1st Plaintiff and 1st Defendant had to contribute 50% of landed property as its share to Crater Highlands Co. Ltd* is answered in the affirmative.

The sixth issue is, *whether 2nd Plaintiff had tenancy agreement with Crater Highlands Co. Ltd to run a restaurant and an internet Cafe built on the said property above.*

Mr. Omary argued in his closing submissions that, as per **Exhibit P1**, the sixth issue has to be answered in the affirmative. Mr. Tarimo argued that, before this Court three lease agreements were produced. The first, **Exhibit P1** was a lease agreement between the 1st Plaintiff and the 1st Defendant, and it was in respect of the property of the 1st Defendant. The other two lease agreements (**Exhibit P8**), which were between ***Crater Highlands Company Limited*** and ***Tropical Services Limited*** who are not parties to this suit. According to Mr. Tarimo, the 2nd Plaintiff did not testify in Court in proof of this issue or any other matter concerning her in the suit before the Court, and even the Plaintiff's evidence in Court did not support this issue. Thus, Mr. Tarimo prays under Order XIV Rule 5(2) of the Civil Procedure Act, Cap.33 R.E 2002 that the Court should strike out this issue for being wrongly framed. Otherwise, Mr. Tarimo further argued, the issue should be answered negatively to the extent that the 2nd Plaintiff had no tenancy agreement with Crate Highland Co. Limited to run a restaurant and internet café for reason that it was not proved, and further that the said company has never been a lawful owner of the alleged property.

According to the Court record, **Exhibit P1** is a Lease Agreement between the 1st Defendant, **Mr. Rashid Ali Sevingi** as Landlord and the 1st Plaintiff, **Dr. Christopher James Darbon** as Tenant. The 2nd Plaintiff was not therefore among the parties to the said Agreement as suggested by Mr. Omary.

It is for the above reasons that the fifth issue *whether 2nd Plaintiff had tenancy agreement with Crater Highlands Co. Ltd to run a restaurant and an internet Cafe built on the said property above,* is to be answered in the negative.

The last issue is as ***to what relief(s) are parties entitled.***

Mr. Omary argued that, the Plaintiffs prays that the claim in the Plaint except for Item 4 and 7 of the prayers, be granted since those excepted prayers 4 and 7 were wrongly framed by the previous Counsel who had the conduct of the matter.

The first prayer is for *a Declaration Order be granted that the 1st and 2nd Defendants intentionally and maliciously acted adversely prejudicial to the interests of the 1st and 2nd Plaintiffs.*

In my considered view this prayer lacks any merits and should not therefore be granted for the simple reason that it is not supported by any of the issues framed by this Court for the determination of this suit. In any event whether the 1st and 2nd Defendants acted prejudicial to the interests of the 1st and 2nd Plaintiffs was not among the framed issued and therefore no evidence was lead by the parties to enable this Court make a finding either way. In my considered opinion, the third issue whether the Defendant intentionally and maliciously breached the agreement for

transfer of the said property to Crater Highlands Co. Ltd has got nothing to do with the 1st and 2nd Plaintiffs as it basically concerns the interests of the 3rd Plaintiff, C.H.C. For these reasons, this Court cannot grant the 1st prayer in the Plaintiff's Plaint.

The second prayer is for a *Declaration Order that the 1st and 2nd Defendants intentionally and maliciously acted adversely prejudicial to the pecuniary and proprietary interests of Crater Highlands Company Limited.*

This particular prayer has merits as it is supported by the third issue which has been answered in the affirmative. The third issue is *whether the Defendant intentionally and maliciously breached the agreement for transfer of the said property to Crater Highlands Co. Ltd.* This issue has been answered in the affirmative that the 1st and 2nd Defendants acted adversely prejudicial to the pecuniary and proprietary interests of the 3rd Plaintiff, Crater Highlands Company Limited (CHC) because the property of the 1st Defendant, Plot No.20 Block "G" Karatu Urban, was taken as part of the 100,000 shares allotted to the 1st Defendant for the purposes of the Company's recapitalization. The denial by the 1st and 2nd Defendants to facilitate registration of the transfer of the said property to Crater Highlands Company Limited run counter to the pecuniary and proprietary interests of Crater Highlands Company Limited. It is for this reason that this Court grants the second prayer by the Plaintiffs.

The third prayer is for *a declaration Order that the 1st and 2nd Defendants intentionally and maliciously breached the mutual trust cum investment agreement.*

Unfortunately, the third prayer in the Plaintiff's Plaint is not supported by any of the issues framed by this Court and recorded for the determination of this suit. As Mr. Tarimo rightly submitted in his closing submissions, the issue of mutual trust was never proved by the parties. As such there was no any evidence which the Plaintiffs adduced in Court during the trial to establish the alleged existence of mutual trust cum investment agreement and hence its breach. It is for this reason that, this Court cannot grant the third prayer in the Plaintiff's Plaint.

The fourth prayer is for an order that *the 1st and 2nd Defendants be dismissed as Directors of Crater Highlands Company Limited.* The Plaintiffs' Counsel Mr. Omary respectfully abandoned this prayer and there is no reason for this Court to deal with it. This prayer therefore stands abandoned as prayed.

The fifth prayer is for *an order against the 1st and 2nd Defendants that their servants, agents and any persons claiming interest under or from the Defendants to be permanently prohibited from interfering with the smooth running and operations of Crater Highlands Company Limited as a company.*

The fifth prayer in my considered view is unmaintainable. As Mr. Tarimo rightly submitted, it was not proved at the trial whether the Defendants' servants, agents and other persons from the Defendants were interfering with the running and operations of Crater Highlands Company Limited. Furthermore, the alleged servants, agents and other persons from the Defendants were not identified before this Court and therefore they remain unknown to this Court and thus incapable of enjoying any relief. In

any event such unknown persons against whom the prohibitory order is being sought are not parties to the present suit. Accordingly, the prayer is not maintainable and this cannot therefore grant it.

The sixth prayer is for *an order(s) for Special Damages be granted to the Plaintiffs as pleaded in Paragraph 12A.*

Paragraph 12A of the Plaint enumerates the particulars of the special damages the Plaintiffs cum investors of Crater Highlands Company Ltd. claim to have suffered jointly and severally as follows:

i) Seized stock worth TZS 23,097,047 as shown in Annex P-10 of the plaint.

ii) Seized Office equipment and fittings worth over Tanzanian Shillings Three Million estimated as cost replacement.

iii) Seized Furniture worth over Tanzanian Shillings One Million estimated at cost replacement.

iv) Payment of fuel supplied by the 3rd Plaintiff to the 1st Defendant's business. Cheque Tzs.9, 111, 482/= as Annex P-12 Annexed hereto.

In total the claim for special damages come to **TZS 36,208,529/=**.\

It is a matter of general principle of law that, special damages must be pleaded and be strictly proved. In support, Mr. Tarimo referred this Court to the case of **MASOLELE GENERAL AGENCIES VERSUS**

AFRICAN INLAND CHURCH TANZANIA [1994] T.L.R 192 where the Court of Appeal of Tanzania held that:

> *"Once a claim for specific item is made, that claim must be strictly proved, else, there would be no difference between a specific claim and a general one."*

On the Court record there are Annextures P-10 and 12 to the Plaint respectively. However, these were never tendered in evidence in Court during the trial to prove the Plaintiffs' claim of special damages. I am of the firm view therefore that, the Plaintiffs have failed to prove special damages as required by the law. It is for this reasons that this Court cannot grant the Plaintiffs' prayer for special damages.

The seventh prayer is for *order(s) for general damages as pleaded in Paragraph 12B be awarded/granted to the Plaintiffs being:*

(i) Consequential loss/general damages, damages to business reputation and business goodwill of 3rd Plaintiff, conservatively estimated by Plaintiffs.

(ii) General Damages arising from fraud, mispresentation and breach of trust by the 1st Defendant Rashidi A. Sevingi failure to transfer Plot "20", Block "G" Karatu Urban to 3rd Plaintiff, conservatively estimated by Plaintiffs to be assessed by the Court.

(iii) General Damages for causing mental anguish and frustration arising from issue of a dishonoured cheque be awarded to the 1st and 2nd Plaintiffs respectively being beneficiary /members of Crater Highlands Company Limited.

(iv) General Damages occasioned to the 1st and 2nd Plaintiffs as natural persons and as members cum Directors of Crater Highlands Company Limited following the malicious acts and deeds of the Defendants respectively.

It is rather unfortunate however, that, the Plaintiffs have elected to abandon the seventh prayer for general damages. It therefore stands abandoned.

The eighth prayer is for an order of payment of *interest on the decretal amount from date of filling suit until date of Judgment at 25% per annum current bank rate and further interest from date of Judgment until payment in full at Court rate 12% per annum.*

The Plaintiffs having abandoned their seventh prayer for general damages having failed to prove special damages, there is no basis upon which this Court is to grant the Plaintiff's prayer for interest on the decretal amount from the date of filling of the suit until the date of judgment.

The ninth prayer is for *exemplary damages to be assessed by the Court for the illegal and/or malicious deeds by the Defendants, jointly and severally.*

As regards the prayer for exemplary damages, this has been left to the Court to determine. In his closing submissions Mr. Tarimo argued that, there are no circumstances existing in this suit and there is no any proof regarding illegal and/or malicious deeds done by the Defendants on the Plaintiffs for this Court to award exemplary damages to the Plaintiffs.

The general principle as regards the award of exemplary damages was exemplified in the case of **DAVIES VS. MOHANLAL KARAMSHI SHAH [1957] E.A. 352**, where it was held inter alia that:

> *"...punitive or exemplary damages are, as their names imply, damages by way of punishment or deterrent. They are given entirely without reference to any proved actual loss suffered by the plaintiff."*

It was also stated in **ANGELA MPANDUJI VS ANCILLA KILINDA [1985] T.L.R. 16 (HC)** that, exemplary or punitive or vindictive damages are damages given not merely as pecuniary compensation for the loss actually sustained by the plaintiff, but also as a kind of punishment of the defendant with the view of discouraging similar wrongs in future.

This Court has determined that the Defendants have intentionally and maliciously breached the agreement for the transfer of Plot No.20 Block "G" Karatu Urban to Crater Highlands Co. Ltd. This is therefore sufficient ground for this Court to award exemplary damages, which this Court exercising its discretion and having regard to the circumstances of this case and of the defendants assess at **TZS 10,000,000/-** (*Say Tanzanian Shillings Ten Million*). Much as exemplary damages are non-compensatory in nature they serve as its purpose, penalizing or deterring unacceptable

behavior. Indeed the 1st Defendant of his own free will having agreed to transfer the said property to Create Highlands Co. Ltd. but later on unilaterally going back on his promise, clearly shows willfulness and malicious conduct on the part of the 1st Defendant. The conduct of the 1st Defendant and the state of his mind at the time of the misconduct puts him squarely at fault and in bad faith and hence the award of exemplary damages by this Court to serve as deterrence to others from behaving in the same manner.

The Plaintiff's have also prayed for payment of interest at the Court's rate of 12% per annum from the date of judgment until payment in full. I am of the firm view that the rate of interest of 12% per annum not only is on the higher side but it runs contrary to Order XX Rule 21(1) of the Civil Procedure Code, which sets interest at court's rate at 7%. According to that provision the rate of 12% is awarded where expressly or by consent the parties in their contract have agreed so. In the present suit there is no such express agreement between the parties for the payment of interest at rate of 12% as prayed by the Plaintiffs. In the absence of such express agreement therefore this Court has to confine itself to the court's rate of only 7% per annum. It is for this reason that this Court awards interest at 7% per annum on the decretal sum, which shall be simple interest from the date of judgment until payment in full.

The Plaintiffs have also prayed for an order for costs. In his closing submissions Mr. Tarimo argued that, the law under section 30(2) of the Civil Procedure Code, Cap. 33 R.E. 2002 is very clear that costs should follow the event. This trite legal principle also finds judicial pronouncement

in the case of **DEMBENICTIS & OTHERS VS. CENTRAL AFRICA CO. LTD & ANOTHER (1967) E.A 310** that, as a general rule of practice costs should follow the event. The Plaintiffs in this case have won their case against the Defendants. The Plaintiffs are therefore entitled to an award for an order of costs.

In the whole and for the above reasons, judgment and decree is hereby entered against the Defendants jointly and severally as follows:

1. *It is hereby declared that the 1st and 2nd Defendants intentionally and maliciously acted adversely prejudicial to the pecuniary and proprietary interests of the 3rd Plaintiff, Crater Highlands Company Limited.*
2. *The Defendants shall pay **TZS 10,000,000/=** being exemplary damages for illegal and/or malicious deeds by the Defendants, jointly and severally.*
3. *The Defendants shall pay interest on the decretal sum at (2) above at the Court's rate of 7% per annum from the date of Judgment until payment in full.*
4. *The Defendants shall pay costs of this suit.*

Order accordingly.

.....

R.V. MAKARAMBA

JUDGE

23/08/2013

Judgment delivered this 23rd day of August 2013 in the presence of M/s Cathrine Chilewa, Advocate for the Defendants, and holding brief of Mr. Omary Advocate for Plaintiffs.

.....

R.V. MAKARAMBA

JUDGE

23/08/2013

Word count: 8,637