

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF  
TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR-ES-SALAAM  
COMMERCIAL CAUSE NO.36 OF 2021  
IN THE MATTER OF COMPANIES ACT, CAP.212, R.E 2002**

AND

IN THE MATTER OF IPSOS TANZANIA LIMITED

AND

IN THE MATTER OF APPLICATION FOR UNFAIR PREJUDICE  
UNDER SECTION 233 (1), (2) & (3) OF THE COMPANY ACT,  
2002

BY

**SCHOLASTICA MUKATESI NDYANABO** (*Petitioning as  
Administratrix of the Estate of the Late Julius Ishengoma Francis  
Ndyanabo*).....**PETITIONER**

**VERSUS**

**IPSOS TANZANIA LIMITED**..... **RESPONDENT**

Date of the Last order: 28/04/2022  
Delivery of the Ruling: 19/05/2022

**RULING**

**NANGELA, J.,:**

Through the services of Mr. Claudio Msando of Claud  
Msando Law Office, the Petitioner has petitioned before this  
Court seeking for the following:

1. A declaration that, the  
Respondent's acts, omissions and

conducts are contrary and prejudicial to the Petitioner.

2. A declaration that, the Respondent's acts of performing the Company duties and affairs without consultation with the members'/ Board resolution, is contrary to the articles of the Company and prejudicial to the interest of the Petitioner.
3. An order of this Court authorizing the Petitioner to commence civil proceedings in the name as against the Respondent and any other person(s) as shall deem necessary in order to protect the interests of the Petitioner.
4. An order nullifying all acts, deeds and decisions made by the Respondent without prior consultation with the Petitioner.
5. An order for payment of monies arising out of the company operation as dividends and any such payments from 2008 to the present, subject to the Audited Financial Statements and Bank Statements of the Respondent.
6. General Damages amounting to **TZS 200,000,000/.**
7. Costs of this Petition.

8. Any Other relief or orders that the Honourable Court will deem just and equitable to grant to the Petitioner.

Following the filing of the Petition in Court on the 5<sup>th</sup> of July 2021, the Respondent, through its Company Secretary, one Methuselah Boaz Mafwele, filed an affidavit in opposition to the Petition on 13<sup>th</sup> Day of August 2021. Further supplementary affidavits deponed by Roger Steadman and Rupert Van Hullen were filed on 7<sup>th</sup> December 2021. These were replied to by the Petitioner's affidavits filed in this Court on the 14<sup>th</sup> December 2021.

When the parties' advocates appeared before me on the 23<sup>rd</sup> March 2022, this Court directed that the matter shall be disposed of by way of written submissions. A schedule of filing was issued and, I am glad that the parties complied with the directives of this Court and duly filed their submissions. I will thus summarise their written submissions before I proceed to analyse them in light of the existing facts and the law applicable to this Petition.

Submitting in support of the Petition, and having adopted the contents of the Petition, it was Mr Msando's submission that, the present Petition is hinged on three issues, to wit:

- (a) The fate of ten (10) shares held in the Respondent Company by the late Julius Ishengoma Francis Ndyanabo who passed on sometimes on the 5<sup>th</sup> day of October, 2008.
- (b) The Status of the Petitioner, and
- (c) The unfair prejudice acts by the Respondent since the demise of the late Julius Ishengoma Francis Ndyanabo who was a shareholder, Director and Company Secretary of the Respondent Company.

Expounding on the three aspects noted here above, Mr Msando submitted that, there is no dispute that, before his departure, the late Julius Ishengoma Francis Ndyanabo was not only a shareholder but also a Director and Company Secretary of the Respondent.

To support that fact, Mr Msando relied on the affidavit sworn by Mr Methuselah Boaz Mafwele in opposition to the

Petition. Indeed, paragraphs 7, 8, 9 and 10 of that affidavit as well the paragraphs 6, 7 and 8 of the affidavit of Mr Roger Harold Steadman, do support that factual position.

Mr Msando submitted that, the contradiction in respect of the issue regarding the status of the 10 shares held by the late Julius Ishengoma Francis Ndyanabo was brought to light by paragraph 10 of the affidavit of Mr Methuselah Boaz Mafwele who claimed that, the 10 shares erstwhile held by the late Julius Ishengoma Francis Ndyanabo, were held by him in trust because the late Julius Ishengoma Francis Ndyanabo had, on the 14<sup>th</sup> November 2007, executed a Declaration of Trust in favour of Steadman Group International Ltd.

Mr Msando made a further reference to the Supplementary Affidavit affirmed by Mr Roger Harold Steadman who, at paragraph 12 affirmed that, the ten (10) shares held by the late Julius Ishengoma Francis Ndyanabo were transferred to him through a resolution dated 27<sup>th</sup> May 2008. Mr Msando pointed out that, looking at the contents of the two affidavits as regards that matter, the two contradict each other.

From such contradicts; Mr Msando submitted that, the Petitioner totally denies the alleged transactions as they are fraught with uncertainties and their validity is questionable. He pointed out that, the alleged Declaration of Trust was executed and signed by one party only, who is the late Julius Ishengoma Francis Ndyanabo (**the nominee**), and secondly, the Registrar of the Companies does not recognise such arrangement.

Mr Msando submitted that, in many cases formed companies have been utilizing declaration of trusts to evade various provisions of the law, but in the end the records of the Registrar of Companies is the final status of matters relating to formed companies in the event of ascertaining rights and liabilities of the company members.

Mr Msando held a view that, the alleged Declaration of Trust is invalid and contravenes sections 10, 13 and 14 of the Law of Contract Act, Cap.345 R.E 2019. To support his submission on that point, Mr Msando referred to this Court the case of **Priskila Mwainunu vs. Magongo Justus**, Land Appeal No.9 of 2020 (HC) at Bukoba, (unreported).

He surmised that, the fact that the alleged Declaration of Trust was signed by one party only makes its validity questionable in the eyes of the law and even to the Petitioner, and, further, that, if considered in the light of the facts affirmed by Mr Rogers Harold Steadman in his Supplementary Affidavit in opposition to the Petition, the uncertainties concerning the shares held by the late Julius Ishengoma Francis Ndyanabo becomes more apparent.

Mr Msando submitted that, the Petitioner is totally opposed to the alleged transfer of shares from the late Julius Ishengoma Francis Ndyanabo to Mr Roger Harold Steadman. He contended that, the evidence brought to the attention of the Petitioner and, even the Court, is illegible and, thus, denies the Court and the Petitioner the opportunity to verify its validity.

Mr Msando did also brought to the attention of this Court that, despite such illegibility of the alleged "proof of transfer of shares", which transfer is alleged to have taken shape and form in 2008, to date the Petitioner is recognised as a Shareholder of the Respondent.

To support that fact, Mr Msando relied on the Annual Returns of the Respondent for the year 2019 and 2020 (attached to the Petition as **Annexure MSL-1 and MSL-2**). He therefore doubted the validity of the alleged transfer and urged this Court to make a pronouncement on the same.

Responding to whether the ten (10) shares previously held by the late Julius Ishengoma Francis Ndyanabo are lawfully held by the Petitioner, Mr Deogratius Ogunde Ongunde made an equally forceful submission. His view was that, the issue that put the parties at logger head is whether the Petitioner was rightfully enlisted in the Register of companies as a shareholder.

To Mr Ogunde's understanding, the late Julius Ishengoma Francis Ndyanabo was not a rightful owner of the shares at the time of his demise the reason being that, by the time he had sold his shares to one Roger Harold Steadman who transferred the same to Synovate Limited. He relied on paragraphs 11, 12 and 17 of the supplementary affidavit of Roger Harold Steadman.

He submitted further that, the transfer of the 10 shares of late Julius Ishengoma Francis Ndyanabo was done and accomplished during his lifetime and, for that matter, the Petitioner has nothing to claim over the property which passed hands during the deceased's life time.

Mr Ogunde contended further that, there is on top of that, a Declaration of Trust which, if the Petitioner wishes to dispute it, the burden is upon her as per section 112 of the Evidence Act, Cap.6 R.E 2019. In Mr Ogunde's view, there is no any contradiction between the affidavit sworn by Mr Methuselah Boaz Mafwele and that of Roger Harold Steadman as all are aimed at proving one fact, i.e., the shares in dispute were not held by late Julius Ishengoma Francis Ndyanabo at the time of his demise.

He concluded, therefore, that, the same cannot be legally held by the Petitioner; a personal legal representative of the deceased Julius Ishengoma Francis Ndyanabo, and, that, the Petitioner's name was wrongly entered into the register of members of the Respondent Company. He regarded the authorities relied on by Mr Msando as irrelevant.

Mr Ogunde did also submit on the way forward arguing regarding who are the members of the company, and what shares they hold, if the name of a person has been wrongly entered into the register of members, this Court has powers to order rectification of the register. He relied on section 121(1) (a) and (b), Section 121 (2), (3) and (4) of the Companies Act, No.12 of 2002, [Cap.212 R.E 2002].

As regard these submissions, Mr Msando has vehemently opposed them as being matters which were never raised in the affidavits filed in opposition, and which cannot be raised in the submissions having not been pleaded or averred in the affidavits.

Perhaps it is pertinent that I start with what Mr Msando raised in his rejoinder, particularly, the unpleaded facts, which Mr Ogunde wishes that I take a position on them, i.e., whether there is a need for a rectification order being issued by this Court.

But, before, I even embark on that, I do take note that, in his submissions, Mr Ogunde did question the competence of this Petition labelling it as frivolous, vexatious and an abuse of

Court process. However, as rightly stated by Mr Msando, the Respondent never raised any preliminary objection challenging the Petition.

In the first place, I do share the views of Mr Msando that, any issue that relates to an objection on point of law, need to be brought to light at the earliest possible time. That position was held in the case of **James Burchard Rugemalira vs. The Republic & Mr. Harbinder Seingh Sethi**, Criminal Application No. 59/19 of 2017, (CAT) at DSM, (unreported).

In that case, the Court of Appeal of Tanzania dismissed a point of objection on account of failure to follow the requirement of the law in rising the objection. The Court stated:

"It should be remembered that a notice of objection is always intended to let the adverse party know a point of law raised so that when it comes up for hearing he should be aware in advance what the nature of the point of objection is all about and this will enable him to prepare

himself for a reply thereof, if any."

From that understanding, I find that, what Mr Ogunde has raised in his written submission as regards whether the present Petition is tenable in law or not as a matter which he ought to have raised it properly and in advance and not in his written submissions. I will thus disregard such issues and the submissions made in support of them.

The earlier point to which I revert to is with regard to introduction of new facts which were not pleaded or raised in the affidavits in opposition to this Petition. Specifically is the issue of deregistration of the Petitioner from the Register of Companies, an issue which Mr Ogunde has raised and supported in his submissions urging me to take a position on that under Section 121 (1) (a) and (b), (2), (3) and (4) of Cap.212 R.E 2002.

In my view, I fully agree with Mr Msando that, the facts having not been pleaded or rather averred by the Respondent in the affidavits filed in opposition to the Petition, the same cannot be entertained in the submissions. I do fully subscribe to the correct view of this Court, **Mzuna, J.**, in the case of

**Loisieku Nambari vs. Lemomo Mollel**, Misc. Criminal Application No.11 of 2020 (HC) Arusha Registry, at Arusha, that:

"A submission is a summary of arguments and cannot be used to introduce evidence. For that reason ... this Court cannot deal with matters not otherwise raised in the affidavit instead were introduced during submissions."

It follows, therefore, that, the issue of deregistration of the Petitioner from the Register of Companies is an unviable proposition and I hereby throw it out of my attention, discussion and determination. Having stated so, let me now turn to the first issue regarding the ownership of the ten (10) shares which were erstwhile held by late Julius Ishengoma Francis Ndyanabo.

In his submissions, Mr Ogunde has decried Mr Msando's argument that validity of the ownership of those respective shares is fraught with contradictions as evidenced by the affidavit of Mr Methuselah Boaz Mafwele and the supplementary affidavit of Mr Roger Harold Steadman.

Mr Ogunde contended that the two affidavits are in no way contradictory simply because, all are aimed at proving one fact, i.e., the shares in dispute were not held by late Julius Ishengoma Francis Ndyanabo at the time of his demise.

However, looking at the two affidavits, I do share a view that, they are not speaking of one and the same thing in a straight language. In his affidavit in opposition to the Petition, one Methuselah Boaz Mafwele deponed on paragraph ten (10) thereof as follows:

"That, regarding initial ten (10) ordinary shares held by the late Julius Ishengoma Francis Ndyanabo, I state that, on **14<sup>th</sup> November 2007**, the late Julius Inshengoma Francis Ndyanabo executed a Declaration of Trust in favour of STEADMAN GROUP INTERNATIONAL LIMITED and declared that, all along since incorporation of the Respondent Company, he had been holding ten (10) ordinary shares and all dividends, interest, bonuses and other benefits in respect of the said shares on trust for STEADMAN GROUP

INTERNATIONAL LIMITED, the beneficial owner. Copy of a Declaration of Trust is attached hereto and marked annexure "IPSOS-2" to form part of the affidavit."

The averments quoted here above, are from the affidavit in opposition to the Petition filed on the 13<sup>th</sup> of August 2021 having been deponed by Mr Methuselah Boaz Mafwele on the same day, before Alex Felician Mianga, Advocate, Notary Public & Commissioner for Oaths.

On the 06<sup>th</sup> December 2021, Mr Roger Harold Steadman did depone to a supplementary affidavit in opposition to the Petition. His affidavit was filed in this Court on the 7<sup>th</sup> December 2021. In paragraphs 6, 10, 11 and 12 of Mr. Roger Harold Steadman's affidavit stated the following facts:

"6. That, initial shareholders of the Company were DAVID RAFFMAN, holding Ten (10) Ordinary Shares, JULIUS ISHENGOMA FRANCIS NDYANABO, holding Ten (10) Ordinary Shares and, I, ROGER HAROLD STEADMAN, holding Eighty (80) Ordinary Shares.

10. That, on 14<sup>th</sup> November, 2007, I transferred my Eighty (80) Ordinary Shares stated in paragraph 6 above to STEADMAN GROUP INTERNATIONAL LIMITED of Port Louis Mauritius. On the same date, DAVID RAFFMAN also transferred his ten (10) Ordinary Shares to the same STEADMAN GROUP INTERNATIONAL LIMITED making a total of Ninety (90) Ordinary Shares. JULIUS ISHENGOMA FRANCIS NDYANABO on the same date signed a Waiver of Pre-Emption Rights on transfer of DAVID RAFFMAN's shares. Copies of the Share Transfer Forms and Waiver of Pre-Emption Rights are attached and collectively marked annexure IPSOS-7 to form part of the affidavit.

11. That, since JULIUS ISHENGOMA FRANCIS NDYANABO was holding Ten (10) Ordinary Shares, on 16<sup>th</sup> May 2008, he informed the Company (STEADMAN GROUP (T) LTD) about his desire to sell his shares. The Company convened a

meeting and passed a resolution blessing sale of Ten (10) Ordinary Shares from JULIUS ISHENGOMA FRANCIS NDYANABO to me. A copy of Board Resolution is attached and marked annexure IPSOS-8 to form part of the affidavit.

12. That, with that being resolved, on 27<sup>th</sup> May 2008, JULIUS ISHENGOMA FRANCIS NDYANABO **transferred his Ten (10) Ordinary Shares to me.** All government taxes were duly paid. Copy of Share Form Transfer and Payment Notice and Deposit Slip of Tanzania Revenue Authority are attached and collectively marked annexure "IPSOS-9" to form part of the affidavit."

As I stated earlier, if one carefully examines the averments quoted from the two affidavits opposing the Petition, the two are not speaking to each other.

In the first place this Court is told, through the affidavit of Mr Methuselah Boaz Mafwele, who is the Respondent Company's Secretary, that, all along since incorporation of the

Respondent Company, the ten (10) ordinary shares held by the late J.I.F. Ndyanabo, and all dividends, interest, bonuses and other benefits in respect of the said shares were being held on trust for STEADMAN GROUP INTERNATIONAL LIMITED, the beneficial owner.

However, Mr ROGER HAROLD STEADMAN tells us a different story, that, the Ten (10) shares were initially the property of the late Julius Ishengoma Francis Ndyanabo and, that, he transferred them to Mr ROGER HAROLD STEADMAN.

In essence, therefore, the two factual statements by the two affiants of the two affidavits in support of the Respondent's case contradict each other.

I am alive to the fact that not every contradiction is fatal to a particular case. The Court of Appeal stated in the case of **Sylvester Stephano vs. R**, Criminal Appeal No. 527 of 2016 (unreported) (citing the earlier case of **Said Ally Ismail vs. R**, Criminal Appeal No. 249 of 2008 (unreported) that:

"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the

evidence is contradictory then the prosecution case will be dismantled."

In that same case, the Court of Appeal was of the view that:

"Where there are inconsistencies, the Court's duty is to consider them and determine whether they are minor not affecting the prosecution case or they go to the root of the matter. That was said by the Court in the case of **Mohamed Said Matula vs. R.** [1995] TLR. 3 in the following words:

*"where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible , else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter."*

Having stated that, the evidence offered under oath by the two affiants, namely: Mr Methuselah Boaz Mafwele and Mr Roger Harold Steadman, contains inconsistencies or

contradictions; I am, thus, guided by the Court of Appeal decisions cited here above, to see as to whether the notable contradictions are fundamental or just trivial.

Indeed, if found to be trivial there will be of no effect since the Latin Maxim **de minimis non curat lex**, which means the law will not bother about trivial matters, will apply. However, if the contradictions are material contradictions, they will be impactful since it is trite, that, if two or more facts or statements are contradictory, they state or imply that opposite things are true. In the context of this Petition, the opposite, in my view, is that, the shares were never been transferred from the ownership of the late Julius Ndyanabo. I will, thus, elaborate more why this Court holds that view.

In the first place, if at all the shares were held in trust for STEADMAN GROUP INTERNATIONAL LIMITED as the beneficial owner, and if the alleged Declaration of Trust which is purported to be signed by the late J.I.F. Ndyanabo was valid, then, the transfer alleged to be made by the late J.I.F. Ndyanabo to Roger Harold Steadman would not have been effected or made possible without there being an express

directive or consent of the beneficial owner. It is also a fact that, it is only signed by the alleged Nominee who is the late J.I.F.Ndyanabo.

All that aside, even if it were to be regarded as genuine, still that will not created a solution to the issue raised by the Petitioner. In essence, while clause 1.1 of the operative part of the alleged Declaration of Trust provides for such a requirement, nothing of that sort was availed to the Court. From that understanding, it means, therefore, that, the alleged transfer to Mr ROGERS HAROLD STEADMAN was not effective since it was done contrary to the alleged Declaration of Trust.

The second consideration goes to the fact that, since the alleged transfer was effected in 2008, nothing was filed in the Register of Companies to indicate that, there was such a change in the ownership of the Respondent Company. As correctly submitted by Mr Msando, the Annual Returns filed by the Respondent Company for the year 2019 and 2020 (Annex.MSL-1 and 2 to the Petition) show that, the Petitioner is one of the shareholders of the Respondent Company. If at all the shares of the late J.I.F. Ndyanabo were effectively

transferred, why after more than 12 years the Respondent Company continued to recognise his personal legal successor in title to those shares as the lawful owner?

All such inconsistent proofs are not trivial but rather very material and raise doubts as to the validity of any of the transactions previously alleged to have been executed during the lifetime of the later J.I.F.Ndyanabo. I also take note of the concerns raised by Mr Msando that, the documents attached were illegible and provides difficult even to myself to ably appreciate them.

In my view, and as correctly submitted by Mr Msando, following the demise of the late J.I.F.Ndyanabo and the subsequent appointment of the Petitioner as the administrator of his estates, the Petitioner effectively becomes a personal legal representative of the deceased and, by transmission, the holder of the shares erstwhile held by the late J.I.F. Ndyanabo. The evidence availed, which originates from the Respondent herself, does recognise the Petitioner as the lawful holder of Ten (10) shares in the Respondent Company.

To be specific, the Annual Returns dated 31<sup>st</sup> December 2020 which were filed in the office of the Register of Companies by Mr Methuselah Boaz Mafwele, the very deponent of the affidavit in opposition, shows that, the Petitioner is a true shareholder to date. It is also clear that, the annexures MSL-1, MSL-2 and the BRELA Status Report, (MSL-3) do perfectly respond to the averments raised in the supplementary affidavit of Mr Rupert Van Hullen regarding the status of the Petitioner within the Respondent Company's ownership structure.

Likewise, I am contented that, Annexure MSL -5 to the Petitioner's Reply affidavit to the Respondent's supplementary affidavit sworn by Mr Rupert Van Hullen, does, as well, indicate that, Mr David Jozef Somers and Mr Rupert Hullen as the Directors of the Respondent Company and Mr Methuselah Boaz Mafwele, as the Company Secretary, do acknowledge that, the Petitioner is the lawful shareholder of the Respondent since they are the very ones who signed the Annexure MSL -5 on the 28<sup>th</sup> of January 2020.

In view of all that, it is the finding of this Court that, such proof solidifies the position that, the Petitioner is the lawful

owner of the Ten (10) Ordinary Shares held in the Respondent Company, and this Court so finds and declares. Consequently, since the purported transfer of shares alleged to have been made by the late J.I.F Ndyanabo, as well as the allegation that he held the Ten (10) shares in trust for STEADMAN GROUP INTERNATIONAL LIMITED as the beneficial owner, were found to be plagued with contradictions, the same cannot, in my view, be regarded as valid but rather a sham and are hereby declared to be of no legal effect.

The next question to address is whether there has been any act of unfair prejudice committed against the Petitioner. As submitted by Mr Msando, the Petitioner herein, having been appointed as the administratrix of the Estate of the late J.I.F. Ndyanabo (who held Ten (10) shares in the Respondent Company), is, by virtue of section 44, 99 and 108 of the Probate and Administration of Estates Act, Cap.352 R.E 2019 and section 233 (1) to (3) of the Companies' Act, Cap.212 R.E 2002, entitled as a member or shareholder the Respondent's company, to bring a petition of the like nature before this Court.

In paragraph 11 of the Petition, the Petitioner alleges that, despite being recognised by the Directors of the Respondent as one of the shareholders of the Company, the Respondent has never associated or involved the Petitioner in anything related to the operation or affairs of the Company since the demise of the late J.I.F Ndyanabo, and even after entering her name in the register of members. The Petitioner has contended that, such an act which alienates her from the affairs of the Company was unfairly prejudicial to the Petitioner.

Paragraph 11.1 to 11.7 contains a list of acts which constitute the alleged unfairness on the part of the Petitioner. These ranges from lack of information regarding statutory meetings in which the Petitioner could have been informed about the financial and other matters regarding the operations of the Company, to other matters regarding the rights and liabilities subject to her entrance in the Company as the beneficiary.

In his submission, Mr Msando contended that, although the Petitioner was appointed and granted Letters of Administration and became the personal legal representative of

the late J.I.F. Ndyanabo (who was a upon death of one of the shareholders of the Respondent), and; despite of the established fact that upon death of a shareholder his/her shares are transmitted by operation of law to the duly appointed legal person, who in respect of the matter at hand is the Petitioner, it was not until February 2020 (since the demise of the late J.I.F Ndyanabo in 2008 and appointment of the Petitioner as the administratrix of his estate in 2010), that, the transmission of the shares to the Petitioner and recognition into the register as the member of the Company was made.

He maintained that, during all this period of about 12 years or so, the Petitioner was unaware of the conducts and changes undergoing within the Company as set out in Paragraphs 4, 5, 10 and 11.1 to 11.7 of the Petition. He contended that, even after being recognised as a shareholder, the Petitioner has not able to easily access or be availed with information she has requested from the Respondent.

In view of the above, and relying on the decision of this Court in the case of **Janeth William Kimaro and Others vs. Pelagia Auye Mrema and Others**, Misc. Commercial Appl.

No.2 of 2020 (HC) [2020] TZHCComD 2015, Media Neutral Citation, Mr Msando urged this Court to grant the Orders sought by the Petitioner.

In response to Mr Msando's submissions, it was Mr Ogunde's contentions that, for a Petition under section 233(1) of Cap.212 to succeed; the Petitioner must not only prove that the conducts complained of were prejudicial but also that, they were unfair. He summarised the complaints under paragraph 11 of the Petition as being that, the Petitioner was not made aware of how the company affairs were being carried out and, that, she has been denied access to the company's information.

To support his submission he relied on the case of **McKillen vs. Misland (Cyprus) Investments Ltd & Others** [2013] EWCA Civ.781 (03 July 2013) where the Court pointed out that, for an unfair prejudice petition to succeed, the Petitioner must prove that, (i) there is an act or omission on the part of the Company and, (ii) that, the act or omission is unfairly prejudicial to the Petitioner. He also supported his views by citing the case of **O'Neill and Another vs. Phillips and Others** [1999] UKHL 24, [1999]1WLR 1092 and, from a

generalised perspective, concluded that, the Petitioner has not been able to prove what she has alleged.

In a brief rejoinder on this second issue, Mr Msando reiterated his submission in chief and rejoined further, that, the Respondent deprived the Petitioner her rights as a legal representative and a shareholder while as per what the law provides as well as the Articles of Association of the Respondent Company, a lawful shareholder is entitled to enjoy the fruits of the company.

I have carefully examined the rival submissions herein by the learned counsels for the parties. In the case of **Bhavesh Chandulal Ladwa & 3 Others vs. Jitesh Chandulal Ladwa**, Misc.Commercial Cause No.35 of 2020, this Court held that, in a petition premised under section 233(1) and (3) of Cap.212, the Petitioner is required to establish four elements to the satisfaction of the court, that: (1) *the conduct of the company's affairs*, (2) *has prejudiced*, (3) *unfairly*, (4) *the petitioner's interests as a member of the company*.

This Court stated, in particular that:

"the conduct complained of must be conduct of the company's affairs..... it is the affairs of the company which are being or have been conducted in an unfairly prejudicial manner or that it is an act or omission of the company that is or would be so prejudicial.... Refusal by a company to convene a general meeting, for instance, would be an act of the company, although whether it was either unfair or prejudicial it will all depend on the circumstances. It means, therefore, that, actions or omissions in compliance or contravention of the articles of association of a company may or may not constitute the conduct of the company's affairs depending on the precise facts."

In the present Petition, the Petitioner has lamented that, she has never been given any notice regarding any of the statutory meetings of the Company and she is unaware of the directors report since 2007 to mention but a few. In my view, all those matters are matters touching on the conduct of the affairs of the company.

As regards, the rest of elements, it was stated, in the case of **Arbuthnott vs. Bonymann & Others** [2015] EWCA Civ.536 (20 May 2015), at 630, that:

"Prejudice ... may also extend to other financial damage which **in the circumstances of the case is bound up with [a petitioner's] position as a member.** So, for example, **removal from participation in the management of a company** and the resulting loss of income or profits from the company in the form of remuneration will constitute prejudice in those cases where the members have rights recognized in equity if not at law, to participate in that way. **Similarly, damage to the financial position of a member in relation to a debt due to him from the company can in the appropriate circumstances amount to prejudice.** The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to

damage to the value of his shareholding. **Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section.**" (Emphasis added).

Taking the cue from the above legal position and, considering the matters narrated in paragraph 11.1 to 11.7 of the Petition, I find that, such matters constitute conduct of an unfairly nature and prejudicial to the interest of the Petitioner as a shareholder.

In fact, as a shareholder, the Petitioner has a right to be informed and to be involved in the management of the affairs of the Company, including right to be notified of the statutory meetings of the Company and receive financial and other type of reports concerning the affairs of the Company.

In the case of **Irene Kahemele vs Ndiyo United Co & 2 Others**, Misc. Civil Cause No.3 of 2018, (unreported), this

Court, (Mambi, J.,) had the following to say regarding the right of shareholders to participate in the affairs of the Company:

"As part of the business and company owners, the petitioner, as one of the shareholders, [has] the right to participate in a business and company's affairs and profitability as long she own the shares and contributed to the capital and growth of the business. It should be noted that as the shareholder and contributor to the business and company capital, the petitioner has inalienable rights to be consulted or informed before the company takes a particular action. The Law gives a shareholder or part of the company owner like the petitioner the right to inspect the books, register, annual returns and other business affairs."

In view of the above findings, and taking into account the earlier findings which I made regarding the status of the Petitioner within the Company, i.e., she is legally a shareholder of Ten (10) shares erstwhile held by the late J.I.F.Ndyanabo, it

is my settled view that, her being sidelined in taking part in the affairs of the Company, including being availed with information regarding the status of the Company from 2007 to date, and such other conducts listed in paragraph 11 of the Petition, constitute conducts which are unfair and prejudicial to the Petitioner's interests. This Petition, therefore, should be granted and, the Petitioner is entitled to the reliefs sought.

As for the kind of reliefs for which she is entitled to, having taken into account the totality of the matters as deliberated here above, this Court settles for the following, Orders, that:

1. this petition is hereby granted and this Court does hereby declare that, since the Petitioner is a lawful shareholder, the Respondent's acts, omissions and conducts complained of are contrary to the law and the Articles of Association of the Respondent and, hence, prejudicial to the Petitioner's interests;
2. this Court does hereby declare that, the Respondent's acts of performing the Company's duties

and affairs without consultation with the members, is contrary to the Articles of the Company and prejudicial to the interest of the Petitioner;

3. this Court does hereby authorize the Petitioner to commence civil proceedings in the name as against the Respondent and any other person(s) as shall deem necessary in order to protect the interests of the Petitioner;

4. this Court does hereby invalidate all acts, deeds and decisions made by the Respondent without prior consultation with the Petitioner;

5. this Court makes an Order for payment to the Petitioner of all monies due to her as a shareholder of the Company, that might have arisen or which arose out of the company's operation as dividends and any such payments from 2008 to the present, subject to the Audited Financial Statements and Bank Statements of the Respondent;

6. since payment of general damages and the quantum to be awarded is a matter that falls

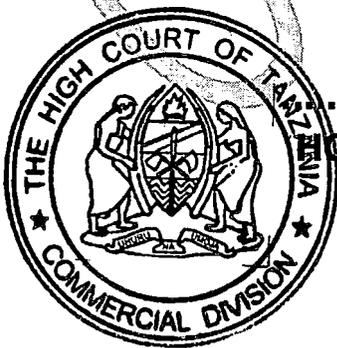
under the discretion of this Court, and taking into account that the Petitioner has from 2010 to the time when her name was entered into the register of the Company in 2020 continued to suffered isolation from the affairs of the Company, the Petitioner is entitled to award of general damages to the tune of **5,000,000 (Five million Tanzania Shillings)**, payable by the Respondent;

7. the Respondent is to bear the costs of this Petition.

**It is so ordered.**

*Right of Appeal Explained*

DATED AT **DAR-ES-SALAAM**, THIS 19<sup>th</sup> DAY OF MAY 2022



.....  
**ON. DEO JOHN NANGELA**  
**JUDGE**