IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 23 OF 2022

MOHAMED SAID KILUWA (SUING IN THE NAME OF KILUWA STEEL GROUP COMPANY LTD) …….PLAINTIFF

VERSUS

WANG SHENGJU……1ST DEFENDANT
WANG WENQIAN ……..2ND DEFENDANT

Date of Last Order: 30/08/2022
Date of Judgment: 21/10/2022

JUDGMENT

NANGELA, J.

In law, what is goodwill of a company and how should it be calculated? Is the Articles of Association a binding Contract between the Company and its directors or members? What if a director is also a member of the Company? Whom does the Articles of Association bind and how should it be interpreted? These and other issues are matters that have exercised the mental faculty of this Court in this suit.

However, before I delve into their nitty-gritty of this suit, I find it apposite to commence this judgment by setting out its factual background. It all started sometimes in 2014 whereby, the Company named **"Kiluwa Steel Group Company Ltd"** (hereafter to be referred to as "**the Company**") was incorporated, as a body Corporate existing and organized under the Companies Act.

Following its incorporation, the Company was issued with a Certificate of Registration, No. 105365. At the time of incorporation, however, the Company had three directors namely: Mr. Liu Delli, (holding 5,000 shares), Mr. Wang Shengju (holding 2,500 shares) and Mr. Mohamed Said Kiluwa, (holding 2,500 shares). The Company commenced its business operations in the year 2016. Since then, its shareholding structure underwent substantial changes. According to its Financial Statements for up ordinary shares of **TZS-11,957,200,000.00/=**

It is alleged that, after full commencing of the business and operations of the Company, the Defendants removed the Plaintiff who is a director and shareholder from the management of the Company, denied him access to his office and the Company's information, documents, together with his entitled benefits.

Following such developments, a dispute ensued whereby the Plaintiff filed in Court a Petition, **Miscellaneous Commercial Cause No. 30 of 2020**, premising his claims under section 233 of the Companies Act (**unfair prejudice**) and sought for the various orders of the Court which I need not reproduce here.

Following the institution of that Petition, this Court (B.K. Phillip, J.,) heard and determined it in favour of the Petitioner (Plaintiff herein).

This Court issued several directives, including that, the Parties were to convene an Extra-ordinary General Meeting of the Members to deliberate on: the issue of disposal of shares of the Petitioner (Plaintiff herein), the process of implementing this Court's orders for change of the Company's name from "**Kiluwa**"

to another name; the payment of the Petitioner's (Plaintiff) remuneration and compensation for his investment in the Company in terms of Goodwill, and the issue regarding the disposal of the Company's properties and cash withdrawals from the Company's Bank Accounts.

Moreover, this Court did direct and granted leave, that, after the Extra-Ordinary General Meeting of the Company is convened, parties were at liberty to institute civil proceedings in the name of the Company.

It is from that background, therefore, the Plaintiff herein, instituted this suit praying for judgment and decree against the Defendants jointly and severally as follows:

(1) An Order for removal of the Defendants from management of the Company;

(2) A permanent injunction restraining the Defendants or their agents, employees and assigns from managing affairs of the Company;

(3) An Order for the Plaintiff to manage operations of the Company as the Managing Director of the Company;

(4) An Order for payment of TZS. 33,984,394,221.00 by the Defendants to the Plaintiff as per paragraph 18 of the plaint and its sub-paragraphs.

(5) Alternatively, to prayers 1, 2, 3 and 4 above, the Honourable Court be pleased to make an Order for payment of TZS 12,970,406,318 being a value of 55,500 fully paid-up ordinary shares held by the

Plaintiff as per paragraph No. 20 of the Plaint.

(6) An Order for payment of the sum of TZS. 8,573,335,815.00 being the Plaintiff proportionate share entitlement from illegally withdrawn cash/funds from accounts of the Company.

(7) An order restraining the Defendants from using the name of "Kiluwa" by the Company and exit of the Plaintiff from the Company.

(8) An Order for the payment of Directors remunerations to the Plaintiff in the sum of TZS. 10,000,000/=per month from January, 2016 to the date of Judgment till the date of his exit from the Company

(9) An Order for payment of TZS. 22,027,194,221.00 being "Goodwill" that, the Plaintiff is entitled to for his efforts to raise the Company and the use of his family name by the Company.

(10) Payment of general damages to the plaintiff to be assessed by this Honourable Court.

(11) An Order for Commercial rate interest at 21%from the date of filing of the case until satisfaction of the Decree

(12) An Order for payment of Court rate interest at 12% from the date of judgment till full satisfaction of the Decree.

(13) Costs of this suit be borne by the Defendant and;

(14) Any other relief this honourable court may deem fit to grant.

On the 24th March 2022, the Defendants herein filed a joint Written Statement of Defence and refuted all of the Plaintiff's claims. In short, they averred that, the Plaintiff is a Managing Director of Kiluwa Steel Group Company Limited who oversees the daily activities of the Company and its departments and is also responsible for the management of the Company.

Upon completion of the filing of the pleadings and the carrying out of the pre- trial hearing processes, the matter went through the mediation process. Unfortunately, mediation failed and, consequently, this court convened for a final pre-trial conference on 10th May 2022.

On the material date, this Court, in agreement with both parties, came up with the following issues for determination in this suit:

(1) Whether the Plaintiff has partly paid up his shares in the Company.

(2) Whether the Auditors 'MAZAR TANZANIA' established the true value of the Company

(3) Whether the Company had in place an arrangement regarding Director's remuneration and, if so, whether the Plaintiff has ever been paid Director's remunerations and to what extent was he paid.

(4) Whether there has been misuse of the Companies' assets, including money from the Company's Account' to the detriment of the Company and the Plaintiff as a shareholder.

(5) Whether the Company has made any profit and if so whether the plaintiff is entitled to dividend thereof.

(6) Whether the Plaintiff manages the affairs of the Company as its managing director and, if not, whether the Defendants have denied the Plaintiff access to the management of the affairs of the Company.

(7) Whether the Plaintiff is entitled to compensation towards the good will of the Company which he helped to create.

(8) To what reliefs are the parties entitled.

On 22nd June 2022, a day when the full hearing of this case commenced, the Plaintiff enjoyed the legal services of Mr. Alex Balomi, learned counsel, together with Mr. Imam Daffa, learned counsel. Mr. Bernard Stephen and Mr. Edrick Luimuka, learned advocates represented the Defendants.

In total, the Plaintiff called three (3) witnesses and tendered 8 Exhibits (the 8th one being produced by the 1st Defendant). On the other hand, the Defendants called two (2) witnesses and tendered six (6) Exhibits. It is worthy noting, also that, all witnesses filed witness statements and these were admitted as their testimonies in chief. I will proceed, therefore, to sum-up the

witnesses' testimonies before I deliberate on the whole available evidence in response to the agreed issues.

In her witness statement received in Court as her testimony in chief, the first witness for the Plaintiff, Ms. Witness Shekirwa, an independent auditor with 15 years of experience in auditing profession, testified as Pw-1. She told this Court that, she is a partner with an Auditing Firm in the name of MAZARS TANZANIA (hereafter referred to as "MAZARS"). According to her testimony, on the 18th June 2020, her firm was appointed by this Court (B.K. Philip, J.) to carry out an investigation, audit and valuation of the assets of Kiluwa Steel Group Company Limited as well as all things incidental thereto.

It was Pw-1's testimony that, upon embarking on the assignment, MAZARS conducted the audit in accordance with the International Standards on Related Services (ISRS) 4400, 'Engagement to perform agreed-upon Procedures regarding Financial Information.

Pw-1 testified further that, at the time, MAZARS outsourced MAJENGO Estate Developers Ltd to perform the valuation of the Company's assets as at 31st December 2020. She tendered in Court the Report of the Investigation and its executive summary statement of findings of her audit work and, this Court admitted it as **Exhibit P.1**.

According to her testimony, currently the Company is comprised of three (3) Directors cum shareholders in the name of Mr. Wang Shengju (the 1st Defendant), Mr. Weng Qian (the 2nd Defendant) and the Plaintiff (Mohamed Said Kiluwa). Pw-1

testified further that, based on the financial investigations, audit and valuation, the value of the Company is **TZS 51,104,223,241.00**. Pw-1 elaborated further that, as per the audit report, the company has assets worth **TZS 28,635,590,000**, Net current assets (as per the balance sheet-2020) **TZS 3,147,224,606** and a total adjustment of the investigation findings **TZS 19,631,408635.**

It was further testimony of Pw-1 that, according to the valuation report, at the time of valuation, which was October 2021, estimated value of the landed properties, buildings, plant and machinery, motor vehicles, furniture and equipment as well as overhead electricity line was **TZS 28,635,590,000.00.** According to Pw-1, the Investigation and Auditing exercise came up with two categories of findings, to wit: (i) those with effect to the financial status of the Company and (ii) those without effect to the financial status of the Company.

Pw-1 testified, as regards effects that impact on the financials, that, the findings were to the effect, firstly, that, the auditors established a number of unsupported cash withdrawals to a tune of **TZS 1,379,695,573/=** and **USD 263,800.00**. Pw-1 told this Court that, there was no scintilla of evidence supporting those withdrawals. She stated that, the cash withdrawals were from the CRDB Bank Plc Account No.250237535801 amounting to **USD 220,000.00** and NMB Plc Account No. 24110000553 amounting to **TZS 1,379,695,573/=**and Account No.24110000554 amounting to **USD 43,000.00.**

Secondly, it was the testimony of Pw-1 that, the auditors did point out inflated costs and expenses. She told this Court that, a total of **USD 2, 987,482.00** was unsupported payments, an outflow of financial resources from the Company with no supporting evidence of any value flowing back to the Company. Since the auditors labelled such amounts as being fictitious, they adjusted them in the computation of the Company's financial status.

It was as well the testimony of Pw-1 that, the audit revealed unsupported loan balance relating to one Mohamed Said Kiluwa (the Plaintiff) amounting to **TZS 1,838,350,000/=**. She testified as well that, there was also noted an aborted loan agreement between the Company and Mr. Kiluwa but there was no proof of a later disbursement, a fact which made the Auditors to conclude that, the loan was not in existence and so is the balance, hence, the balance was adjusted in computing the Company's financial status.

Pw-1 testified further that, there were noted as well, omission of assets in the financial statements of the Company. According to Pw-1, the omitted assets included costs related to expansion of Mlandizi Power-Sub-station amounting to **TZS 5,558,868,708/=**. According to Pw-1, the costs that went to the construction of the substation were recoverable costs based on a Memorandum of Understanding between TANESCO and the Company deductible from the power invoices.

Pw-1 told this Court further that, the cost for construction of dedicated power line amounting to **TZS 949,500,000/=** was

excluded. Pw-1 told this Court further that, certain consumable items were not disclosed in the financial statements amounting to **TZS 1,408,938,300/=**.

It was also the testimony of Pw-1 that, the audit uncovered unexplained accounting adjustments amounting to **TZS 3,767,820,274/=** which had the effect of reducing retained earnings reserve with no justification. She told the Court that, in the opinion of the Auditors, the adjustments were meant to reduce the book value of the equity of the Company and clean up the debtors' and creditors' balances which had numerous misstatements. Pw-1 stated as well that, the noted defects had the effect of devaluing the Company by **TZS 19.6 billion** as explained in page 3 of **Exh.P1**.

Pw-1 told this Court upon being asked by Mr. Daffa that, the Auditors were given a 2017 loan agreement with Mr. Mohamed Said Kiluwa for **TZS 2,500,000,000/=** but which was nevertheless shown to have been cancelled/revoked. She told the Court that, when as Auditors pressed for better documents, they were given vouchers which could not have been relevant because they predated the loan agreement and, hence, lacked correlation with the loan purported to have been issued by the Company to the Plaintiff.

Pw-1 told this Court that, even where there is disposal of shares such transactions ought to be reflected in the financial statements of the Company and the traces regarding where the shares went, would have been visible.

During cross-examination, Pw-1 told this Court that, the assignment given her was to conduct audit investigation and valuation of the Company's value as per the Orders of this Court. She admitted, however, that, the Order did not mention valuation. She told this Court that, she got the Company documents from the Company itself and that, the Company has four shareholders. Pw-1 did tell this Court that, she did ask for documents which were intended to prove the withdrawals made by the Company.

Pw-1 further told this Court that, the auditors did point out some defects and sought clarifications several times. She confirmed to have seen the loan agreement dated 28/9/2017 and 6/8/2019 between the Mr. Kiluwa (Plaintiff) and the Company as well as the revocation. Upon re-examination, Pw-1 was of the view that, the valuation was done by an expert in that field and from his technical report, one can garner useful information. She admitted that, the valuer was appointed by MAZARS to do the task for them.

The second witness for the Plaintiff was Mr. Reginald Mosha, (48 yrs), who testified as **Pw-2**. In his testimony in chief, he told this Court that he holds a Bsc. LMV from Ardhi University and is a registered valuer by profession, doing valuations for both movable and immovable properties. He testified that, his Company **Majengo Estates Developers Ltd** was engaged by MAZARS TANZANIA to carry out valuation of assets of the Company in the name of Kiluwa Steel Group Ltd.

Pw-2 told the Court that, the assignment involved producing a valuation report of all fixed and movable assets as an input for

establishment of the financial status of the Company. He told this Court, further, that, after carrying out the requisite assignment, he produced a report which he submitted to MAZARS. He tendered and was received in Court a Report of Valuation and the same was admitted as **Exhibit.P2**.

According to Pw-2, **Exhibit.P2** was meant to provide a value of the Company and all assets owned by the Company for the purpose of a pending litigation in Court and, that, he valued the land, plant, machinery, buildings, motor vehicles and overhead electricity line as well as leased land to other third parties. As such, he testified that, the total value of all that was **TZS 28,635,590,000.00**.

Upon being cross-examined, Pw-2 told this Court that, the assignment he was given was to be done for 30days but since the report was to meet the criteria required, the Report had to be registered by the registered valuer and endorsed by the Chief Government valuer. He told this Court that, his report was sent to the Government Valuer in December 2021 and the approval fees were paid on 15th December 2021. He told this Court that, after verification and correction the final stamping of the Report by the Chief Government Valuer was affixed on 13/1/2022. Upon being re-examined, Pw-2 told this Court that, the kind of corrections which he was required to make in the Report was also reported to the client.

The third witness for the Plaintiff was Mr. Mohamed Said Kiluwa himself (53yrs), who testified as Pw-3. In his testimony, he told this Court that, his line of business is production of pig iron

(steel bars), having incorporated a company in the name of Kiluwa Steel Group Ltd. In his testimony in chief, Pw-3 told this Court that, he is a founder member, shareholder and the lawful Managing Director of the Company. He tendered in Court a certificate of incorporation, as well as the Memorandum and Article of Association of the Company, and, these were received and collectively admitted into evidence as **Exhibit- P-3.**

According to Pw-3, the Company has got three Directors and shareholders, including him. He tendered in Court an official search of the Company, which was admitted as **Exhibit P-4**. Pw-3 testified further that, currently, the 1st Defendant, who is a director and shareholder of the Company, has designated himself and serves as the Managing Director of the Company while the 2nd Defendant who is also a director and shareholder, serves as well as the Company Secretary.

In his testimony, Pw-3 stated in chief that, at the time of incorporation of the Company, in the year 2014, its shareholding structure was comprised of Mr. Liu Delli holding 5000 ordinary shares, Mr. Wang Shengju holding 2500 ordinary shares and Mohamed Said Kiluwa (the Plaintiff) holding 2500 as ordinary shares with a par value of **TZS. 200,000.00** each.

Pw-3 further stated that, after commencement of the business in the year 2016, the Company went through changes of its shareholding structure and, as per its Financial Statements for the year 2018, 2019, and 2020, the current status of the Plaintiff's shareholding is that, he owns a total of **59,786** paid up ordinary shares valued at **TZS 11,957,200.00**.

He testified that, on the 20th day of December 2015, through its board resolution, the Company sanctioned, among the things, the corresponding fully paid-up shares of all members, including those of the Plaintiff. During his testimony in chief, Pw-3 did tender in Court, as well, copies of Certificate of Title No.147169; Certificate of Title No.139664 and Certificate of Title No.165596. All these were collectively admitted into evidence as **Exhibit P.5**.

Pw-3 told this Court that, he has had a case with the Defendants in this Court and contended that, in its decision, the Court found him to have paid up his shares and hence, their rightful owner thereof. He tendered in Court in a ruling in respect of Misc. Commercial Cause No.30 of 2020 and the same was admitted as **Exhibit.P.6**.

In his testimony, Pw-3 stated that, currently he is not engaging in the management of the affairs of the Company because, after commencement of its business and full operation, his other two directors removed him from the managing of the affairs of the Company by denying him access to his office, companies' information and documents, hence, he had to file this suit having obtained leave to do so from this Court under the **Misc. Commercial Cause No.30 of 2020**.

He testified that, in its Orders, this Court had directed for the calling of series of the Company's meetings for the purpose of appointing an audit firm to carry out auditing, Valuation and Investigation so as to establish the financial status of the Company. According to Pw-3, during those meetings there was no consensus arrived at and the Court had to intervene and appointed

MAZARS TANZANIA who came up with a Report which was duly submitted to the Court on the 29th day of October 2021.

Pw-3 tendered minutes of a meetings called upon by the Company as per the directives of this Court, and those minutes were admitted as **Exhibit P.8**. He prayed that; this Court be pleased to grant him the prayers he has sought in his Plaint. He testified, further, that, among the things noted by the Auditors (MAZARS) Report were some illegal acts done by the Defendants in managing the affairs of the Company whereby, the whereabout of **TZS 33,984,394,221.00** is without explanations having been withdrawn from the Company's accounts by the Defendants without any colour of right or justification. Pw-3 told this Court that, such monies being the property of the Company, he is entitled to its share in the amount of **TZS 8,573,335,815.00**.

Pw-3 also testified that, currently he owns a total of **55,500** shares in the Company which results into an investment of the sum of **TZS 11,100,000,000.00** out of the **TZS 44,000,000,000.00**, the share capital of the Company. According to Pw-3, by simple arithmetic, the value of the Plaintiff's shares is **TZS 12,970,406,318.00** based on the details of the current official search, **Exhibit P.2**. Pw-3 lamented, however, that; he has been suffering at the hands of the Defendant without enjoyment of any returns from his investment he made in the Company equal to **TZS 11,957,200,000. 00.**

He stated that, under Article 64 (a) of the Company's Articles of Association, every director is entitled to the Directors' remuneration, and, that, at the time of commencement of the

business venture, it was agreed in a general meeting in 2015 that, the Director's remuneration should be **TZS 10,000,000/=** per month but, that, he has never paid such amount to date. He, however, said that, he was unable to provide evidence because he has no access to the records of the Company after being expelled by the Defendants.

Pw-3 told this Court as well that, he is entitled to a "goodwill" from the Company from the date of its incorporation to the date of his exit from the Company. He testified that, the "goodwill" he asks is based on the grounds that, (i) the Defendants, by virtue of being foreigners, were supposed to invest through the Tanzania Investment Center (TIC) but they used the Plaintiff to acquire land without going through the TIC; (ii) they used the Plaintiff and the properties he had acquired to obtain loan facilities from banks; (iii) they used the Plaintiff's family name and, that, the Company is nowadays famous in that family name of the Plaintiff.

He stated further, that, by virtue of being a promoter and Managing Director of the Company, the Plaintiff facilitated construction of a railway from SOGA Area in Kibaha to the factory for the purposes of smoothening transportation of raw materials and finished products and facilitated construction of the factory, compensation of all villagers from whom land was acquired and a sub-station electricity power supply of 33KV, solely used by the Company.

During cross-examination, Pw-3 stated that, indeed he owns **59,787** shares in the Company. He admitted also that in paragraph

24 of his Witness Statement he did state to be owning **55,500** shares. When shown **Exh.P4**, Pw-3 acknowledged to have recognized **Exh.P4** as share certificates and maintained that, the shares he owned were paid-up shares. He maintained as well that, currently he is not being involved in the management of the affairs of the Company.

He stated that, the Company cannot make valid decisions without following up the laid down procedures. He denied to have received any invitation letter from the Company or any dividend. He said that the Company do pay its employees, pay taxes and the Defendants do even travel out for holidays with their families and they get paid. He said the Company has never failed to repay its loans either and concluded, thus, that, the Company is making profit.

Pw-3 told this Court further that, since 2016 to date the Company never had a meeting where any of the directors was said to have not paid up his/her shares. He told this Court that, the Court' findings in the previous case were that, either all shareholders have fully paid up or not paid up their shares, but insisted that, it was incorrect to say that he has not paid up his shares in full. When shown **Exh.P5**, Pw-3 admitted to have signed it together with the 1st Defendant and, that, all were shareholders of the Company. He told the Court he wants to exit from the Company as of now. In short, that is all about the Plaintiff's case.

As I stated earlier, the Defendants called two witnesses only, and withdrew from the Court the witness statement of the third witness. The first Defence witness was Mr. Wang Shengju who is

also the 1st Defendant herein. He testified as Dw-1 and stated in his witness statement received in Court as his testimony in chief, that, he was testifying for all Defendants. He told this Court that, he is a Director of the Kiluwa Steel Group Company and he also act as its secretary who keeps the Company documents.

Dw-1testified that, the Company has four shareholders, namely: Mr. Wang Shengju, Ms. Wang Wengquian, Mr. Mohamed Said Kiluwa and Zhu Jin Feng and, that, Mr. Wang Shengju, Ms. Wang Wengquian, Mr. Mohamed Said Kiluwa are directors of the Company. According to his testimony, the Plaintiff hold **55,500 unpaid shares** in the Company and is still a director of the Company. He told the Court that, the Company has never recalled up the Plaintiff's shares for the reason of being unpaid up shares and the Plaintiff has never disclosed to other shareholders, including the Defendants, his intention to sell or transfer shares or request for approvals regarding his shares and no consent has been granted by the Defendants, only that they are being forced to buy the shares.

Dw-1 stated that, it was until 2019 when the Plaintiff issued the Defendants with a Demand Notice complaining about irregularities in the Company. He stated, however, that, the Plaintiff is at liberty to sell his shares to anybody else subject to the approval of the Board of Directors, as the Defendants are not bound, obliged or liable to purchase them. He testified that, the Plaintiff is responsible in managing the affairs of the Company and, that, all monies for buying the properties of the Company came from China through the Defendants.

In Court, Dw-1 tendered audited financial statements for the year 2017 and 2018 (admitted as **Exh.D1** and **D.2**) as well as three (3) Share Certificates in the name of Mr. Zhu Jinfeng, Mr. Wang Shengju and Ms. Wang Wenquian, collectively admitted as **Exh.D3**. Dw-1 did also tender in Court a Valuation Report by LIPAZ Consultants Ltd dated 18th March 2022, to show the value of the Company a being **TZS 17,810,000,000/=**, and this was admitted as **Exh.D4**.

Dw-1 did also tender in Court a Board resolution dated 27th September 2017. He told this Court that, the Board Resolution was about a loan of **TZS 2.5 billion** advanced by the Company to the Plaintiff Mohamed Said Kiluwa. The Board Resolution and the loan document dated 28th September 2017 were collectively admitted as **Exh.D5**. Moreover, Dw-1 tendered a letter which he had written to the Court in objection to the Audit Report submitted in the course of hearing the **Misc. Commercial Cause No.30 of 2020**. The letter was admitted as **Exhibit D-6**. He urged this Court to dismiss the suit with costs.

He told this Court that, MAZARS conducted the Auditing on their own and decided not to consider the Defendants' explanations. He stated that, after rejecting the Report, the Defendants commissioned their own auditor to do valuation. He stated as well that, the Defendants were not invited in the exit meeting contrary to the ISRS 4400.

During cross-examination, Dw-1 tendered his Passport in Court, and, since it was tendered at the behest of the Plaintiff's counsel, the same was admitted as **Exh.P.8. Dw-1** stated that, the

signature on the WSD is his signature but admitted that it differs with the signature on the Passport as he changed his signature in 2014 and did not follow any procedure to do so. He told this Court further, that, Ms. Wang Wangquian and Mr. Zhou were not in Tanzania when the Company was registered. He admitted to be the secretary of the Company and keeps the documents but does not remember when Ms. Wang Wangquain and Mr. Zhou Feng got their share certificates. He said the Plaintiff has not paid up his shares but the rest have paid a total of **TZS 32,900,000,000/-**.

Dw-1 stated likewise that, either Ms. Wang Wangquain and Mr. Zhou Feng paid up for their shares by depositing monies in the Bank or they did so by bringing machinery to the Company from China. He stated that, their share certificates were issued on 14/12/2015 as paid-up share certificates.

During cross-examination, Dw-1 told this Court also, that, he is not competent to testify about Exh.D1 or D2 as another witness will testify about them. He admitted, however, that, the authorized share capital shown in **Exh.D1** and also **in Exh.D-2** is **TZS 20,000,000,000/-**. He also admitted that, the paid-up share capital in 2016 was **TZS 5,289,187,610** /= and, that, in 2017 it was **TZS 5,289,187,610**/-.

When shown **Exh.D3**, Dw-1 responded that, the share certificates were issued on 14th December 2015 and they show that the authorized share capital is **TZS 44,000,000,000/-.** When asked why in 2015 the share capital was **TZS 44 billion** and in 2017 it was **TZS 20 billion**, Dw-1 failed to give explanations. He reiterated, however, that, the paid-up shares in 2016 were in the

tune of **TZS 5,289,187,610** and in the share certificates the total paid up capital was **TZS 32billion**. He admitted, however, that, the amount of the paid-up shares in **Exh.D3** (Share Certificates) does not appear in the **Exh.D1** (the 2016 Financial Accounts).

Dw-1 did also insist that the Company loaned the Plaintiff **TZS 2.5 billion** and that, he was given a loan agreement. He admitted that monies in Total of **TZS 200,000,000/=** given to the Plaintiff in 2016, did not form part of the loan. However, he maintained that the Plaintiff took a loan on divers' dates to the total of **TZS 1,357,500,000/**=. However, he admitted that, the document showing the signatures indicating that the Plaintiff took monies from the Defendant was not titled.

Dw-1 further testified while under cross-examination, that, sometimes the Plaintiff took steel bars ("nondo") from the Company and, that, the total amount on the documents shown to be signed by the Plaintiff was **TZS 1,357,500,000**/= and the last date of signing is shown to be 09th day of October 2018. He admitted, however, that, although a loan is an asset of the Company, the loan taken by the Plaintiff is not reflected in the books of accounts (**Exh.D2**).

As regards **Exh.D4**, it was Dw-1 testimony during cross-examination that, **Exh.D4** was issued on instruction of the NMB Bank. He stated that, the Company hired the Consultant LIPAZ to do the valuation for purposes of securing a loan with NMB Bank. According to Dw-1, the valuation done was for 2 Plots out of four (4) plots of land with certificate of titles. He stated that, the Valuation include the Plant and machinery and the 2 Plots and the

total value of the Company was **TZS 17, 810,000,000.00.** He admitted that, the Report by MAZARS was issued under a Court order and that, the Defendants did not tell MAZARS that they were not accepting it and neither did they complain to the NBAA.

Dw-1 told this Court further, that, although he is a Secretary to the Company, he did not know how he was appointed to that position. He also stated that, he did not remember who prepared the share certificates he tendered in Court as **Exhibit D.3**. He also stated that he does not remember the years when the Company called for an annual general meeting but the last one was on 2021. He stated as well that, he did not remember if the Company ever called for a meeting to reduce its Capital.

As regard the loan taken by the Plaintiff, Dw—1 stated that, the Plaintiff was part to the meeting that agreed to give him loan, but did not sign anywhere in an attendance register though he signed the loan agreement. During re-examination, Dw-1 told this Court that, the Company carried out valuation (**Exh.D4**) so as to extend the tenure of the Company's loan. He reiterated that the value of the Company, as per **Exh.D4** is **TZS 17,810,000,000/=** as of March 2022. He also stated that, as per **Exh.D1** and **Exh.D2**, the Company has never generated profit but in 2017 it recorded loss of **TZS 470 million** and in 2018 a loss of **TZS 960million**.

Dw-1 was of a further view that, in 2015, the Company increased the Capital to **TZS 44 billion**, but he stated that, the Company's account used its old Memorandum. He admitted again that, the loan by Mr. Kiluwa is not reflected in the Statements of Accounts and stated that it was because he is a shareholder and

was repaying it. He said Mr. Kiluwa does not have share certificate because his shares were not paid up to date. He stated further that, the Defendants rejected MAZARS report because it was ordered by the Court.

The second witness for the Defence case was Mr. Jonas Nyamuryenkunge, (62yrs) who testified as Dw-2. In his testimony in chief received in Court, Dw-2 told this Court that, he is an accountant employed by Kiluwa Steel Group Co. Ltd (**the Company**) since February 2019. Dw-2 told this Court that it is true MAZARS did audit the Company and issued a report (**Exh.P1**) to the Court since it was commissioned by the Court. He stated that, their Company submitted documents to MAZARS including copies of cheques and payment vouchers, bank statements showing disbursements and personal payments made to the Plaintiff in relation to his loan.

According to Dw-2, MAZARS held a view that they were not given evidence of disbursement and so, the Defendants objected to the Report's (**Exh.P1**) findings. He also urged this Court not to rely upon **Exh.P1**. He stated that, during exit meeting the Defendants were not invited hence MAZARS did not conduct the audit as per the ISRS 4400 requirements.

He stated further that, according to the books of accounts, there is no proof of paid-up shares by the Plaintiff and the Company has never declared dividends. However, he denied that the Company Directors are remunerated and that, there has never been passed a Board Resolution resolving that the Directors are to

be remunerated **TZS 10,000,000 /=** per month. He urged this Court to dismiss the suit with costs.

During cross-examination Dw-2 admitted that, when **Exh.D-1** was prepared in 2017, he was not present as an employee of the Company but he has seen it and knows its contents and did not see any defects in it. He admitted that, the financial statements dated 31st December 2017 shows authorized capital of **TZS 20 billion** and that, the paid-up capital as per the Report was **TZS 5 billion**, while advance Capital is **TZS 12 billion** giving a total of **TZS 17.4 billion**.

While under cross-examination, Dw-2 told this Court as well, that, he has never seen **Exh.D3** (the share certificates) which shows to be dated 14th December 2015. He told the Court that, the total share capital of the Company is **TZS 44 billion**. He admitted that the 2017 Financial Accounts does not give correct position regarding the authorized capital. He also admitted that, the total paid up capital asper **Exh.D3** is **TZS 32.9 billion** and this ought to have been shown in **Exh.D1,** but it was not.

He admitted that, **Exh.D1** does not show the true reality of the financial state of affairs of the Company as the same does not show the paid-up capital of the Company either. He also admitted that, the paid-up capital as per **Exh.D3** which is **TZS 32.9 billion** is neither shown in **Exh.D2** as well. Dw-2 admitted as well that, the loan amounting to **TZS 2.5 billion** alleged to have been advanced to the Plaintiff is neither reflected in **Exh.D1** nor in **Exh.D2**.

Dw-2 admitted also that, in the accounting profession, any misconduct by an auditor or accountant is dealt with by the National Board of Accountant and Auditors (NBAA). He told this Court that, the Company Secretary is the 1st Defendant and, that, he has never seen any other document signed by another Company secretary. Dw-2 told this Court that, he was not the one who prepared the objection letter regarding the **Exh.P1** but the same was prepared by the 1st Defendant who is not an accountant.

Upon being re-examined, Dw-2 told this Court that, he does not know why **Exh.D1** and **Exh.D2** were prepared in the manner they were prepared as he was not present at the time. However, upon being asked by this Court, whether looking at both **Exh.D-1** and **Exh.D-2**, the two presents a true and fair view of the company, Dw-2 responded that, **Exh.D-1** and **Exh.D-2** do not show the true and fair view of the Company. With the two witnesses (i.e., Dw-1 and Dw-2) the Defense case came to a closure.

Having summed up the testimony offered to the Court by the witnesses from both sides, let me now address their testimonies in light to the issues framed by this Court and the applicable legal principles. In the first place, it is a cardinal legal principle that, he who alleges must prove. There is a host of cases, both reported and unreported, which affirm to that principle, one among them being the case of **Jasson Samson Rweikiza vs. Novatus Rwechungura Nkwama**, Civil Appeal No.305 of 2020 (unreported).

In that case, the Court of Appeal, citing with approval its earlier decision in the case of **Paulina Samson Ndawavya vs.**

Theresia Thomasi Madaha, Civil Appeal No. 45 of 2017 (unreported), was of an emphatic view that:

> "...the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."

Secondly, unlike in criminal cases where proof is to be established beyond reasonable doubt, proof in civil cases, as in the suit at hand, is only established on the balance of probability. In the same case of **Jasson** (supra) the Court of Appeal cited with approval the English case of **Miller vs. Minister of Pensions** [1937] 2 All. ER 372 in which, it was stated that:

> "If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly\ but if the

> evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in criminal case. If the evidence is such that the tribunal can say- We think it is more probable than not, the burden is discharged, but, if the probabilities are equal, it is not..."

In view of the above, the Plaintiff bears the legal burden of proof at all times while the evidential burden may shift from moment to moment and from either side or party to the case. However, before I proceed any further, and having looked at Exh.P4, I find it necessary to address a concern which was raised by the learned counsel for the Defendants in his closing submissions regarding whether it is appropriate that I proceed with this case while one of the shareholders in the name of Zhu Feng who is a shareholder is not a party to the case.

In response to the above point raised by the Counsel for the Defendant belatedly, I think I need to be very brief on that. First, it

is a well settled view that, the Plaintiff is "**dominus litis**" and, as such, at liberty to sue whomsoever he wishes. Secondly, if the said Zhou Feng was interested in the suit as a defendant, the learned Counsel for the Defendants was at liberty to apply to the Court to have him joined as a Party. Instead, the said Zhu Feng was merely listed as a witness for the Defendant who nevertheless did not testify in Court as his witness statement was withdrawn from the case. In view of all such facts, I do not see how it can be said that as a shareholder, he has been denied right to be heard.

Having stated so, let me revert to the issues for consideration in this case. **The first issue** agreed upon by the parties and recorded by this Court was:

> Whether the Plaintiff has partly paid up his shares in the Company.

According to the testimony of Pw-1, his shares were paid-up in full. However, according to the testimony of Dw-1 and Dw-2, the Plaintiff's shares were unpaid-up shares. From those dichotomous propositions, the first issue was drafted so as to ascertain where the pendulum of truth lays. The ascertainment of truth regarding that issue, however, is only possible by looking at what was laid before the Court as evidence for or against, taking into account the whole circumstance surrounding this suit.

In his testimony, Pw-1 has been of unwavering stance that, he owns **55,500** ordinary paid-up shares in the Company, worth **TZS 11,100,000,000.00**. According to **Exh.P4** which was obtained from BRELA on the 23rd day of February 2022, at 16:50:03, the share capital of the Company, as of that date, stands

at **TZS 44,000,000,000.00** and the Company's registration date was 23/01/2014 and has three (3) Directors -namely: - Mr. Wang Shengju; Ms. Wang Wengquian and Mr. Mohamed Said Kiluwa. **Exh.P4** does show that the Plaintiff owns 55,500 Ordinary Shares in the Company. However, it does not say whether such shares are paid-up or not.

Essentially, it is the company's articles of association (and shareholders' agreement, if one has been drawn up) which states when shares have to be paid by the members. In particular, and depending on the provisions set out in the articles or shareholders' agreement, the shareholders may be required to pay for their company shares at the following stages during incorporation of the Company, or upon allotment (issue) or transfer after incorporation. They may as well be required to pay at a specified or unspecified date in the future or when the director issues a 'call' on shares, i.e., payment demand, or when the company is wound up.

In the suit at hand, if the shares were to be paid up in future, be it in whole or in part, the ordinary course of events holds that, any such unpaid amount for shares will be requested by the company's directors upon sending **'a call notice'** to shareholders stipulating their requirement to pay the company a specified sum of money at a specified period, and the payment may be either the whole or part of the unpaid amount, in respect of any shares which one holds.

In such scenario, if no response is made, a reminder is ordinarily sent and if the same is ignored, then, a '**forfeiture**

notice' may be sent to the members if payment remains outstanding and interest on the call payment will usually accrue until the debt is settled. Subsequent to the issuance of a forfeiture notice, however, any failure to pay will likely result in the shareholders losing entitlement to their shares. In such a trail of events, one expects that there will be generation of evidential materials which, if need arises, will be submitted in Court as proof. This has not been the case in the circumstances of this present suit.

But, let me even shed some more lights on this issue, given what transpired in the course of hearing of this suit. In the attempt to show that the Plaintiff has not paid for his shares, Dw-1 tendered in Court what this Court admitted as **Exh.D-3** collectively. **Exh.D-3** constitutes three (3) "share certificates" purporting to show that three shareholders in the names of **Zhu Jin Feng**, **Wang Wenquian** and **Wang Shengju** had their shares paid up.

According to **Exhibit D.3**, Mr. Zhu Jin Feng, is said to have paid TZS 11,420,000,000/=; Ms. Wang Wenquian is said to have paid TZS 19,720,000,000/= and Wang Shengju is said to have paid TZS 1,760,000,000/= out of an Authorized share Capital of **TZS 44,000,000,000/=**. These three certificates indicate that they were issued on 14th December 2015. But when Dw-1 and Dw-2 were cross examined by Mr. Daffa, they could not tell the Court who prepared those Certificates in 2015.

Surprisingly, however, Dw-1 (the 1st Defendant) was the Company Secretary who was in custody of such documents. Dw-1 told this Court that, the rest of the shareholders who hold

certificates (Exh.D-3) either paid by depositing their amounts in Bank or by bringing machinery. However, nothing in form of bank slip or even receipts in respect of machinery purchased by them for the Company was tendered in Court as evidence of what Dw-1 stated.

The only inference which one may draw from the testimony of Dw-1 and the **Exh.D-3** which he tendered in Court is, however, that, such Certificates purporting to show that the shares in respect of the 1st and 2nd Defendant as well as those of Mr. Zhu Jin Feng were paid-up shares, are in my view, not genuine but stands rather to be close to "choreographed" or "doubtful" evidence.

I hold it to be so because, **firstly**, in this suit, Dw-1 failed to tender in Court evidence of Board Resolution or otherwise to show that, there was a call up of unpaid shares which the holders of the **Exh.D3** heeded to. In the previous case before this same Court, such documents were not produced in Court. And, this Court did raise a concern regarding that fact and, for that matter, this second attempt which unearthed the Certificates, seems to be an attempt to coverup the missing links and could very well be construed to amount to an afterthought state of affairs under which evidence was "manufactured" to meet the needs of the present suit.

Secondly, it is on record that, when Dw-1 was under cross-examination, he was shown **Exh.D3**, and **Exh.D1** and asked why **Exh.D3**, issued on 14th December 2015, shows that the authorized share capital of the Company in 2015 was 44 billion while **Exh.D1** shows that in 2016 and 2017 authorized share capital was 20

billion, Dw-1 failed to give explanations. Worst still, and even more confusing on his part, Dw-1 stated that, the paid-up shares in 2016 were in the tune of **TZS 5,289,187,610/-.** However, as **Exh.D-3** shows, the three "shares certificates" issued on 14th December 2015 have a total paid up capital of **TZS 32bilion**.

Besides, the amount of the paid-up shares which **Exh.D3** (Share Certificates) purport to exhibit, does not appear in the **Exh.D1** (the 2016 Financial Accounts). With all such anomalies, I am satisfied, therefore, that, the Defendants have not been able to marshal sufficient evidence to show that the Plaintiff's shares were unpaid nor have they been able to prove that they have fully paid for their shares as well. In my view, what was tendered as **Exh.D-3** stands to be questionable in terms of their genuiness and in light of the testimony of Dw-1 given while he was under cross-examination, and, further, if one considers what **Exh.D1** reveals.

In his witness statement as well, Dw-1 does admit that the Company has never recalled back the Plaintiff's shares for the reasons of being unpaid for. It is on a cumulative consideration of those factors which makes me to conclude that the Defendants have not been able to prove to this Court that the Plaintiff has never paid for his shares.

But, be that at it may, there is also a more compelling reason to hold that way. In his closing submission, Mr Balomi has urged this Court to make a finding that the issue of shareholding of the Plaintiff herein and payment or otherwise of his shares, was conclusively laid to rest by this Court in the case of– **Mohamed**

Said Kiluwa vs. Kiluwa Steel Group Ltd and 2 Others, Misc. Commercial Cause No.30 of 2020 (unreported).

I have had the liberty of looking at that decision of this Court and, indeed, in that decision, this Court observed, at page 19-20, as follows:

> "As regards the issue on the shares allotted to the Petitioner, looking at the facts of this matter and the documents attached to the Pleadings by both sides, **I am not convinced with the arguments raised by Mr. Bernard that the Petitioner did not pay for the shares allotted to him**. I find the same to be unfounded since there are no any documents tendered in Court to substantiate that. No documents have been tendered in Court to show that there either has been any demand/notice served to the Petitioner for the payment of his shares as stipulated in Article 16 of the Company's Articles of Association, or [that] the Petitioner's shares were forfeited as stipulated in Article 27,28 and 29 of the Company's Articles of Association. Thus, under the circumstances, **it is the finding of this Court that, the Petitioner is rightful owner of all shares allotted unto him and he**

> **paid for the same**." (Emphasis added).

As it may be observed here above, and, as correctly submitted by the learned counsels for the Plaintiff, the issue regarding whether the Plaintiff herein paid up for his shares or not, is currently a non-starter. It stands to be so, because, it was effectively settled in the Misc. Commercial Cause No.30 of 2020, and, since there was no appeal preferred it remains settled for good and cannot be re-opened in this case at this time round. For all those reasons, I respond to the first issue in the affirmative, and with an addition that the shares are fully and not just partly paid for. As such, I now move on to the second issue.

The second issue is:

> *Whether the Auditors 'MAZARS TANZANIA' establish the true value of the Company.*

In order to correctly respond to the above second issue, it is imperative to point to the fact that, the MAZAR'S Report which was admitted by this Court into evidence as **Exh.P-1**, was a report commissioned by this Court in the course of the previous hearing, i.e., in **Misc. Commercial Cause No.30 of 2020**, after the parties failed to appoint an auditor to carry out investigation and valuation of the Company. From the case, leave was obtained to file this present suit and, in the course of hearing of this suit, Pw-1 and Pw-2 testified before this Court, tendering **Exh.P1** and **Exh.P2**.

Pw-1 testimony explains how the audit exercise was carried out leading to the making of **Exh.P1**. On the other hand, Pw-2

testified how, being professional valuers, his Company was appointed by Pw-1's Audit firm (MAZARS) to carry out valuation leading to **Exh.P2**. Pw-1's testimony was that, from the exercise the results were that the Company's value stands at **TZS 51,104,223,241**. Pw-2's report (**Exh.P2**) indicated that, the Company's estimated value of the landed properties, buildings, plant and machinery, motor vehicles, furniture and equipment as well as the 33kv overhead electricity line, as at 1st Day of December 2021, was **TZS 28,635,590,000.00.**

In an effort to counter **Exh.P1** and **Exh.P2**, the Defendants' witnesses, Dw-1 and Dw-2 relied on **Exh.D4** dated 18th March 2022, to show the value of the Company to be **TZS 17,810,000,000/=**. **Exh.D4** is a Valuation Report from a firm known as LIPAZ Consultants Ltd. Besides, Dw-1 and Dw-2 also relied on **Exh.D-6** which was a letter of objection to the reliance on **Exh.P1**.

However, few things need to be observed here. In the first place, it should be noted that, during cross-examination, Dw-1 and Dw-2 testify that **Exh.D4** was sought for the sole purpose of facilitating a mortgage to secure a loan with the NMB Bank Plc. That fact is evident from **Exh.D4** itself since at page 2 para 1.0 it reads:

> "The purpose of the …valuation is to establish the Market Value and Forced Sale Value for Mortgage Purpose. We were also instructed to establish the insurable value for insurance purposes".

Secondly, in essence, auditing is a professional expertise done by certified professionals. They provide expert opinion as such. To challenge an Audit Report/opinion, one has to come up as well with an equally professional Report carried out in the same parameters as the Report sought to be challenged. Perhaps I should once again reiterate what this Court stated in the case of **East Coast Oils and Fats Ltd vs. Tanzania Bureau of Standards and the Attorney General**, Commercial Case No. 151 of 2017, (unreported), that, expert evidence/opinion can only and must be countered by an expert evidence/opinion premised on an equal measure. It follows, therefore, that, **Exh.D6** cannot challenge **Exh.P1** since Dw-1 is not an expert in auditing and it is on record by Dw-2's testimony while under cross-examination, that, **Exh.D6** was authored by Dw-1.

Thirdly, even **Exh.D4** cannot be of help since it should be noted that, in their testimonies under cross-examination, Dw-1 and Dw-2 did testify that, the Report, **Exh.D4** took into account two landed properties only, i.e., Plot No.1 & 2 Block "N", held under CT.No.139664 and 147169 and 479217 respectively, while leaving behind others such as Plot No.200, Block "D" and Plot. No.201, Block "D" located at Disunyara area, Mlandizi Township, as well as some buildings and furniture.

In my humble view, therefore, **Exh.D4** cannot in any means possible be on the same measure as **Exh.P1** or even **Exh.P2** since both were carried out for different purposes and, for that matter, the Defendants' effort to discredit the findings in **Exh.P1** through **Exh.D4** cannot stand the test. With those observations, the

second issue is responded to in the affirmative and paves way for my discussion regarding the third issue.

The **third issue** is:

> *Whether the Company had in place an arrangement regarding Director's remuneration and, if so, whether the Plaintiff has ever been paid Director's remunerations and to what extent was he paid.*

Before I analyze the above issue, it is worth noting, as a matter of principle that, the amount of remuneration to be paid to directors is a matter of internal management and will not be interfered with by the courts. In my view, the old cases of **Burland vs. Earle** [1902] A.C. 83 at 93; and **Normandy vs. Ind. Coope & Co. Ltd** [1908] 1 Ch. 84 at 103, still stands as good persuasive authorities to rely on. In the case of **Hutton vs. West Cork Railway Co**. (1883) 23 Ch. D. 654 at 672, however, Bowen L.J. (as he then was) posed a bit to ask:

> "But what is the remuneration of directors? ... it is a gratuity ... In some companies there is a special provision for the way in which the director should be paid, in others there is not. If there is a special provision . . . you must look to the special provision to see how to deal with it. But if there is no special provision their payment is in the nature of a gratuity."

From the above understanding, it is clear, as a matter of fact and law, therefore, that, the law will concern itself with whether a director is entitled to remuneration or not but not how much he should be paid.

In order to respond to the above, one has to look at what the Articles of Association of the Company provides in respect of Director's remuneration. The Memorandum and Articles of Association of the Company in which the Plaintiff is a Managing Director was admitted in this Court as **Exh.P3**. According to Clause 64 (a) and (b) thereof, the following is provided:

> "64(a) The remuneration of the directors **shall from time to time be determined by the Company in general meeting**.
> (b) In addition to their usual remuneration the directors shall also be paid such travelling, hotel and other exercise of their duties, any such expenses incurred in connection with (sic) their attendance at meeting of director (sic)." (Emphasis added).

As it may be observed from hereabove, the Articles does provide that directors' remuneration shall be determined by the Company's general meeting from time to time. In his testimony, Pw-3 testified that, there is a legal arrangement or requirement by virtue of Article 64 of the Articles of Association, that, Directors of the Company will be remunerated. He testified that, in 2015 it was

"resolved" that the directors should be paid **TZS 10,000,000/=** per month but he has never received such.

According to the testimony Dw-1 and Dw-2, however, the Directors are never remunerated because the Company has never made profits. Dw-1 and Dw-2 testified also that, there has never been a Board Resolution that they (directors) be paid **TZS 10million** as salary. They testified, instead that, Pw-3 (Plaintiff) was issued with **TZS 2.5 billion** as loan by the Company. I shall revert to this issue of loan later.

Ordinarily, given Pw-3's testimony regarding payment of remuneration, one would have expected Pw-3 to submit evidence such as the respective Board Resolution he claimed was passed in 2015 to substantiate that claim. It is worth noting, however, that, when P-3 was asked of such evidence, he said that, he was unable to provide it because he has no access to the records of the Company after being expelled by the Defendants. His testimony that he was locked out was not controverted. But even if it was not, is he entitled to the payments of TZS 10million he claims as remuneration?

In their closing submissions, Mr. Balomi and Mr. Daffa have argued that by virtue of what the Article 64 of the Articles of Association provides, he is entitled and, that, the Defendants are in fundamental breach of the Articles of Association. Looking at their submission and their argument that, the Defendants are in breach, I am made to ask myself a question? Do they mean the Articles of Association constitutes a contract binding upon the Company and the Plaintiff (director)?

In essence, there is a necessity to consider whether or not the articles or a resolution of the company amounts to a contract upon which a director can sue to recover remuneration. By doing so, however, I will not be travelling on uncharted path either since the question whether a director of a company is entitled to be paid remuneration and/or whether the Articles of Association constitutes a Contract are issues which have received consideration from time immemorial.

For instance, earlier in **Dunstan vs. Imperial Gas Light and Coke Co.** (1832) 110 E.R. 47 Taunton J. (as he then was) held that, to recover remuneration a director must show a contract. See also the cases of **in re George Newman & Co.** (1895) 1 Ch. 674; **Kerr vs. Marine Products Ltd.** (1928) 44 T.L.R. 292; and **Putaruru Pine & Pulp Co. (N.Z.) Ltd. vs. MacCulloch** [1934] N.Z.L.R. 639 at 647 and 648.

In a more recent case, the case of **Cosmetic Warriors Ltd vs. Gerrie** [2017] EWCA Civ 324, the Court was of the view that, the articles are a statutory contract between the members, and between each member and the company. In this present case, however, the Plaintiff is claiming for remuneration as a director. But what will amount to a contract in such a circumstance?

In the present suit at hand, reference has been made to section 18 of the Companies Act, Cap.212 R.E 2002 regarding the effects of the Articles of Association. The section provides as follows, that:

> "18.-(I) Subject to the provisions of this Act, …. the …. articles shall, when registered, bind the company

> and the members thereof as if they respectively had been signed and sealed by articles each member, and contained covenants on the part of each member to observe all the provisions ... of the articles."

Generally, Courts will interpret the Articles of Association of a company by applying the same principles used when interpreting any written contract. According to the case of **Arnold vs. Britton** [2015] UKSC 36, the Supreme Court was of the view that:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", And it does so by focusing on the meaning of the relevant words, …. in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions …, (iii) the overall purpose of the clause and …, (iv) the facts and circumstances known or assumed by the parties at the time that the document was

executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

That having being said, let me consider what section 18 of the Companies Act, Cap.212 which I cited earlier hereabove means when one considers the fact that the Plaintiff is relying on Article 64 of the Articles of Association and has cited section 18 of the Act as a basis for his claims for payment of remuneration.

In the case of **Hickman vs. Kent or Romey Marsh Sheepbreeders' Association** [1915] 1 Ch. 881 at 900, Astbury J. (as he then was) when considering a somewhat similar provision under the then English Companies Act, held a view that, while articles do create rights and obligations between members and the company, no right given by an article to a person, whether a member or not, in a capacity other than that of a member, e.g., a director, can be enforced against the company. Essentially, the views held by Astbury J would mean that, the articles do not constitute a contract on which a director or a director/member could sue for remuneration.

Even so, there are some cases which seem to have derogate from this principle. One of them is the **Re Richmond Gate Property Co. Ltd.** [1965] 1 W.L.R. 335 at 337 when Plowman J. (as he then was) held that, an article providing the remuneration of a managing director was to be fixed by the board, created an express contract between the managing director and the company. Yet in the case of **re. George Newman & Co.** [1895] 1 Ch. 674 at 686, Lindley L.J. (as he then was) stated that:

> "Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, **unless authorized so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting**". (Emphasis supplied).

Years later, **in New British Iron Co., ex parte Beckwith** (1898) 1 Ch. 324, Wright J. held a view, at page 326, that:

> "That article is not in itself a contract between the company and the directors . . . But where on the footing of that article the directors are employed by the company and accept office the terms of [the articles] are embodied in and form part of the contract between the company and the directors. Under the article as thus embodied, the directors obtain a contractual right to [their] remuneration."

See also **Molineaux vs. London etc. Insurance Co.** [1902] 2 K.B. 589 which applied that principle as well. This principle, however, applies to an article that provides remuneration is to be fixed by the general meeting. In this present suit, Article 64 (a) of the Articles of Association provides that:

> "The remuneration of the directors **shall from time to time be**

> **determined by the Company in general meeting**." (Emphasis added).

In the **Putaruru Pine & Pulp Co. (N.Z.) Ltd. vs. MacCulloch** [1934] N.Z.L.R. 639 at 647 and 648, it was held that, such an article forms part of the contract between the company and the director. Even so, in **Loftus vs. Roberts** (1902) 18 T.L.R. 532 the Court was of the view that, under such an article there is only a possibility of payment since the company has a discretion as to whether or not the director is to be paid.

In the **Putaruru case** (supra), at the first general meeting of the Company, the Company's accounts presented showed a profit and it was agreed that the board members be paid £1000 for their services for the past year. Subsequently, however, it was found that the Company was in a loss, not profit. The directors resolved not to allocate their fees until finances permitted. However, one of them was disgruntled and brought action claiming his shares of the fees. The Court, Reed J., (as he then was) considered the matter and stated, at page 647, that:

> "A resolution duly passed by the shareholders remunerating directors, [does] not in itself constitute a contract with the company."

It may however be argued that, even if a director cannot establish a contract, an alternative approach to enforce his right to remuneration might possibly be available, especially if it will be taken that each member has a general contractual right to have his

company's affairs conducted in accordance with the articles. This line of thinking was considered in the in **Re H. R. Harmer Ltd.** [1959] 1 W.L.R. 62, and was impliedly accepted by Jenkins L.J. at 85 and expressly accepted by Romer L.J. at 87.

In regard to the present suit at hand, the Plaintiff herein is not only a member but also a Managing Director. In view of the reasoning herein, it will follow that, provided he has evidence or authority to be paid, the Plaintiff being a director and a member, may, in his capacity as a member, demand that the company should not derogate from the articles which relate to his special right as a director to remuneration.

To wind up this discussion on payment of remuneration to the Plaintiff, it will perhaps be necessary to cite the case of **Guinness Plc vs. Saunders Plc** [1989] UKHL 2; [1990] 2 AC 663 where Lord Templeman, citing **Palmer's Company Law,** the 24th edition (1987) at Page 902, held a view that:

> "Prima facie, director of a company cannot claim remuneration but the articles usually provide expressly for payment of it … and, where this is the case, the case, the provision operates as an authority to the director to pay remuneration out of the funds of the company; **such remuneration is not restricted to payment out of profits**." (Emphasis added).

As I stated herein, Article 64(a) of the Articles of Association of the Company, did provide for payment of remuneration to the directors and, in that regard, the Plaintiff is entitled to claim for such payments and his claim is not restricted to payment out of profits. The only problem is the amount which he has claimed, i.e., **TZS 10million** which, as a matter of fact, is not an amount fixed by the Articles, but one which ought to have been fixed by the Members and be evidenced by a Board Resolution.

Pw-3 testified that there was a Board Resolution to the effect, but when he was pressed for such evidence, he contended that he was unable to present it in Court because he had no access to the Company having been denied access. I have looked at his testimony in that regard. Although there was no direct evidence that he was denied access to the Company and, even if Dw1 did acknowledge that the Plaintiff is still the Managing Director of the Company, on the other hand there are some admissions by Dw-1 in para 1.16 of his testimony in chief and also in the Written Statement of Defense, that, since 2017, the Plaintiff has not been in management of the Company.

According to Dw-1, it was the Plaintiff who withdrew himself from the management of the Company from 2017 to date. I have asked myself, how possible is that, for a person who has invested time and energy to stay aside without any reasons being assigned?

Since Dw-1 did not give further elaborations regarding the reasons which made the Plaintiff to take such a move, if at all it

was his own making, the circumstances that led to the filing of Misc. Commercial Cause No.30 of 2020 and thereafter this present suit, speaks volumes in terms of how the management of the Company has been fairing, all bearing to an inference that, the Plaintiff was squeezed out by the rest of his colleagues. Given that Pw-3 (Plaintiff) has been out of the helm of management of the affairs of the Company since 2017, and because he claims to be out not because of his own choice, I tend to be convinced that, his claim of being denied access to the Company documents to substantiate his claim for remuneration is plausible.

As I stated earlier herein above, amount of remuneration to be paid to directors, as the old case of **Burland vs. Earle** [1902] A.C. 83 provides, at 93, is a matter of internal management of the company. In view of that, this Court find that the since **Articles 64 (a) and 69** of the articles of association did provide that remuneration will be paid to directors/managing director, and given that the Plaintiff as a 'Managing Director' was not paid the amount claimed, it is my finding that, the Plaintiff's claims are genuine and he is entitled to be paid. The issue that the Company has never made profits does not hold since, as Lord Templeman in the case of **Guinness Plc** (supra) stated, **"such remuneration is not restricted to payment out of profits**."

In view of the above, the third issue is responded to in the affirmative and the Plaintiff is indeed entitled to be paid remuneration pegged at **TZS 10Million.** This Court, therefore, will proceed to grant that prayer.

But, before I move away to the next issue, let me say a word regarding the claim that the Company had issued a loan worth **TZS 2.5 billion** to the Plaintiff. In efforts to establish that fact, Dw-1 and Dw-2 relied on **Exh.D5** (collectively). Looking at it, and taking into account what Pw-1 and Pw-3 stated, I find, however, that, there has been no sufficient proof since, in his response while under cross-examination, Dw-1 did admit that, the document which is part of **Exh.D-5** and which purports to show that the Plaintiff signed when monies were disbursed to him by the Defendants was not even bearing any title.

In my view, looking at the total amount on the documents shown to be signed by the Plaintiff, the same show an amount equal to **TZS 1,357,500,000/=** and not **TZS 2.5 billion**. In that regard, the document cannot be relied upon. Further still, even if Dw-1 claimed that, sometimes the Plaintiff took materials (iron bars (nondo)) from the company, no evidence was offered to substantiate the value of such materials.

Worse enough, Dw-1 admitted that, although a loan is an asset of the Company, the purported loan taken by the Plaintiff was not reflected anywhere in the books of accounts (**Exh.D2**). All those facts deny the plausibility of what was averred by Dw-1 and Dw-2 in their testimony regarding the purported loan.

Let me now move to the **fourth issue** which was:

> *"Whether there has been misuse of the Companies' assets, including money from the Company's Account' to the detriment of the Company and the Plaintiff as a shareholder."*

An alleged misuse of company's assets including money in the Company's account, encapsulates one fundamental idea, that, directors do not own company's assets. Under Company Law, Company directors are obliged to comply with a range of duties owed to the company, some of which are fiduciary in nature. According to the testimony of Pw-1, the investigation carried out and reported in **Exh.P1** did reveal a host of illegalities in respect of how the assets of the Company were utilized in managing the affairs of the Company. Pw-1 testified that at total of **TZS 33,984,394,221.00** were misused.

I have looked at **Exh.P1** and what it uncovered. It includes misstatements of costs, unsupported cash withdrawals, inflated costs and expenses, unsupported payments, revenues understatement and unsupported loan balance relating to the Plaintiff. In their closing submissions, however, the counsels for the Plaintiff have contended that, the above acts have a nature of criminal elements as they attract the scrutiny under the Anti-Money Laundering Act, since there seems to be repatriation of funds outside the Country.

Well, I cannot comment on that fact for the time being. It suffices to note, however, that, in their testimony, Dw-1 and Dw-2 have just given a scanty challenge to the testimony of Pw-1 and the evidence she tendered in Court as **Exh.P1**. Indeed, even though Dw-1 tried to counter it by tendering in Court **Exh.D-6**, as I stated earlier, expert opinion is countered by the like and not otherwise. Both Dw-1 and Dw-2 failed, therefore to meaningfully contest the testimony of Pw-1 and **Exh.P1**.

In an Indian case **Mrs. M.R. Shah vs Vardhman Dye-Stuff Industries P,** 2005 60 SCL 623 CLB, which is a case about unfair prejudicial conduct of some of the majority shareholders cum directors, it was stated that, an alleged transfer of Rs. 20 lakhs to the personal account of one of the directors for a period of 2 days amounted to an obviously misuse of finances of the company for the personal use of one of the directors.

In view of all that, it is the finding of this Court that, the **TZS 33,984,394,221.00** which the Auditors found to be misused were company's monies and the Plaintiff, being a member of the Company, was entitled to his share of them since they are properties of the company. In view of that, and being Company properties, which ought to benefit all members including the Plaintiff, such monies cannot be awarded one member but the 1st and 2nd Defendants, being the responsible directors who had been managing the affairs of the Company, must, and should be so directed, to refund the amount to the Company. The fourth issue is, therefore, responded to in the affirmative. That being said, let me proceed to tackle the fifth issue.

The **fifth issue** to tackle is:

> *Whether the Company has made any profit and, if so, whether the Plaintiff is entitled to dividend thereof.*

According to the testimonies of Dw-1 and Dw-2, the Company is a loss-making company. Reliance has been placed on **Exh.D1** and **D-2** and during re-examination Dw-1 stated that in 2017 the Company recorded loss of **TZS 470 million** and in 2018 a loss of **TZS 960million**. However, it is also on record that, upon

being asked by the Court during cross-examination whether looking at the financial statements for the year 2017 and 2018 the two presents a true and fair view of the company, Dw-2 responded that, **Exh.D-1** and **Exh.D-2** do not show the true and fair view of the Company.

In my view, firstly, I find that, Dw-2 was fair enough to admit that fact, given the defects which were pointed out including the fact that some material information such as the alleged loan advances to the Plaintiff were not reflected in the statements of accounts.

Secondly, according to **Exh.P1**, page 18 para 2.9 thereof, since, as per the findings of this Court in the Misc. Commercial Cause No.30 of 2021, the Company was not having its Annual General Meetings, and given that dividend is legally paid if declared by the directors and ratified by the Annual General Meeting of the members and, given that, no such meetings were ever called, it follows that, no profits were declared but rather, if any profit was made, the same was ploughed back into operations and, hence, would be reflected in the valuation of the Company's financial status.

In view of the above, much as the Plaintiff would have been entitled to dividend had there been a declaration, there being no declaration of that nature, and since, as per **Exh.P1**, the profits of the company got ploughed back to the Company's operations, it means, therefore, that, the value of his shares appreciated.

That being said, I find that, *the fifth issue* is partially responded to in the affirmative in the sense that, the profits if at all

made were ploughed back into the operations of the company to maximize the shareholders' wealth, a fact which, translates into maximizing the value of the company, which, according to Priya, S. & Azhagaiah, R. in their article *The Impact of dividend policy on shareholders' wealth* **International Research journal of Finance and Economics,** (2008) Issue 20: 181-182, is measured by the price of the company's common stock. It follows, therefore, that, while in essence shareholders may desire to be paid cash dividends, at some point they may prefer growth in the earnings per share (EPS), which results from ploughing earnings back into the business.

In view of the above fact, and, as **Exh.P1** indicated, any benefit on the part of the Plaintiff would be reflected in the valuation of the Company's financial status. With that in mind, let me proceed to address the sixth issue.

The **sixth issue** is:

> *Whether the Plaintiff manages the affairs of the Company as its managing director and, if not, whether the Defendants have denied from access to the management of the affairs of the Company.*

In the first place, I do not think that I need to be held up in long discussion regarding the above cited issue No.6. I hold it that way because, as I stated earlier herein when dealing with the fourth issue, even though both Dw-1 testified that, the Plaintiff is still recognized as the Managing Director of the Company, yet Dw-1 acknowledged as well, that, since 2017 the Plaintiff is not in touch with the management issues of the Company. That is what I

gather from their testimonies in Chief and in paragraph 6 of the Written Statement of Defense.

On the other hand, according to Pw-3's witness statement, the Plaintiff (Pw-3) has averred that, legally he is the managing director of the Company. However, as I stated herein, much as Pw-3 (the Plaintiff) contends to be so as a matter of law, he has also raised a concern that he has been locked out from the running of the affairs of the Company.

However, as I said earlier, Pw-3 could not offer to this Court evidence to satisfy or substantiate that claim but such evidence could still be inferred from the fact that, Dw-1 does acknowledge that since 2017 to date, the Plaintiff is not exercising his mandate in the Company as its *de jure* managing director.

To that end, and taking into account the circumstances which led to the filing of this suit as well as the previous Misc. Commercial Cause No.30 of 2020, I find that there is sufficient material upon which one may safely peg a conclusion that, the Plaintiff was squeezed out and his denial of access to the premises and to the running of the affairs of the Company, and, to its books of accounts, as the Managing Director of the Company were made possible and stands to be real. The sixth issue, therefore, is responded to in the affirmative.

Having stated so, I will now focus on the seventh issue. The **seventh issue** was:

> *Whether the Plaintiff is entitled to compensation towards the good will of the Company which he helped to create.*

In this suit, the Plaintiff is claiming payment of **TZS 22,027,194, 221.00** as "**Goodwill**". Before I consider the seventh issue here above, I find it pertinent to define **what "goodwill"** is. What constitutes a company's goodwill? That question was once discussed by Lady Justice Arden in the case of **Condliffe & Anor vs. Sheingold** [2007] EWCA Civ 1043 citing what Lord Macnaghten stated in the old case of **Commissioners of Inland Revenue vs. Muller & Co. Margarine** [1901] AC 217 at 223.

In that old case of **Commissioners of Inland Revenue** (supra), the learned Lord Macnaghten had the following to say:

> "What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of a good name, reputation, and connection of business. It is the attractive force which brings in customers. It is the one thing which distinguishes an old established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However, widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its

> composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there. To analyze goodwill and split it up into its component parts to a dry *residum* ingrained in the actual place where the business is carried on while everything is in the air, seems to me to be as useful for practical purposes as it would be to dissolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one whole and in a case like this it must be dealt with as such."

In the same case, Lady Justice Arden also referred to the separate opinion of Lord Lindley who, at page 235 had the following to say about goodwill:

> "Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In that connection, I understand the word to include whatever adds value to the business by reason of the situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others

> which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value, and, in my opinion, exists where the business is carried on."

It is similarly defined at Volume 80 (2013) of *Halsbury's Laws of England* at 807:

> "The goodwill of a business is the whole advantage of the reputation and connection formed with customers together with the circumstances, whether of habit or otherwise, which tend to make that connection permanent. It represents in connection with any business or business product the value of the attraction to customers which the name and reputation possesses."

See also the case of **Primus International Holding Company & Ors vs. Triumph Controls - UK Ltd & Anor** [2020] EWCA Civ 1228.

From the above discussion, it is clear to me that good will is a property or intangible asset with an indefinite life and, in the words of Lord Macnaghten in **Commissioners of Inland Revenue** (supra), it is a property that can be sold and be bought and, is, indeed being:

> "bought and sold every day. It may be acquired, I think, in any of the different ways in which property is

> usually acquired. When a man has got it, he may keep it as his own. He may vindicate his exclusive right to it, if necessary, by process of law. He may dispose of it if he will—of course under the conditions attaching to property of that nature."

It follows, therefore, that, the term goodwill in its ordinary commercial sense as defined hereabove, connotes or embraces the value of a company's name, brand reputation, loyal customer base, solid customer service, good employee relations, and proprietary technology.

From accounting point of view, however, goodwill of a company is essentially calculated by taking the purchase price, i.e., the "gross value of the business" of a company less the difference between the fair market value of its assets and liabilities. However, from a legal point of view, goodwill is to be understood differently from accountant's vantage point.

In view of that fact, Lady Justice Arden in the case of **Condliffe & Anor** (supra) summed up her understanding of the term by stating as follows, that:

> "I am satisfied that, the authorities point overwhelmingly to the conclusion that "goodwill" … refers to a type of proprietary right representing the reputation, good name and connections of a business, and is different to the particular or specific meaning

> attributed to the term by accountants."

Another case which discussed the meaning of Goodwill of a Company and how to calculate it is the Indian case of **Mrs. Mehru Belgam Vala & Ors. Vs. G. Bell & Co. And Ors**. (1984) 1 MLJ 139. In that case the Court referred to the decision of Lord Macnaghten in **Commissioners of Inland Revenue** (supra), and noted that:

> "the goodwill of a business is an intangible asset, and it is the whole advantage of the reputation and connection formed with the customer together with circumstances making the connection durable. It is … the value of the attraction to customers arising from the name and reputation for skill, integrity and efficient management or efficient service…. acquired during the course of number of years of business. It rarely springs from the very institution of the firm …Goodwill is composed of a variety of elements and all the surrounding circumstances must be taken into account as a whole."

In the present suit at hand, there is no doubt that the Plaintiff has spent energies to build the Company's name and reputation among producers and suppliers of steel bars/pig iron. I

hold it to be so, because, as his testimony in chief indicates, he was the promoter of the Company. In para 27 of the witness statement, Pw-3 (Plaintiff herein) has narrated lengthy how he got involved in the initial stages of building up the company and why he is entitled to payment of goodwill from the Company. There is as well no doubt, that, his family name "**KILUWA**" has been the flagship name of the Company and that, business associates and dealers/customers in steel bars market definitely knows the Company in that name of "KILUWA".

As it was stated in the case of **Mrs. Mehru Belgam Vala & Ors. vs. G. Bell & Co. And Ors** (supra), intangible as it is, goodwill, in a business environment, is acquired during the course of number of years of business and rarely does it spring from the very institution of the firm. It takes time to nurture and grow, and thus, being composed of a variety of elements, all the surrounding circumstances must be taken into account as a whole, when one considers what value, it carries in the Company.

In that same Indian decision of **Mrs Merhu** (supra), T.N Singaravelu, J. was of the view that, in calculating what is worth in value as goodwill of a company, all that will depend "*upon a computation of the various circumstances like the location, service, standing of the business and many other factors*".

As I stated earlier, in this suit, the Plaintiff is claiming **TZS 22,027,194,221.00** as goodwill. From the record of **Exh.P4**, the Company in which the Plaintiff is a director, was incorporated sometimes in 2014 and, as per the testimony of Pw-3, commenced

its business operations in the year 2016 to date. That is roughly nine (9) years of incorporation and seven (7) of operation.

The Company is dealing with manufacturing of pig iron or steel bars. As such, there is some special skills and competence that are required in that business, taking into account that the firm is dealing with specialized form of metallurgy engineering, a field which encompasses both the science and the technology of metals. The authorized capital of the Company as per Exh.P4 stands at TZS 44billion divided into 220,000 Ordinary shares each share having a value of TZS 200,000.

In the case of **Mrs Merhu** (supra), calculation of goodwill was based on the so-called 'super profit method' this being a method adopted for evaluation of the goodwill of a firm. However, in the circumstance of this suit, the Company has not declared profit and **Exh.D1** and **D2** shows that loss of retained earnings. Even so, as I indicated herein earlier, according to **Exh.P1**, and the testimony of Dw-2 the financial statements of the Company for the year 2016 and 2017 which were admitted as **Exh.D1** and **D2** do not present a fair financial status of the Company given the defects which Pw-1 pointed out in her Report, **Exh.P1**.

Pw-1 was also of the view that, even if the Company did declare profits and issue dividends, yet the possibility was that it ploughed back its earnings and thus such would reflect in the valuation of the company (the financial status). In such a circumstance, what then would be the appropriate method of gauging the goodwill of the company?

Basically, goodwill may be calculated by taking the purchase price of a company and subtracting the difference between the fair market value of its assets and liabilities. In our case, **Exh.P1** revealed that, the value of the current Company stands at **TZS 51,104,223,241.00** which value, as I stated earlier, was not controverted by another expert opinion. From the Exh.P1's financial status, my approach in calculating the goodwill, taking into account that the Company is still a going concern, would therefore be that of taking the total assets (as valued in **Exh.P2**) plus the current assets of the Company, minus total liabilities.

As per **Exh.P2**, the total assets stood at TZS 28,635,590,000. The value of current assets as disclosed in the 2020-FS (Financial Statements) as per **Exh.P1**, was **TZS 16,571,710,666**. Thus, if these are put together, they give a figure of total assets amounting to **TZS 45,207,300,666.00/=**. There were also some adjustments made as per the findings in Exh.P1 equal to **TZS 19,631,408,635**.

If the above sums are put together, they will give a total of **TZS 64,838,709,301** which, if one **deducts** therefrom the total liabilities (long term and current) of the Company as per the 2020FS- (which stood at (**TZS 12,439,729,793** as current liabilities) plus (**TZS- 984,756,268- long term liabilities**) which brings a figure of total liabilities to **TZS 13,424,486,061.00/=**), the remaining balance which is **TZS 51,414,223, 240.00/=** which stands as the true value of the Company.

From the value of **TZS 51,414,223, 240.00/=** the Plaintiff is claiming **TZS 22,027,194, 221.00** as "**Goodwill.**" The capital for

this business stands at **TZS 44,000,000,000. 00** contributed by four partners at a share price of **TZS 200,000/-** per shares which one holds. The Plaintiff holds 55,500 shares (as per Exh.P4) (but as per Exh.P1 he owns 59,786 shares) worth a nominal value of **TZS 11,957,200,000.00.** Therefore, taking all these surrounding circumstances into account it appears to me that the **TZS 22,027,194, 221.00** as "**Goodwill**" is very much on the high side.

In my view, since the Company has four shareholders and the Plaintiff owns about 25.2 % of the entire value of the Company, that being the case, if one takes the value of the Company (i.e., **TZS 51,414,223, 240 x25/100** the amount payable to the Plaintiff as goodwill would be **TZS 12,853,555,810.** Therefore, my finding on this issue is that the Plaintiff will be entitled to a goodwill of **TZS 12,853,555,810** as on 31st December 2020 when Exh.P1 was made.

Notwithstanding the above entitlement, it is my holding, however, that, the payment of goodwill will only be possible if the Plaintiff is to exist from the Company and, in that eventuality, the Company will forthwith cease to use his family name. This **seventh issue** is, therefore, responded to accordingly.

The **final issue** is in respect of **the relief which the parties are entitled to**. As I stated earlier here above, ordinarily the party who manages to prove its case to the required standards of proof as required by the law, is entitled to relief which she/he might have prayed. In civil cases, the burden of proof rests upon the party who substantially asserts the affirmative of the issue. See the

case of **Joseph Constantine Steamship Line vs. Imperial Smelting Corporation Limited** [1942] A.C. 154,174.

In this case, having considered all the evidence available and the testimonies of the witnesses for the Plaintiff, I am convinced that, on the preponderance of probability, the Plaintiff herein has managed to fully discharged his burden of proving his case and deserves to be granted the reliefs he has sought for, although not in the form and manner he has asked.

In view of that, this Court proceeds to grant judgment and decree to the Plaintiff and award him reliefs as follows:

(1) That, owing to the shortcomings revealed in Exh.P.1, the 1st and 2nd Defendants are hereby ordered to vacate their managerial positions in the Company and the remaining Directors are hereby directed to, and within three months from the date of this judgement, convene a general meeting of all shareholders wherein the Company shall as part of their agenda, appoint a new management team to manage the affairs of the Company;

(2) That, the 1st and 2nd Defendants are hereby permanently barred from managing or running the affairs of the Company;

(3) That, the Plaintiff shall, in the meantime, manage the operations of the Company, till when the

Company appoints a new Management team;

(4) That, the 1st and 2nd Defendants are hereby ordered to re-pay **TZS. 33,984,394,221.00** to the Company since the monies are properties of the Company owing to the fact that utilization of that amount has not been fully supported with sufficient evidence.

(5) That, in **the alternative to orders given in No.1, 2, 3 and 4 above**, the Company's remaining shareholders are to purchase the 55,500 shares of the Plaintiff for a payment of **TZS 12,970,406,318** being a value of such 55,500 fully paid-up ordinary shares held by the Plaintiff pursuant to the valuation Report Exh.P1 and the Plaintiff shall forthwith exit from or cease to be a member of the Company.

(6) **Further, that, in the alternative to Paragraph 4 herein above**, if the Company chooses to implement what is stated in paragraph 5 herein above, the 1st and 2nd Defendants should pay the Plaintiff the sum of **TZS. 8, 596,098,555.25,** being the Plaintiff's proportionate fair share entitlement from illegally

withdrawn cash/funds from accounts of the Company.

(7) That, if the Company chooses to implement what is stated in **paragraph 5 and 6 herein above**, the Company **shall cease forthwith** from using the name of "**Kiluwa"** and exit of the Plaintiff from the Company.

(8) That, the Plaintiff is entitled to payment of Directors remunerations in the sum of **TZS. 10,000,000/**=per month from January, 2016 to the date of Judgment, till the date of his exit from the Company (if he exits).

(9) That, in case the Company choose to implement what is stated in No.5, 6, and 7 hereabove, the Plaintiff shall be entitled to a payment of **TZS 12,853,555,810.00** being "Goodwill" entitlement for his efforts to raise the Company and for the use of his family name by the Company.

(10) That, given the circumstances pertaining to the conduct of affairs of the Company as per the availed evidence before this Court, the Plaintiff is to be paid general

damages equal to **TZS 20,000,000.00** as general damages.

(11) That, the Defendants shall pay interest at a commercial rate of 14 % p.a, on the amounts **stated** in **paragraphs 6, 8 and 10 hereabove,** from the date of filing of the case until satisfaction of the Decree.

(12) That, the Defendants shall pay interest at a Court rate of 7% on the amounts stated in **paragraphs 6, 8 and 10 hereabove,** from the date of this judgment till full satisfaction of the Decree.

(13) The **Defendants** are liable to pay Costs of this suit.

It is so ordered.

DATED AT DAR-ES-SALAAM, THIS 21ST DAY OF OCTOBER 2022

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
COMMERCIAL DIVISION

.....

DEO JOHN NANGELA

JUDGE