

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 123 OF 2021**

**JUMA RAJABU FURAJI..... PLAINTIFF**

**VERSUS**

**CRDB BANK PLC..... 1<sup>ST</sup> DEFENDANT**

**ORBIT SECURITIES CO. LTD.....2<sup>ND</sup> DEFENDANT**

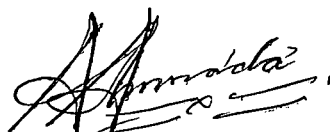
**CSD & REGISTRY COMPANY LIMITED.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**A.A. MBAGWA, J.**

The controversy in this matter originates from the transfer of the plaintiff's shares to 1<sup>st</sup> defendant and their subsequent sale. The disputed transfer of shares resulted from the loan agreement between the 1<sup>st</sup> defendant, CRDB Bank PLC and Maxcom Africa Limited. The said loan was secured by mortgage of the plaintiff's 175387 shares in Tanzania Portland Cement Co. Limited on CDS account No. 121108.

Plaintiff is a natural person, director of Maxcom Africa Limited and mortgagor to 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant is a corporate body, duly established under the Law of Companies Act and licensed under the Banking



and Financial Institution Act, 2006 to carry out banking business while the 2<sup>nd</sup> defendant is a private company incorporated under the laws of Tanzania and licensed to trade as a stock broker and, in this case it is the dealer and broker of the plaintiff's shares. The 3<sup>rd</sup> defendant is a private Limited company approved by the Capital Markets and Securities Authority to conduct the central depository business.

The plaintiff, **JUMA RAJABU FURAJI**, by way of amended plaint, instituted the instant suit against the above-named defendants praying for declaratory orders and reliefs as follows; -

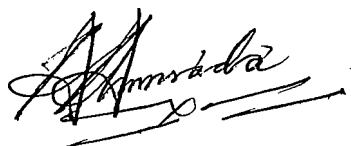
- i. Declaration order that the seizure and transfer of plaintiff's 175,387 ordinary shares to 1<sup>st</sup> defendant was null and void.
- ii. Declaratory order that the sale of the plaintiff's 58,390 shares which were fraudulently transferred from CDS Account No. 121108 with 175387 ordinary shares issued by Tanzania Portland Cement Company was null and void
- iii. A declaratory order compelling the defendants to transfer back 58,390 ordinary shares to the plaintiff on his CDS Account No. 121108 which was unlawfully sold after fraudulent seizure and transfer valued at TZS 227,721,000.00.
- iv. General damages<sup>5</sup>



- v. Costs of the suit
- vi. Any other reliefs which the Court deems fit to grant

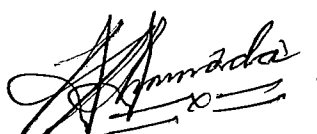
Upon service, all the three defendants filed their written statements of defence separately. The 1<sup>st</sup> defendant filed a written statement of defence contesting all the prayers by the plaintiff on ground that after default by the Maxcom Africa Limited, the 1<sup>st</sup> defendant invoked recovery measures which, among others, entailed selling securities, plaintiff shares inclusive, and finally, prayed that the instant suit be dismissed with costs. Also, the 2<sup>nd</sup> defendant on 15<sup>th</sup> August, 2022 filed written statement of defence disputing plaintiff's prayers. The 2<sup>nd</sup> defendant admitted to have transferred the shares to the 1<sup>st</sup> defendant after receiving share transfer form executed between the lender and guarantor and eventually, prayed the instant suit to be dismissed with costs. Similarly, the 3<sup>rd</sup> defendant filed her written statement of defence disputing the plaintiff's prayers on the reason that, the transfer of plaintiff's shares was done in accordance with the prescribed rules and procedures hence the suit was without merits. She consequently urged the Court to dismiss the suit with costs.

The brief facts which resulted into the suit may be summarised as follows; It is on the record that, at the request of Maxcom Africa Limited, the 1<sup>st</sup> defendant, CRDB Bank, on 10<sup>th</sup> October, 2019 extended an overdraft to

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Maxcom Africa up to TZS 140,000,000. That Maxcom Africa is not a party to this suit. The said loan was secured, among other assets, by the plaintiff's personal guarantee and mortgage of 175387 ordinary shares, which the plaintiff owns in a company called Tanzania Portland Cement Co. Limited on CDS account No. 121108. The borrower, Maxcom Africa Limited defaulted to service the overdraft loan as agreed in the facility letter between it and the 1<sup>st</sup> defendant. Consequently, 1<sup>st</sup> defendant invoked recovery measures by selling the deposited securities including the plaintiff's shares.

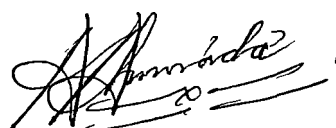
Thus, on 27<sup>th</sup> August, 2020, the 1<sup>st</sup> defendant submitted written request form together with shares transfer form to the 2<sup>nd</sup> defendant requesting for transfer of pledged shares so as to recover her outstanding amount. Subsequently, the 2<sup>nd</sup> defendant tabled the transfer forms to the 3<sup>rd</sup> defendant. Based on the information in the transfer forms, the 3<sup>rd</sup> defendant transferred 17587 shares to the 1<sup>st</sup> defendant. However, the plaintiff contends that the transfer was done without his consent or knowledge. According to plaintiff, the whole exercise of transferring his shares was unprocedural and fraudulent. The efforts by the plaintiff through his lawyers to have the fraudulently transferred shares returned into CDS account together with accumulated dividends were in vain hence, this suit. The plaintiff is therefore claiming for declaratory orders and other consequential prayers as contained in the plaint.

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When the matter was called on for hearing, the plaintiff was in the legal services of Mr. Seleman Almas, learned advocate. On the adversary part, the 1<sup>st</sup> defendant had the legal services of Mr. Nzaro Kachenje, learned advocate whereas the 2<sup>nd</sup> defendant enjoyed the services of Mr. Derick Alcard, learned advocate. The 3<sup>rd</sup> defendant was represented by Ms. Jacqueline Kilama, learned advocate. Before hearing started, during final pre trial conference, the following issues were framed, recorded and agreed between the parties for the determination of this suit, namely:

- a. Whether seizure and transfer of plaintiff's 175,387 shares issued by Tanzania Portland Cement Co. Ltd from CDS account No. 121108 to the 1<sup>st</sup> defendant by the defendants was valid.
- b. Whether the sale of the plaintiff 58,390 shares issued by Tanzania Portland Cement Co. Ltd from CDS account by 1<sup>st</sup> defendant which was part of 175,387 shares was legal
- c. What reliefs parties are entitled to.

In the endeavours to prove his case, the plaintiff called one witness, **Juma Rajabu Furaji (PW1)** and tendered nine (9) documentary exhibits which were marked from exhibit P1 to exhibit P9. PW1 under oath and through his witness statement which was received by this Court and adopted as part of his testimony in chief, told the Court that, he was the director of



Maxcom Africa Limited and plaintiff in this case, hence conversant with the facts of this suit. It was the testimony of PW1 that he was a third-party guarantor to the overdraft facility in the sum of TZS 140,000,000 granted to Maxcom Africa Limited. He stated that the said facility was secured, among others, by 175387 shares issued by Tanzania Portland Cement Co. Ltd on CDS account No. 121108. PW1 tendered in evidence mortgage form dated 28/7/2011 and the same was admitted and marked exhibit **P1**. It was further the testimony of PW1 that sometimes in April ,2020 he was informed that Maxcom Africa had defaulted to service its loan. However, later on, it come to his knowledge that there was ongoing discussion on the restructure of the loan.

PW1 went on telling the Court that, sometimes in May, 2021 he was supposed to receive dividends but, to his dismay, he did not get anything. Thus, upon follow up to CAD security limited, the broker of the Tanzania Portland Cement Co. Ltd, he was informed that his shares and dividends were transferred to 1<sup>st</sup> defendant. PW1 tendered in evidence form No. TDIC (CSDR) mortgage of share transfer form dated 9.9.2020 which was admitted in evidence **as exhibit P2**. PW1 further told the Court that, following that information, he requested for explanation from the 2<sup>nd</sup> defendant who was dealer & broker of his shares. The 2<sup>nd</sup> defendant responded that they had transferred his shares by using mortgage of



share transfer which was signed on 9<sup>th</sup> September, 2020. PW1 tendered in evidence a letter from CRDB Bank to chief executive officer of Orbit Securities dated 27/8/2020 and the same was admitted in evidence **as exhibit P3.**

According to PW1, the seizure and transfer of his shares was unprocedural and fraudulently conducted between 1<sup>st</sup> and 2<sup>nd</sup> defendants because the whole year of 2020 he was out of Tanzania as he returned to the country on 15<sup>th</sup> April, 2021. As such, he could have not signed the transfer form purportedly signed on 09/09/2020. PW1 tendered in evidence Juma Rajabu passport with registration No. TAE0514771 issued on 12.9.2012 which was admitted as **exhibit P9.** He added that, the 3<sup>rd</sup> defendant came into force in 2017 while the pledge share was done in 2011 through DSE form prior to the formation of the 3<sup>rd</sup> defendant. That, the plaintiff contended that, it is a clear indication that documents were forged. PW1 further told the Court that, he demanded for the return of his shares together with his accumulated dividends but he was informed that 58,390 shares were already sold by the 1<sup>st</sup> defendant. PW1 testified that through the letter dated 7<sup>th</sup> June, 2021, the 1<sup>st</sup> defendant informed the 2<sup>nd</sup> defendant on the return of the 116,997 in plaintiff account. PW1 tendered in evidence a letter from CRDB Bank to Juma Rajabu dated 3/8/2021 and a letter from CRDB Bank to Chief Executive Officer of Orbit Securities



dated 7/6/2021 which were admitted as **exhibit P4 and exhibit P6.**

PW1 insisted that the seizure and transfer of shares was perpetuated with fraud hence illegal for want of proper procedure. According to PW1, transfer of shares as articulated in the operation manual transfer of mortgage share are to transferred through signed shares transfer form and signed request form. PW1 tendered in evidence operational manual of CSD and registry company which was admitted as **exhibit P8.**

Further, testimony of PW1 was that, the borrower was not in default because there was ongoing process for the restructure of the loan. He added that, neither plaintiff nor principal debtor was notified on Maxcom default. It was PW1 evidence that Maxcom did not default to service its loan nor did the plaintiff refuse to repay the loan because there is nowhere in the evidence showing that the plaintiff was demanded to pay the loan and neglected. PW1 went on telling the Court that the liability of guarantor to repay the loan arises only when the principal borrower defaults. PW1 stressed that since there was no default, the sale of the plaintiff's shares was illegal that is why on 17<sup>th</sup> August, 2021 he issued demand notices to 1<sup>st</sup> defendant for return of his shares. It was PW1 further testimony that through the letter dated 19<sup>th</sup> August 2021, the 1<sup>st</sup> defendant refused to settle her demand. PW1 tendered in evidence demand notice dated 17.8.2021 and reply to demand notice dated 19.8.2021 which were

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admitted as **exhibit P7**. On the basis of the above testimony, PW1 prayed the Court to enter judgment and decree against the defendants as indicated in the plaint.

Under cross examination by Mr. Kachenje, learned advocate, PW1 told the Court that there is no dispute that all securities were signed before disbursement and according to CRDB2 there is no procedure for transfer. PW1 when shown CRDB5 recognized it and admitted to have signed and he added that CRDB5 does not provide procedure for transfer but it allows the sale of pledges. PW1 acknowledged to be aware of the default of the borrower while in Mozambique. PW1 when pressed with questions, he told the Court that it came to his knowledge that his signature was forged on mortgage transfer form sometimes in May 2021. However, he was quick to point out that there was no evidence to prove forgery.

When cross examined by Mr. Derick Alcard, learned counsel for 2<sup>nd</sup> defendant, PW1 told the Court that, being a Director of the borrower (Maxcom), he ought to know what was going on between Maxcom and CRDB. Upon further cross examination, PW1 told the Court that the chief executive officer of the 2<sup>nd</sup> defendant sent him the document through whatsapp and he discovered that the signature does not belong to him. PW1 went on telling the Court that the transfer of shares was supposed

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to be effected upon endorsement by the borrower. However, he pointed out that clause 10 of exhibit P8 provides that forms are to be signed at the time of mortgaging. PW1 when pressed with further questions told the Court that, during perfection of mortgage, he signed one form that is why exhibit P3 was signed in 2020. PW1 when shown exhibit P3, he read it and told the Court that, according to clause 45(3) (a) he was supposed to sign the transfer form.

Under re- examination by Mr. Seleman Almas, learned advocate, PW1 told the Court that, the 1<sup>st</sup> defendant was required to inform the plaintiff on Maxcom default. In case the plaintiff failed to remedy the default then she could proceed with transfer of shares to lender upon signing mortgage transfer from which he did not sign. He admitted to have signed exhibit P1 and maintained that the signature in exhibit P3 was forged. This marked the end of hearing of plaintiff's case and the same was marked closed.

In defence, the defendants marshalled three witnesses namely, Consolatha Aloyce Mallya (DW1), Radegunda Maurice Mosha (DW2) and Patrick Kassonde Gondwe (DW3) and produced a total of fourteen (14) documentary exhibits which were marked from exhibit D1 to D14.

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The 1<sup>st</sup> defendant was defended by one Consolatha Mallya (DW 1). DW1 under oath and through her witness statement adopted in these proceedings as her testimony in chief told the Court that, she is manager customer services of the 1<sup>st</sup> defendant hence conversant with facts of the case. It was the testimony of DW1 that the plaintiff being a share holder and director of Maxcom Africa Public Limited Company hereinafter referred to as Maxcom applied for the loan and was granted an overdraft in the sum of TZS 140,000,000. DW1 tendered in evidence enterprises loan application form and the facility letter which were admitted as exhibit **D1 and D2** respectively.

Testifying on securities, DW1 told the Court that, the said loan was secured by personal guarantee of the plaintiff in favour of the 1<sup>st</sup> defendant to the effect that, in the event, the borrower failed to perform its obligation, the plaintiff would be personally liable. DW1 tendered in evidence deed of personal guarantee and indemnity executed by the plaintiff and single debenture instrument dated 18/9/2014 executed on behalf of Maxcom which were admitted as **exhibit D3 and D4** respectively. DW1 added that apart from issuing the above securities, the plaintiff created mortgage share pledge which, among other things, it was agreed therein that, without notice to the plaintiff upon default by the borrower, the 1<sup>st</sup> defendant would sell the securities. DW1 tendered in

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evidence share pledge by Juma Rajabu Furaji which was admitted as **exhibit D5**.

It was further the testimony of DW1 that, the borrower defaulted to service the loan hence the 1<sup>st</sup> defendant invoked the recovery measures by selling the securities pledged. DW1 tendered in evidence the borrower's bank statement which was admitted as **exhibit D6**. She added that, following that default, the 1<sup>st</sup> defendant issued demand notice dated 19<sup>th</sup> February, 2020, default notice dated 2<sup>nd</sup> April, 2020 and she tendered the same which were admitted as exhibit P7 collectively. Further, she tendered receipts from Tanzania Postal Corporation to prove the service and the same was admitted and marked exhibit P8. According to DW1, despite the notices issued, the plaintiff failed and/or neglected to pay the outstanding amount hence 1<sup>st</sup> defendant had no option than to sell the pledged securities. On that note, she urged this Court to dismiss the suit with costs.

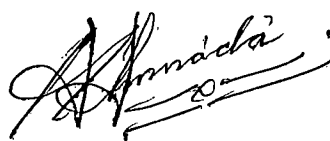
During cross examination by Mr. Seleman Almas, learned advocate for plaintiff, DW1 admitted that she is aware of the contents of exhibit P1 which was signed 28/7/2011. She further stated that the other documents which were signed on that date are mortgage request form (exhibit P1 and D11), share transfer form (exhibit P3), share pledge (exhibit D5) and

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personal guarantee and indemnity (exhibit D3). However, she pointed out that she does not have the share transfer form that the plaintiff signed. DW1 went on to tell the Court that the procedures of enforcing share as security are; issuance of notice to borrower and mortgagor and in case no remedy, the Bank is authorised to proceed with disposition of the security. DW1 when pressed with questions told the Court that, on 9<sup>th</sup> September, 2020 1<sup>st</sup> defendant submitted mortgage of shares transfer form (exhibit P3) to 2<sup>nd</sup> defendant and through a letter from CRDB Bank to Chief Executive Officer of Orbit Securities dated 27<sup>th</sup> August, 2020 (exhibit P2), the 2<sup>nd</sup> defendant forwarded the request to 3<sup>rd</sup> defendant for transfer of shares.

When cross examined by Derick Alcard, learned advocate for 2<sup>nd</sup> defendant, DW1 told the Court that the share transfer form (exhibit P3) is signed to authorize transfer and it is signed without date so that the same can be filled in the event of default. DW1 went on telling the Court that the said form goes directly to the broker for processing transfer to the lender.

Under cross examination by Ms. Jacqueline Kilama, learned advocate for 3<sup>rd</sup> defendant, DW1 told the Court that, where any of the documents is not signed, the bank cannot grant loan.

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In re-examination by Mr. Kachenje, learned advocate, DW1 told the Court that, the plaintiff was not called because all documents were already signed before default.

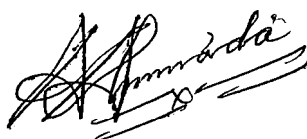
The 2<sup>nd</sup> defendant, on its part, testified through Redegunda Maurice Mosha (DW2). DW2 under oath and through his witness statement which was adopted to form part of her testimony in chief told the Court that, she is the Head of the Department of Trading and Customer Relation of the 2<sup>nd</sup> defendant. It was the testimony of DW2 that the 2<sup>nd</sup> defendant is a broker of the plaintiff's securities at DSE. It was further the testimony of DW2 that sometimes in 2011 the plaintiff and the 1<sup>st</sup> defendant approached the 2<sup>nd</sup> defendant requesting its service for facilitation of mortgage of the plaintiff's 175387 shares in Tanzania Portland Cement Company under CDS Account No 121180 to the 1<sup>st</sup> defendant.

DW2 went on testifying that being the officer of the 2<sup>nd</sup> defendant, she facilitated the arrangement by ensuring that all the documents that is mortgage request form and mortgage transfer form were executed before submission to Dar es Salaam Stock exchange and after obtaining the approval from the DSE she collected the copies of the application forms and handed them to 1<sup>st</sup> defendant and plaintiff. Testifying further, DW2 told the Court that on 27<sup>th</sup> August, 2020, the 2<sup>nd</sup> defendant received request form and transfer form mortgage from the 1<sup>st</sup> defendant



requesting the seizure and transfer of shares from the plaintiff's account on the reasons that there was default. Further, the testimony of DW2 was that, upon completion of the share transfer on 9<sup>th</sup> September, 2020, she referred the application to DSE. DW2 went on telling the Court that upon transfer of mortgage share, the 1<sup>st</sup> defendant sold 58,390 shares so as to settle the outstanding amount that was guaranteed. Then the 1<sup>st</sup> defendant requested the 2<sup>nd</sup> defendant to transfer back 116, 997 shares from 1<sup>st</sup> defendant CDS account Number 45588 to the plaintiff CDS account No. 121108 after satisfying her outstanding amount through the application form dated 19<sup>th</sup> July, 2021. DW2 tendered in evidence order form dated 14<sup>th</sup> December, 2020 as **exhibit D9**. DW2 went on telling the Court that the allegations in respect of unprocedural and fraudulent transfer of shares are unfounded because she observed all the procedures. On that regard, she urged this Court to dismiss the suit with costs.

Under cross examination by Ms. Jacqueline, learned advocate for 3<sup>rd</sup> defendant, DW2 told the Court that, transfer form is always signed by mortgagor and the spaces for the transferer and transferee and dates of transfer are left blank because it is not known as when the borrower would default.



Under cross examination by Mr. Kachenje, learned advocate for 1<sup>st</sup> defendant, DW2 told the Court that after receiving the documents, the said documents were referred to trading system for scrutiny and thereafter the documents were submitted to DSE. DW2 when pressed with question told the Court that, exhibit P3 is in the name of CSDRC which was formed since 2017.

Under cross examination by Mr. Almas, learned advocate for plaintiff, DW2 told the Court that, in 2011 she was working in the trading section that is why she facilitated the execution of mortgage request. DW2 told the Court that the parties signed documents on 28<sup>th</sup> July, 2011 and on 29<sup>th</sup> July, 2011, the 2<sup>nd</sup> defendant endorsed them. She insisted that they dealt with transfer form (exhibit P3 and D11) in 2011.

Under re-examination by Derick Alcard, learned advocate for 2<sup>nd</sup> defendant, DW2 told the Court that, she received the document and upon scrutiny she submitted them to CSDR for further process. DW2 when pressed into question told the Court that, transfer form is dated and stamped 9<sup>th</sup> September, 2020 because that is when CRDB came for purposes of seizing the shares.

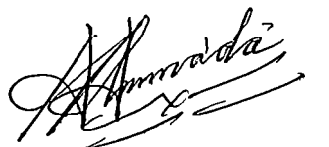
The 3<sup>rd</sup> defendant was defended by Patrick Kasonde Gondwe (DW3). DW3 under oath and through his witness statement adopted as part of his testimony in chief told the Court that, he is a principal officer of the 3<sup>rd</sup>





defendant hence conversant with facts of this case. DW3 told the Court that he is aware that the plaintiff was a holder of 175387 ordinary shares of Tanzania Portland Cement Co. Ltd under CDS account No. 121108 listed at DSE. DW3 went on telling the Court that he recalls that on 28<sup>th</sup> July, 2011 the plaintiff signed a mortgage request form (exhibit P1) and the mortgage share transfer form (exhibit P3) signifying to mortgage his 175387 shares as collateral for the credit. According to DW3, it is a normal procedure for borrower or guarantor to sign transfer share form at the time of mortgaging the security and in the event of default, the lender only inserts dates on the form for execution. It was the testimony of DW3 that following the borrower's default, the 1<sup>st</sup> defendant on 27<sup>th</sup> August, 2020 through 2<sup>nd</sup> defendant submitted request form and transfer of share form to 3<sup>rd</sup> defendant to seize the shares. DW2 tendered in evidence mortgage request form, letter from CRDB dated 27/8/2020 and share transfer form which were admitted as **exhibit D10, exhibit D11** and **exhibit D12** respectively.

DW3 told the Court that the 3<sup>rd</sup> defendant debited the plaintiff shares from the CDS account and credited the lender account CDS account with No. 175387 shares. DW3 tendered in evidence a letter dated 9/9/2020. DW3 went on telling the Court that the 1<sup>st</sup> defendant sold 58390 shares to recover the unpaid loan and after taking what she was entitled to, she

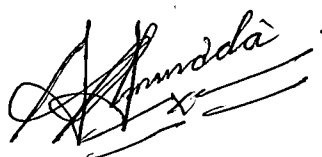
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returned 11699 shares to plaintiff's account. DW3 tendered in evidence depository receipt which was admitted **as exhibit D14**. According to DW3, the 3<sup>rd</sup> defendant did not bless any fraudulent act as such, the plaintiff's claims are baseless. In the end, DW1 beseeched this Court to dismiss the suit with costs.

Under cross examination by Mr. Alcard, learned advocate for 2<sup>nd</sup> defendant, DW3 told the Court that, the role of CSD and registry company (3<sup>rd</sup> defendant) is custodian of shares and bonds. DW3 also said that the 3<sup>rd</sup> defendant is enjoined to recognise the shares before disposition. DW3 when pressed with question told the Court that, exhibit P1 was signed 2011 while exhibit P3 was signed in 2020 because the default occurred in 2020. He also said that exhibit P1 was issued by DSE while exhibit P3 was issued by CSDR.

During cross examination by Mr. Almas, learned advocate for plaintiff, DW3 told the Court that both exhibit D10 and exhibit D11 were signed on 28<sup>th</sup> July, 2011 and are the ones used to transfer shares to CRDB. However, he was quick to point out that he cannot confirm that exhibit D11 was signed by Juma Furaji (the plaintiff).

Under re-examination by Ms. Jacqueline, learned advocate for the 3<sup>rd</sup> defendant, DW3 told the Court that, mortgage transfer form always

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remains in the custody of the lender. According to DW3, when document is brought before him bearing the log of CSDR and signature on the respective part, that document is genuine.

This marked the end of hearing of defence case and same was marked closed. The learned advocates for parties prayed to exercise their right under rule 66(1) of this Court Rules to file final closing submissions. I granted the prayer. I should register my sincere appreciation for their insightful submissions. Suffice it to say that I have considered the parties' submissions in my deliberations but I will not reproduce them verbatim.

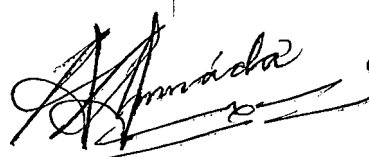
As hinted above, the cornerstone of the dispute is the legality of the transfer and sale of the plaintiff's shares.

The 1<sup>st</sup> issue was couched that, whether seizure and transfer of plaintiff's 175,387 shares issued by Tanzania Portland Cement Co. Ltd from CDS account No 121108 to the 1<sup>st</sup> defendant by the defendants was valid. The learned counsel for plaintiff strongly submitted that the seizure and transfer of plaintiff shares was unprocedural and fraudulent on three folds. **One**, the learned counsel submitted that the plaintiff's signature appearing on exhibit P3 was not signed by the plaintiff because on 9<sup>th</sup> September, 2020 the plaintiff was in Mozambique and signature appearing on exhibit P9 is not similar to the signature in exhibit P3 and exhibit P1.

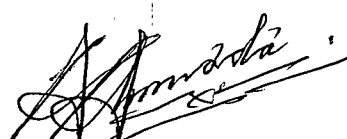
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**Two**, the counsel lamented that there was no notice of default while the share pledge (exhibit D5) mandates 1<sup>st</sup> defendant to invoke sale of the pledged shares upon borrower's default. According to Mr. Seleman Almas, the 1<sup>st</sup> defendant invoked sale prior to default because there was ongoing process of restructuring loan. **Three**, the counsel had it that the transfer of share form used (exhibit P3) bears the 3<sup>rd</sup> defendant log and stamp while the 3<sup>rd</sup> defendant in 2011 was not in existence. The learned counsel stressed that the 3<sup>rd</sup> defendant CSD Registry Company Limited came into existence in 2017. The learned counsel for plaintiff summed up that those three folds establish that the defendants fraudulently transferred the plaintiff's shares hence he urged this Court to find and hold that the defendants fraudulently seized and transferred plaintiff's shares.

In rebuttal, all the three learned counsel for defendants strongly differed with the plaintiff's counsel. They were opined that the seizure and transfer of plaintiff's shares were in accordance with the agreement and CSD & Registry Company Ltd (CSDR) Rules (exhibit P8). They made reference to exhibit P1 or exhibit D11 and Rule 10. item 10.1 to 10.1.9. In addition, the learned counsel for defendants had it that the loan in question was transacted in 2019 and after the incorporation of the 3<sup>rd</sup> defendant, all the CDS activities which were previously carried out by DSE were transferred to 3<sup>rd</sup> defendant.

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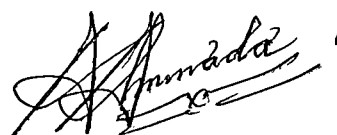
I have strenuously read the pleadings and thoroughly analysed the evidence both oral and documentary. I have also paid the deserving attention to the parties' submissions. Throughout the evidence, there is no gainsaying that the alleged transfer and sales of the plaintiff's shares were only made possible through two documents namely, mortgage request form dated 28/07/2011 (exhibit P1) and mortgage of shares transfer form (exhibit P3). The hot contest is on exhibit P3 which the plaintiff has vehemently alleged that he did not sign whereas the defendant's version is to the effect that the said document (exhibit P3) was signed by the plaintiff along with other documents such as mortgage request form (exhibit P1) dated 28<sup>th</sup> July, 2011. It is therefore paramount to find it out whether exhibit P3 was signed by the plaintiff in 2011 as alleged by the defendants. At the very outset, the document tells it all that it was issued by CSDR (the 3<sup>rd</sup> defendant). Astonishingly, it is admitted by all the defendants that the 3<sup>rd</sup> defendant was formed in 2017. The crucial issue therefore to ponder on is *if the impugned exhibit P1, exhibit P3 and exhibit D11 were signed in 2011 as contended by all the defendants why exhibit P3 purports to be issued by the 3<sup>rd</sup> defendant which came into being in 2017?* Admittedly, this requires an extra intelligence or miracle for one to agree with the defendants. The defendants could not provide plausible explanations on this fatal anomaly.

A handwritten signature in black ink, appearing to be 'Amada', with a horizontal line drawn underneath it.

In view thereof, the defendants' evidence is contradictory and inconceivable.

Furthermore, the defendants' witnesses testified that the plaintiff signed personal guarantee (exhibit D3), share pledge (exhibit D5) and mortgage of shares transfer form (exhibit P3) on the same date that i.e., 28<sup>th</sup> July, 2011. However, upon scrutinising the documents submitted by the defendants, I have observed that the personal guarantee (exhibit D3) indicates to be signed on 3<sup>rd</sup> December, 2019. Similarly, throughout the defence evidence in particular, DW1 Consolatha Mallya testified that the loan agreement between CRDB Bank PLC and Maxcom Africa Public Company Limited was entered on 28<sup>th</sup> July, 2011. Surprisingly, the document, a facility letter which she tendered as exhibit D2 indicates that it was executed on 10/10/2019 whereas DW1 testified that the proposal for restructuring made by Maxcom Africa was not accepted by the bank. These inconsistencies, in my view, augment the plaintiff's case that the procedure for transfer and sale of the plaintiff's shares was tainted with illegalities.

Moreso, upon comparison of undisputed document to wit, mortgage request form (exhibit P1 and D10) vis mortgage of share transfer form (exhibit P3 and D11) which the plaintiff is seriously disputing, it is clear

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that the signature purporting to be of Branch Manager, CRDB BANK KIJITONYAMA is apparently dissimilar. To crown it all, the signature allegedly to be of Branch Manager on exhibit P3 is apparently similar to the one appearing on the bank statement (exhibit D6) which was printed on 21<sup>st</sup> February, 2023. Further, exhibit P1 bears the stamp of DAR ES SALAAM STOCK EXCHANGE dated 01<sup>st</sup> AUG 2011 but exhibit P3 does not bear this stamp. The simple question is, if both exhibit P1 and P3 were signed on the same date and submitted to Orbit Securities Co. LTD and DAR ES SALAAM STOCK EXCHANGE as contended by the defendants, why only exhibit P1 (which is undisputed) bears the stamp of DAR ES SALAAM STOCK EXCHANGE. This is another factor which suggests forgery of exhibit P3.

Upon holistic appraisal of the evidence as herein above indicated, I am inclined to believe the plaintiff's version that the mortgage of shares transfer form (exhibit P3) was forged as he did not sign it. It should be noted that even if the plaintiff defaulted to repay loan, the 1<sup>st</sup> defendant was duty bound to recover its money through lawful means. It was not proper for the defendants to apply fraudulent means by forging the document to wit, mortgage of share transfer form dated 9<sup>th</sup> September, 2020 (exhibit P3) in order to effect the transfer. Indeed, this Court cannot condone such fraudulent acts. Since the mortgage of shares transfer form

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(exhibit P3) which led to the transfer of the plaintiff's 175,387 shares to the 1<sup>st</sup> defendant and subsequent sale of 58,390 shares was forged, it naturally follows that the transfer and sale of shares were invalid and illegal. I therefore answer the 1<sup>st</sup> and 2<sup>nd</sup> issues in the negative. It is worth noting that it is settled in law that forgery of a document can be established through circumstantial evidence. This Court (Katiti J, as he then was) in the case of **Amon Mwaipaja vs the Republic**, Criminal Appeal No. 69 of 1981, HC at Dodoma held that there are several modes of proving forgery including:

1. By calling a person who signed or wrote the documents,
2. By calling a person in whose presence the document was signed,
3. By calling handwriting expert,
4. By calling a person acquainted with handwriting of a person whom document is supposed to have been written or signed,
5. By comparing in court disputed signature or writing with some admitted signature or writing,
6. By proof of an admission of a person who is alleged to have signed or written the document that he signed or wrote it,
7. By other circumstantial evidence.

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Applying the 7<sup>th</sup> mode that is proof by circumstantial evidence, I am convinced that the circumstances surrounding the making and signing of the mortgage share transfer form (exhibit P3) sufficiently prove that the document was forged.

I am aware that proof of forgery (fraud) in civil cases demands higher standard above balance of probabilities. See the case of **Pan Africa Tanzania Equipment Ltd vs. KAS Freight Ltd, Commercial Case No.116 of 2021 (Unreported)**, and the case of **Agro Impex (Tanzania Ltd vs Riyaz Gulamani & 2other** Civil case No. 145 of 2006 the court held that. I candidly hold that the available evidence has met the standard.

In view of the above findings, it is my considered opinion that the plaintiff has proved its case to the required standard in proving fraud. Consequently, I enter judgment and decree in favour of the plaintiff as follows;

- (i) It is hereby declared that the seizure and transfer of plaintiff 175,387 ordinary shares to 1<sup>st</sup> defendant was null and void.
- (ii) It is hereby declared that the sale of the plaintiff's 58,390 shares which were fraudulently transferred from CDS

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Account No. 121108 with 175387 ordinary shares issued by Tanzania Portland Cement Company was null and void

- (iii) The defendants are hereby ordered to transfer back 58,390 ordinary shares to the plaintiff to his CDS Account No. 121108 which were unlawfully sold.
- (iv) General damages of Tanzania Shillings Ten Million (TZS 10,000,000/=).
- (v) Costs of the suit be borne by the defendants

It is so ordered.

The right to appeal is explained.



  
**A.A. Mbagwa**

**JUDGE**

**29/08/2023**

