IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
COMMERCIAL CAUSE NO.2 OF 2020

IN THE MATTER OF INDIAN OCEAN HOTEL LIMITED
AND
IN THE MATTER OF PETITION FOR UNFAIR PREJUDICE UNDER SECTION 233 (1) & (3) OF THE COMPANY ACT, 2002
BY

DHIRAJLAL WALJI LADWA.....1st PETITIONER
CHANDULAL WALJI LADWA .....2nd PETITIONER
NILESH JAYANTILAL LADWA .....3rd PETITIONER
vs.
JITESH JAYANTILAL LADWA.....1st RESPONDENT
INDIAN OCEAN HOTEL LIMITED .....2nd RESPONDENT

RULING

Date of Last Order- 07/11/2023
Date of Ruling 17/11/2023

NANGELA, J.:

This Petition was brought under section 233 (1) and (3) of the Companies Act, Cap.212 [R.E.2002]. Initially, it was filed under a certificate of extreme urgency filed in this court on the 20th of January 2020. Even so, the Petition could not be disposed of expeditiously as it ought to have been disposed following a series of applications which made it impossible to decide the merits of this Petition within a shorter period.

In this Petition, the Petitioners are seeking for the following orders:

1. An Order of this court, declaring that, the conduct and operations of the 1st Respondent were unlawful and prejudicial to the interests of the company and the petitioners as shareholders, directors and members of the Company.
2. An Order of this court, restraining the 1st Respondent permanently from taking part in the management of the affairs of the company and an order directing the management of the company to be placed in the hands of the petitioners.
3. An Order of this court directing and authorizing civil proceedings to be brought for, and on behalf of, the company by any of the petitioners or the petitioners jointly to compel the 1st Respondent make good all losses and business distortions incurred as a result of misappropriation of the

company's funds and mismanagement of the company by the 1st Respondent.

4. An Order compelling the 1st Respondent to vacate the office and business premises to be used by the company only and relocate his personal business ventures from the company's premises.
5. Payment of general damages to the Petitioners as the court may assess.
6. Costs of the suit be borne by the 1st Respondent.
7. Any other relief or order the honourable court shall deem fit and proper to grant.

As I stated herein above, several applications were filed and this court has to dispose them of before turning on this Petition. In terms of appearances, all along the Petitioner enjoyed the services of Mr. Robert Rutaihwa, learned Advocate while Mr. Jermiah Mtobesya and Mr. Sisty Bernard, learned advocates appeared for the Respondents.

On the 18th day of October 2022, the Respondents filed yet another preliminary objection. Their objection was that:

"That the 1st and 2nd Petitioners have

no locus standi".

When the parties appeared before this court on 13th day of July 2023, they prayed to file affidavits to support the petition and the answer to the petition as well. This court granted them equal time to do so and directed that the petition at hand and the objection raised by the Respondents be disposed of by way of filing written submission. This court directed that such written submissions in respect of both the preliminary legal issue and the Petition be filed together. A schedule of filing was issued, and the parties herein duly complied with it. I will now proceed to determine the matter, starting, however, with submissions made in respect of the preliminary legal issue raised by the Respondent.

In his submission in support of the objection, Mr. Sisty Bernard, the Respondents' counsel argued that the 1st and 2nd Petitioners have no locus to bring this Petition because there are not members of the company since, under section 233 (1) and (2) of the Companies Act, Cap.212 R.E 2002, a provision which the Petitioners have relied on to premise their petition, for one to be able to institute a petition based on unfair prejudice he/she must be a member of the company.

He submitted that, the question that begs an answer is whether the 1st and 2nd Petitioners were members of the 2nd Respondent at the time of filing this Petition. Their response to that question they raised themselves was a "**no**". They contended that for one to be a member of a company one must own shares therein but once the shares have been transferred to another, the transferor loses membership.

According to Mr. Sisty Bernard, the Respondents' learned counsel, going by paragraph 9.1, 16 and 17 of the Petition, it is a fact that by the time of filing this Petition in January the 20th day of 2020, the 1st and 2nd Petitioners' shares had been transferred to the 1st Respondent. They argued that transfer process got finalized when the 1st Respondent paid capital gains tax and stamp duty.

He submitted, therefore, that, in the circumstances, by the time they filed this Petition in January 2020, the 1st and 2nd Petitioners were no longer members of the company and lacked the requisite locus for them who could rely on section 233 (1) and (2) of the Companies Act, Cap.212 R.E 2002 to bring a claim on unfair prejudice.

The learned counsel for the Respondents contended that, they have referred to the facts contained in the Petition

since, as it was held in the case of **Ali Said Kurungu & 4 Others vs. The Administrator General & 12 Others**, Civil Appeal No.148 of 2019, (CAT) (unreported) a preliminary objection cannot be taken from abstract without reference to some facts plain on the pleadings which must be looked at without reference to examination of any other evidence.

In support of their submission and the need to consider the issue of locus standi before going to the merits of the Petition, reliance was placed on the cases of **Lujuna Shubi Ballonzi, Senior vs. Registered Trustees of Chama cha Mapinduzi**, [1996] TLR 203 and **Peter Mpalanzi vs. Christina Mbaruka**, Civil Appeal No.153 of 2019 (CAT) (unreported). Based on the submissions made, the learned counsel for the Respondents urged this court to uphold the objection and struck out the entire petition with costs.

Submitting in opposition to the objection, it was Mr. Rutaihwa's submission that, the Respondent's objection has no merits. He submitted that the same kind of objection was earlier raised in the proceedings dated 03rd of April 2020 and voluntarily abandoned by the counsel for the Respondents and now they have raised it. He submitted that, in law such abandonment or withdrawal which the Petitioners did not

resist meant that the Respondents opted not to pursue the same as preliminary objection.

Mr. Rutaihwa submitted that, the matter in respect of that objection should thus be meant to rest there. To support their submission, they placed reliance on the Court of Appeal's decision in the case of **Patricia Mapangala and Another vs. Vincent K.D Lyimo**, Civil Appeal No. 149 of 2020 (unreported) arguing that an objection which was withdrawn from the court cannot be raised again.

Notwithstanding such a submission, Mr. Rutaihwa was of the view that, the preliminary objection does not fit the dictates of preliminary objection. Citing the Court of Appeal decision in the case of **Merchmar Corporation (Malysia) Benhard (in Liquidation) vs. VIP Engineering and Market Ltd and 3Others** (Consolidated Civil Applications No.190 and 206) of 2013, Mr. Rutaihwa contended that the question of locus standi cannot be determined as a preliminary objection. He further relied on the **Mukisa Biscuits'case** (1969) 1EA 696.

Mr. Rutaihwa distinguished the cases which Mr. Sisty Bernard, the counsel for the Respondent relied on and noted further that, for this court to be able to respond to the

question whether the 1st and 2nd Petitioners are members of the 2nd Respondent or nor, there must be evidence to prove that factual issue.

He submitted further that, the response to the question of membership which the Respondents' counsel raised in his submission is better responded in the Misc. Commercial Cause No.62 of 2020 and is what is forming the defence of the Respondent. He submitted that the issue of membership to the 2nd Respondent Company has been irrelevantly introduced in this matter while it could be viably responded to in the petition. He urged this court to dismiss the objection with costs.

The Respondents' counsel filed a rejoinder. He contended that the withdrawn or abandoned objection can validly be raised again subject to limitation of time. He argued that it was a jurisdictional issue and could be raised at any time even if at first abandoned or withdrawn. He, thus, reiterated his submission in chief urging this court to uphold the objection.

I have taken time to look at the rival submissions as set out hereabove in respect of the preliminary objection. In essence, there is ample truth as gathered from the record of

the proceedings of this court dated 03rd of April 2020 that, this court was invited to deal with several preliminary objections raised by the Respondents and a ruling to that effect was issued on the 24th of April 2020. When addressing the objections one of them was abandoned by the Respondents and this was none other than the present objection.

In the first place, I do not find it appropriate to raise the same objection again having withdrawn it from the court at will. Bringing it back to the court's attention is in my view an abuse of the process of the court since the court could have looked at it at the same time when it addressed the rest of the objections which the Respondent addressed in the ruling of this court dated 24th of April 2020.

As rightly argued by Mr. Rutaihwa, the very moments the Respondents withdrew or abandoned the objection closed the doors behind them and cannot reopen the same at will and without leave of the court. That has been a position held by this Court in a number of cases, including the case of **ABDUL RAJABU ZAHORO (Administrator of the Estate of the late Riajabu Zahoro) vs. Kuringe Real Estate Co. Ltd and 2Others**, Land Case No.193 of 2021, HC Land Division (unreported); **Kuringe Real Estate Company Ltd**

vs. Bank of Africa & Three Others, Misc. Com. Application No. 18 of 2020, HC Com. Div. at DSM (unreported) and **Kurwa Guchenya & 18 Others vs. Grumeti Reserves Limited,** Misc. Labour Application No. 13 of 2021, HC at Musoma (unreported).

That remains the legal position and to state otherwise is, in my humble view, to permit or entertain an abusive practice where a party seeking to delay delivery of justice will raise five preliminary points, pick to argue one and drop four, and then, later when a ruling is delivered in his disfavour, go ahead, and pick one or two of those preliminary issue she/he earlier dropped and seek another ruling from the same court. Indeed, I wonder if there will be a court, worth the name, which will ever entertain such an abusive and annoying practice.

In essence, any attempt to condone such acts will not only be unfair to the other party but also an affront to the interests of justice which calls for timely and expeditious disposal of cases by courts given that there will be a chain of endless litigations.

As it was stated in the case of **Steven Masato Wasira vs. Joseph Sinde Warioba** [1999] TLR 334, the

interest of justice is in favour of litigation coming to an end, and, therefore, where matters or issues which ought to be dealt with at once are not dealt with in that manner, the party who failed to bring such to the attention of the court or one who abandons the issues will be as well estopped from raising it up again at will.

In the case of **Patricia Mapangala and Another vs. Vincent K.D Lyimo**, Civil Appeal No. 149 of 2020 (unreported) the Court of Appeal stated as follows, when responding to a somewhat similar issue of withdrawal of an objection:

> "With respect, we think this is a weak arrow in the appellant's bow although the appellant has fervently pursued it. To us, the withdrawal of the objection during the trial signifies that the appellant had elected not to apply for the taking off of the complaint from the file."

In my view, the implication of the above statement by the Court is that once an abjection is withdrawn from the court or abandoned, it cannot be relitigated in the same

proceedings by bringing it to life at a later date. That amounts to an abuse of the court process. From the foregoing discussion, I see no need to proceed any further but rather pose and hold that the preliminary objection could not have been raised at will by the Respondents' counsel having voluntarily withdrawn it from prosecution. In that regard, the same cannot be entertained by this court but should be dismissed with costs, as I hereby do.

Having dealt with the objection, let me revert to the merits of the Petition. Submitting in support of the Petition, it was Mr. Rutaihwa's submission that, according to section 233(1), (2) and (3) of the Companies Act, Cap.212 R.E 2002 a claim like the present one brought by the Petitioners is expressly required to be brought by way of a Petition. He referred to, relied on, and adopted the reply to the answer to the petition which the Petitioners filed affidavits as well which the 1st and 3rd Petitioners filed in this court as proof in support of their claims as well as the prayers contained in the Petition as forming part of his submissions.

He submitted that much as the filing of the affidavits was in line with the orders of this court, it was in assonance with the dictates of Rule 414 read together with Rule 420 (1),

and 421 of the Companies (Insolvency) Rules, 2004. Mr. Rutaihwa submitted that, the 2nd Respondent was merely joined in this Petition as a necessary party as whatever decision entered by the court will impacts the Company.

Mr. Rutaihwa submitted that, the Petitioners and the 1st Respondent are shareholders and Directors of the 2nd Respondent, the Company. He argued that, by way of background information, that, originally and while at the promotion and incorporation of the company, the 1st and 2nd Petitioner with one Jayantilal Walji Ladwa (now deceased) joined to incorporate and bring to existence the 2nd Respondent in 1977. He relied on the Memorandum and Articles of Association (MEMARTS) of the 2nd Respondent attached to the Petition as **Annexure DCN-1** and the Affidavit of the 2nd Petitioner.

He submitted, therefore, that the 1st and 2nd Petitioners are co-founder members of the company along with the late Jayantilal Walji Ladwa (who at some point departed from the company to bring in the 3rd Petitioner and the 1st Respondent. Mr. Rutaihwa submitted that, since the incorporation of the 2nd Respondent, the 1st and 2nd Petitioners have continued to be Directors of the company. He argued that, in the usual course

of running the business the original shareholder, one Jayantilal Wlaji Ladwa (deceased) opted to transfer his shares in the company to his two sons, who are the 3rd Petitioner and the 1st Respondent in the year 2004.

According to Mr. Rutaihwa, up to the time when this Petition got filed the shareholding of the company after the joining of the 3rd Petitioner and the 1st Respondent as members of the company and the relinquishment of the shares hitherto held by Jayantilal Walji Ladwa (the deceased), stood at 1000 shares distributed in the form of the 1st Petitioner holding 400 shares, the 2nd Petitioner holding 300 shares and the 3rd Petitioner and 1st Respondent holding 150 shares each. He submitted that, each of these shares were valued at TZS 47,000,000.00.

He relied on several correspondences with BRELA attached to the Petition and the affidavits filed in support of this Petition as **Annexure DCN-2**. He submitted that; this status of the company subsisted even after the presentment of this Petition in court as evinced by a letter from BRELA dated 18th March 2020 attached to the 3rd Petitioner's affidavit marked **NJL-3.** According to Mr. Rutaihwa, the parties herein would not have reached at the state they are today if it was

not due to the unfair prejudicial conducts of the 1st Respondent, both prior to and even after the presentments of this Petition to the court.

Mr. Rutaihwa submitted that, the grievance which prompted and culminated in the filing of this Petition begun with the 1st Respondent's mismanagement of the affairs of the 2nd Respondent against the benefit of the company and the shareholders in the year 2018. He submitted, ordinarily acts of mismanagement, contravention of the Memorandum and Articles of Association and acting unfairly and in prejudicial manner against the rights and interests of the other members give right to the member aggrieved by such unfair and prejudicial conduct.

As regards the Petition at hand, Mr. Rutaihwa submitted that, the Petitioners sought to restrain the unfair prejudice through the in-door measures including stopping the 1st Respondent from running the day-to-day activities of the 2nd Respondent, a fact which brought to the arena a stiff dispute with the 1st Respondent who misconducted himself to no control by the rest of the members of the company and the directors. He submitted that, in the alternate, the resorted into referring the dispute to the Registrar of Companies (BRELA) as

the custodian of the societal rights of the parties, as shareholders and Directors, but also the company.

Even so, it was submitted that, as evinced by **Annexure NJL-2** of the affidavit of the 3rd Petitioner, the Registrar of the Company, having found that the dispute was stiffening, directed the parties to resort to the court processes in search for resolution. He contended, therefore, that the dispute by the parties was sanctioned by the Registrar's office having failed to resolve the same, and hence, the Petitioners' decision to file this Petition. Mr. Rutaihwa submitted that, from the Petitioner's side they consider and propose the following as issues which this court needs to resolve:

(a) Whether there is unfair prejudice on the part of the Petitioners and the company by the 1st Respondent.

(b) To what relief should the court grant?

In his submission in response to the issues he had proposed, Mr. Rutaihwa submitted that, as far as the 1st issue, the same should be responded to in the affirmative. His was a position that, there is a serious unfair prejudice not only on the rights and interests of the Petitioners as shareholders and directors of the 2nd Respondent but also on the company itself.

He argued that the complaint against the 1st Respondent, the result of which this Petition was preferred, include the deliberate exclusion of the Petitioners in the running of the affairs of company which are now at the sole control of the 1st Respondent without reasons.

According to Mr. Rutaihwa, other conducts include restricting the Petitioners from accessing the company offices and premises thought the use of force by imposing bouncers and fearless security guards, illegal and secret opening and running of bank accounts in the name of the company without the involvement of the rest of the members or directors and/or without their sanction.

He submitted further that, acting contrary to the dictates of the Articles of Association of the 2nd Respondent company and illegally attempting to transfer shares and fraudulent misrepresentation of the true status and structure of the company as well go to the list of conducts complained of as prejudicial to the interests of the Petitioners and the Company itself.

Mr. Rutaihwa relied on the decision of this court in the case of **Velisa Elizabeth Deflosse (Petitioning as a legal representative under a Power of Attorney of Gordon**

McClymont) vs. Joseph Ignatius Noronha, Misc. Commercial Cause No.20 of 2020 (unreported) to support his position. He contended that, the cited case lucidly established the criteria for mounting a claim for unfair prejudice in terms of section 233 of the Companies Act, Cap.212, R.E 2002. In that case, this court noted as follows, that:

> "a petition may be brought under section 233 of the Companies Act, Cap.212 R.E 2002 on the grounds that the affairs of the Company are being carried out or have been conducted in a manner that is unfairly prejudicial to the interests of the shareholders or one of them (the petitioner) or the company itself. The test of such unfairness, however, is an objective one, and a Petitioner under that provision, is required to establish four elements to the satisfaction of the court, that: (1) *the conduct of the company's affairs*; (2) has *prejudiced*; (3) *unfairly*; (4) the petitioner's *interests as a member* of the company."

In his submission, Mr. Rutaihwa submitted that, the Petitioners, who are members and directors of the 2nd Respondent, though the board of meeting under the Articles of Association of the company, resolved and terminated the 1st Respondent for the position of managing director having realized serious mismanagement and unfaithful conducts of the affairs of the company and the petitioners as members.

Mr. Rutaihwa argued that, although the 1st Respondent was removed from his position, he refused to vacate the office and, in his own account engaged security guards and imposed restrictions against the access of the Petitioners to the company. He submitted that, restricting access to the members of the company meant to exclude the Petitioners from the affairs of the company and denying them access to the office, equipment, and premises. He argued that such conduct per se go contrary to the terms of the Memorandum and Articles of Association, a document which brings together the members and Directors of the company. He insisted, therefore, that the conduct of the 1st Respondent constitute a serious unfair prejudice.

It was Mr. Rutaihwa's submission that, while the 1st Respondent was in the position of Managing Director of the

Company and the shareholder thereof, he unfairly and illegally opened bank account and operated three ban accounts at CRDB Bank as particularized in paragraph 9.4 (a), (b) and (c) of the Petition and sanctioned by the affidavits supporting the Petition. He submitted that decisions of the company, including those regarding financial affairs are all sanctioned by the board of directors through resolutions.

Reliance was placed at Article 97 of the Articles of Association of the 2nd Respondent regarding the quorum required in transacting the business of the company which is fixed at the minimum of two. On that account, it was argued that the 1st Respondent's act of opening and the running of the bank accounts without the sanction of the rest of the directors who are the Petitioners was unfair and prejudicial to the wellbeing of the financial affairs of the 2nd Respondent, contravened Articles 77 of Articles of Association of the company as read with section 85 of the Companies Act and amounts to misappropriation and income stripping of the company's funds and properties. To support the above submissions reliance was placed of the English case of **Re Stratos Clum Ltd** [2020] EWHC 3485.

It was also Mr. Rutaihwa's submission that, exclusion of the Petitioners from management of the affairs of the company is as well an act which constitutes unfair prejudice to their interests and rights as members and directors of the 2nd Respondent. He contended that while mere exclusion would not itself suffice, the situation in the 2nd Respondent is of extreme nature as the company is run by only one person who is the 1st Respondent and the Petitioners, though shareholders and directors are not involved in any decision making affecting the company (the 2nd Respondent). It was his submission that, the 1st Respondent has gone further and employed security personnels who, to the very moments, would not allow the Petitioners to access the company's office premises.

Mr. Rutaihwa submitted that, the Petitioners are both members and Directors in the 2nd Respondent and, for that reason, they are entitled to exercise their rights including that of convening and taking part in the Annual General Meeting of the Company, appoint and remove directors, receive director's reports, contribute to the funds of the company, and receive dividends, among others which include running the affairs of the company through board meetings and advance the cause of the 2nd Respondent.

Mr. Rutaihwa He submitted that, all these are not done as the Petitioners' access to the company assets have been prevented, including the access to the premises of the company which is denied by the stationing of security guards at such company premises and vicinity at the directives of the 1st Respondent. He argued that the 1st Respondent's conducts are neither orderly or aligned with the dictates of the Memorandum and Articles of Association of the 2nd Respondent nor the law. He submitted that they interfere with the personal interests and institutional rights of the Petitioners in the company and thus unfair and prejudicial.

To further bolster his submission, he relied on the decision of the English Court in the case of **O'Neill vs. Phillips** [1999] 1 WLR 192 regarding the legitimate expectations which members of a company derive from each other's commitments enshrined under their agreements contained in the Memorandum and Articles of Association.

He submitted further that the Petitioners had a legitimate expectation to run their company, benefiting from it so long as the perpetuity of the company continues but the conducts of the 1st Respondent is putting this asunder. He submitted that all what has been submitted herein has not

been contested by the 1st Respondent through affidavits but only evasively denied in the answer to the Petition with no explanations to vindicate their untruthfulness.

Mr. Rutaihwa submitted that, what could be the most pressing and tempting issue is that of attempted deprivation of the 1st and 2nd Respondents' shares in the 2nd Respondent. He submitted that; such an issue was dealt with by this Court in the **Misc. Commercial Cause No.62 of 2020** which, on the authority of the case of **NBC Limited and Another vs. Bruno Vitus Swalo**, Civil Appeal No. 331 of 2019, the Court of Appeal made it clear that the same matter cannot be dealt with twice in one suit. He contended, however, that while the Petitioners' concern is not to revisit the merit of the **Misc. Commercial Cause No.62 of 2020,** their concern and confine is the procedures involved in transferring the shares under the Articles of Association and the law, the illegality of the purported transfer by the 1st Respondent and other issues not dealt with in the **Misc. Commercial Cause No.62 of 2020.**

I do understand that the Court of Appeal in its recent decision in Civil Application No.640/16 of 2023 set aside the proceedings and the orders emanating from them and, as

such reference to the decision of this court is of no effect anymore.

Submitting on the alleged attempted deprivation of shares, Mr. Rutaihwa submitted that, its genesis springs from the solicitation and procurement of criminal charges by the 1st Respondent against the 1st and 2nd Petitioners in **Criminal Case No. 54 of 2019**. He submitted that, it was further salted by threats agitated to the 3rd Petitioner by the 1st Respondent, all aimed at accomplishing the latter's ill-motive against the shareholder and members of the company.

According to Mr. Rutaihwa, although such facts are not premised within the Petition and the affidavits in support thereof, the Petitioners are still emphatic that it was the 1st Respondent who initiated the proceedings with dubious complaints following the discharge and release of the 1st and 2nd Petitioners on a *Nolle Prosequi* entered by the Director of Public Prosecution. He submitted that, the 1st Respondent while aware of his ill-motives and conditions of the 1st and 2nd Petitioners who had to leave for medication outside the country approached them with already made power of attorneys for their signature or rather, they be taken to prison.

He argued, therefore, that it is upon that background that the 1st Respondent fraudulently attempted to deprive the Petitioners their shares in the company.

Mr. Rutaihwa submitted further that, earlier the 1st Respondent had fraudulently while purporting to be owning 300 shares which were held by the later Jayantilal Ladwa who, however, had transferred them to the 1st Respondent and the 3rd Petitioner in early October 2018, long before even this Petition was filed. Reliance was placed on **Annexure DCN-7** to the Petition, paragraph 12 of the Petition, and the affidavit of the 3rd Petitioner to support the latter averments. He submitted that such acts of attempted deprivation at prejudicial to the Petitioners rights and interests in the 2nd Respondent.

Mr. Rutaihwa submitted that, while the 1st and 2nd Petitioners were incarcerated the 1st Respondent facilitated and encouraged their being incarcerated for three months up to sometime in October 2019 and at all that material time, he continued to manage the affairs of the 2nd Respondent alone. He argued that at the time, however, the 3rd Petitioner was in the country before the 1st Respondent agitated threats to causing the 3rd Petitioner flee away for fear of falsely being

implicated in criminal charges, and the 1st Respondent restlessly begun the process of effecting major changes on the company mainly on the fact that the 1st Respondent was the only member and director in access of the company's office and documents.

Mr. Rutaihwa submitted as well that, in the months of October 2019 the 1st and 2nd Petitioners got a discharge by way of *Nolle Prosequi,* and the 1st Respondent not being pleased by their release, the 1st and 2nd Petition being people of age were seriously sick and therefore wanted to attend medication. He submitted that, they arranged to travel to India for medical attention.

According to Mr. Rutaihwa submissions, learning that fact, the 1st Respondent through his Advocates approached the 1st and 2nd Petitioners demanding their signatures on Powers of Attorney to leave the affairs of the company in the hands of or rather they be taken back to jail. He submitted that, the 1st and 2nd Petitioners had to sign in protest the already made Powers of Attorney under the undue influence of the 1st Respondent with his advocates. He pointed out some features of the said powers of attorney attached to the Petition as **Annexure DCN 3**. He noted that, at front it reads:

"DRAWN BY:

Lawgical Attorneys.

1st Floor, Golden Tulip Hotel…"

Mr. Rutaihwa's eyebrows were raised to question why the Power of Attorney should be shown to have been prepared by **Lawgical Attorneys** who all along have been representing the 1st Respondent and whose contest by the Petitioners are vivid. He submitted that; the Petitioners had never instructed **Lawgical Attorneys** to prepare the powers of attorney for them, and as such, the conclusion to be made was that there was undue influence on the signing of the powers of attorney which were already made by the 1st Respondent's Advocates.

Mr. Rutaihwa has drawn the attention of this court to the writings of **Wel Partners, Whaley Estate Litigation Partiners**, titled: *Undue Influence Checklist, (unpublished) (available online from www.welpartners.com)* which writings are to the effect that:

"in case where multiple planning instruments have been drafted and executed, courts will look for a pattern of change involving a particular individual

> as an indicator that undue influence is at play… a court may then look at the circumstance of the planning document to determine evidence of influence."

He further pointed this court further to the decision of **Kohut v. Kohut Estate** (1993), 90 Man R (2d) (Man QB) at para. 38 where it was stated that, in a situation where undue influence is alleged,

> "[a] court will look at the relationship that existed between the parties to determine whether there is an imbalance of power".

From the above persuasive authorities cited, it was Mr. Rutaihwa's submission that, in the present Petition there was a plan by the 1st Respondent to influence the 1st and 2nd Petitioners under force to sign the powers of attorney. He contended that, at line 6 of the contested power of attorney of the 2nd Petitioner it is shown that the shares are 400 while the 2nd Petitioner attests that he has never had such a number of shares in the company.

He submitted that, while in law a power of attorney cannot transfer shares in a company, the principle of law is to the effect that no one can give what he does not have. It was his contention, therefore, that the 2nd Petitioner has never owned 400 shares in the 2nd Respondent and could not freely sign the document to give shares as alleged by the 1st Respondent, which shares he did not have in the 2nd Respondent.

Mr. Rutaihwa submitted further that, supposing that the powers of attorney were valid (a fact he denies) what exactly did the documents provide? He quoted therefrom as follows:

> "…to transfer the said shares to the company and/or cancel such shares and to re issue and register the shares in my name to the said Jitesh Jayantilal Ladwa…".

He submitted however, that, even though the powers of attorney were void on their face, the procedure which, if at all, ought to have been followed to the stage of transferring such shares in the name of the 1st Respondent, was to involve the above steps. He submitted that, assuming the 1st and 2nd Petitioners had given the powers of attorney to the 1st Respondent, still the 3rd Respondent should have been taken

through all those procedures as a director and member of the 2nd Respondent, a fact which was never done.

The other issue which Mr. Rutaihwa has pointed out in his submission is the fact that, the powers of attorney were never signed before a commissioner for oath at the time of undue influence, ever known to the Petitioners. He submitted, there was to be expected a counter affidavit or otherwise to disprove such a fact that the 1st and 2nd Petitioners have never signed a power of attorney before a commissioner for oaths let alone the one indicted. Relying on section 70 of the Evidence Act, Cap.6 R.E 2022 regarding the necessity of an attesting officer who should have testified to such a fact. Mr. Rutaihwa submitted that luck enough the powers of attorney were revoked by the 1st and the 2nd Petitioners in early 2020 as **Annexure DCN-3** would show.

Regarding the procedures under which shares of a company are transferred, it was Mr. Rutaihwa's submission that, a power of attorney cannot be relied on to transfer shares. He submitted that a company must abide by its Memorandum and Articles of Association (hereafter referred in short as "**MEMARTS"**). He argued that, since the MEMARTS did not provide for transfer by way of a power of attorney,

that which the MEMARTS did not provide cannot be done unless they are duly amended or altered.

Reliance was placed on the case of **Yasmin Haji vs. Kenyatta Drive Properties Ltd & Another**, Misc. Commercial Cause No.14 of 2022 regarding that a transfer effected in contravention of the MEMARTS is illegal. He argued that the copies of Board resolution purported to have been signed by the 1st and 2nd Petitioners are foreign as were never part to the pleadings. He queried as to how possible a power of attorney gave the 1st Respondent mandate on the shares on 29th October 2019 and later the Petitioner seat on the 31st of October 2019 to pass a resolution on transfer of shares. He concluded that the two a logically incongruent and suggests a forgery.

Likewise, it was his submission that the purported letters of resignation were forged since they are signed on 28th October 2019, but the resolutions are said to have been signed and passed on the 31st of October 2019. He argued that termination of directorship is an exercise vested in the members during annual general meeting of a company.

Mr. Rutaihwa referred to this court what Articles 21 to 33 of the 2nd Respondent's MEMARTS provides and argued

that there is no mention of transfer of shares by power of attorney but rather by way of an instrument of transfer, whose format is provided for under Article 22 of the MEMARTS. He submitted that, in law there is no authority that has ever sanctioned a transfer of shares by way of a power of attorney.

He argued, instead, that, under the law, transfer of shares is regulated and governed by Part III of the Companies Act, from sections 74 to 87 thereof, and that, one must, in the first place, bear in mind what section 27 (1) (a) of the Act provides. He submitted that; the restrictions addressed by the subparagraph is what must be fetched from the MEMARTS of the Company.

He submitted that, sections 74, 77, 79,80, 81, 82, and 83 are relevant to the matter at hand. Out of these provisions reliance was placed on section 74, 77 and 80 by way of reference regarding transfer of shares. He submitted that, as per the answer to the Petition, the alleged transfer of shares was done by way of a power of attorney executed in 2019. He submitted, however, that the evidence attached to the answer to the Petition is a Tax clearance Certificate, **Annexure JJ3.** He told this court that there was not any transfer instrument attached thereto since the Petitioners never signed any

transfer instrument or resignation letter as alleged by the 1st Respondent.

Mr. Rutaihwa submitted that, a close look at the transfer instruments there is no reflection that the same were made in accordance with the alleged Power of Attorney. He argued that the attestation of clauses indicates that they were signed by transferor and the transferee in their individual capacity, the suggestion being that they were made even after the purported power of attorney got revoked. He submitted further that, while the power of attorney purported to be signed by the 2nd Petitioner appear to be indicating a transfer of 400 shares while the instrument of transfer shows 300 shares questioning who changed then numbers. He reiterated his earlier submission based on the principle that no one can give that which he does not have.

As regards **Annexure JJ3** (the tax clearance certificate), Mr. Rutaihwa submitted that, one should wonder how can tax paid exceed the value of the property purchased or transferred? He questioned whether the was made by way of payment of money in exchange of shares or on natural love and affection. He questioned how the assessment came into being. He responded that, there was no real transfer which

took place. He argued that, looking at the certificates of capital gain, the same speaks for themselves in that, reading the disclaimer which reads:

> "This Tax Clearance Certificate should be tendered in its original form, and it is valid only if it is embossed with the official seal."

He submitted that; such an official seal is far from being seen on the certificate irrespective of its being signed. He concluded that the same is invalid.

Submitting on the reliefs which should be made available to the Petitioners, it was Mr. Rutaihwa's submission that, the provisions of section 233(1) and (3) of the Companies Act are couched in a wider and the court enjoys wider discretion to grant interim and perpetual orders with a view to regulate the conduct of the company in future.

He referred to the kind of orders which the Petitioners are seeking arguing that the Petitioners have asked for a permanent restraint of the 1st Respondent permanently from taking part in the management of the affairs of the company and an order directing the management of the company to be placed in the hands of the Petitioners. To cement the

position, reliance was placed on section 197(e) of the Act. He urged this court to grant the Petition with costs.

Responding to the submissions, Mr. Sisty Bernard, the learned counsel for the Respondent submitted that, the 1st and 2nd Petitioners had sometimes in October 2019, through a Board Resolution and two registered Special Powers of Attorney authorized transfer of shares to the 1st Respondent where upon two Deeds of transfer were prepared and got executed by the 1st and 2nd Petitioners.

Mr. Bernard submitted that, subsequently all documents were submitted to the TRA, and a Tax clearance was issued after payment of the necessary taxes on 31st December 2019. He submitted that, apart from issuing the two powers of attorney, the 1st and 2nd Petitioners did also sign resignation letters.

Mr. Bernard argued that, considering section 233(1) and (3) of the Companies Act, Cap.212 R.E 2002, it is blatantly clear that for one to institute a petition under that provision, one must, first, be a member of the company and second, his shares must have transferred to by operation of the law. He submitted that, the 1st and 2nd Petitioners do not meet the first criteria since they no longer own shares in the company.

He contended that, by the 20th of January 2020 the Petitioner were no longer shareholders as they had transferred their shares to the 1st Respondent, a transfer which was completed on the 31st of December 2019 when the 1st Respondent paid capital gain tax and stamp duty. He thus concluded that by January 2020 the 1st and 2nd Petitioners lacked the legal basis got them to bring this action against the 1st Respondent.

The second argument fronted by Mr. Bernard is that the 1st and 2nd Petitioners have nor acquired shares in the 2nd Respondent through operation of the law. Relying on section 39 of the Income Tax Act, 2004 he argued that the 1st and 2nd Petitioners parted with their assets as evinced by the Board Resolution and the executed Special Power of Attorney.

Thirdly, relying on **Annexure A** to the Affidavit in support of the Answer to the Petition, on the 16th of April 2020, both the 1st and 2nd Petitioners were not members of the 2nd Respondent despite the orders of this Court in the **Misc. Commercial Application No.62 of 2020** which he contended that had no effects on the membership in the 2nd Defendant. As I stated earlier, reference to the decision and orders of this court which emanated in the **Misc.**

Commercial Application No.62 of 2020 is of no effect any more following the decision made by the Court of Appeal in respect of those proceedings and the orders emanated therefrom.

Mr. Bernard submitted that, the alleged matters in the submissions regarding that the 1st Respondent invented and fabricated false charges against the 1st and 2nd Respondents leading to the filing of the **Criminal Case No.54 of 2019** and that he encouraged that the 1st and 2nd Respondents be held in prison for three months as well as the averments that a power of attorney could not be used to transfer shares are a misdirection.

He argued that the powers to instate, supervision, charges, prosecute and terminate any prosecution are vested upon the Director of Public Prosecutions as per the Constitution of the United Republic of Tanzania 1977 and the National Prosecutions Service Act, Cap. 430 R.E 2022. He contended, therefore, that, it is illogical and irrational that the 1st Respondent invented charges against the 1st and 2nd Petitioners without proof on how he did so. He argued that in the same **Criminal case No.54 of 2019**, the 1st and 2nd Petitioners were facing charges of obtaining money by false

pretence from the ITB Bank, a fact which is totally unrelated with the Petition at hand.

Concerning the issue of power of attorney and whether such can be used to transfer shares, it was Mr. Bernard submitted that, the transfer was specified in the power of attorney and so the power of attorney can be used to transfer shares. He argued that **Annexure K-** attached to the affidavit in support of Answer to the Petition and **Annexure DCN5** attached to the affidavit of Chandulal Walji Ladwa in support of the Petition respectively shows that on the 21st of January 2020 and 3rd of January 2020 the 1st and 2nd Petitioners respectively revoked their both powers of attorney previously granted to the 1st Respondent.

Mr. Bernard argued that the Petition was filed while the 1st Petitioner had not revoked his power of attorney. He contended that one cannot revoke that which he did not grant, as it is the giver of such powers who can then revoke the same. He submitted that, it is questionable as to why the 1st and 2nd Petitioners revoked powers granted to the 1st Respondent of such were not granted in the first place and, that, if anything is to go by, the revocation was done after the

fact as by the time of revocation the 1st Respondent had executed that which he was supposed to execute.

Relying on Clause 22 of the MEMARTS of the 2nd Respondent, Mr. Bernard submitted that the same does stipulate that shares can be transferred in any manner approved by the Directors. He argued therefore, that, there is no gainsaying that the shares were not transferred in accordance with the law. He submitted that the manner and form duly sanctioned by the Directors was through a Board Resolution. He argued that the 1st and 2nd Petitioners' assertions in paragraph 9.1 and 17 of the Petition and in paragraph 11 of the Affidavit of the 2nd Petitioner are contradictory to one another.

He concluded that, as a matter of principle that, once two or more statements are in contradiction this means the opposite of the things is true. Reliance was placed on the case of **Scholastica Mukatesi Ndyanabo vs. Ipsos Tanzania Ltd**, Misc. Commercial Cause No.36 of 2021 to support that view. As regards the alleged coercion on the part of the 1st and 2nd Petitioners while signing the said documents, it was Mr. Bernard that none of them has shown to the court the mature and amount of coercion other than the frivolous and

vexatious assertions that the 1st Respondent invented and fabricated false charges against the 1st and 2nd Petitioners to make them stay in Prison for 3months while it is clear that the power to charges and prosecuted are vested in the Directorate of Public Prosecutions.

In a further submission, Mr, Bernard submitted that unfair prejudice is a tool in the hands of minority shareholders to protect their position and rights in the company on the ground that they lack much influence in the management of the company. To support that view, reliance was placed on the decision of this court in the case of **Sebastian Marondo & Anastazia Regaba vs. Norway Registers Development East Africa Ltd and Another**, Commercial Cause (Winding up) No. 26 of 2019 (unreported).

In his submission, Mr. Bernard contended that (assuming the 1st and 2nd Petitioners are still members of the 2nd Respondent (of which he denounced) being majority shareholders, with 70% shares, it would be unprocedural for them to claim for unfair prejudice against the 1st Respondent whom they assert is a minority shareholder. Finally, he contended that the 1st and 2nd Petitioners have not proved their case as they are not members of the 2nd Respondent

and, hence, it was wrong for them to have instituted the proceedings for unfair prejudice and more, based on the case of **Sebastian Marondo** (supra) they are unqualified to initiate unfair prejudice proceedings.

He contended that, even if the Petitioners were to be said to qualify, they have not been able to discharge their burden as they are bound by their pleadings which fails to show existence of unfair prejudice. He argued that the alleged CRDB Bank Accounts opened were not proved to exists and whether the funds in the accounts were misused or not. He submitted that the court must be moved by evidence beyond the assertions made in the pleadings. He contended that the allegations levelled against the 1st Respondent fails to meet the threshold set out in section 110 of the Evidence Act, Cap.6 R.E 2022, and that, the same should not be acted upon. He urged this court to decline granting the prayers sought and, instead, dismiss the Petition with costs.

In a brief rejoinder, Mr. Rutaihwa, the learned advocate for the Petitioners, submitted that, the issue whether the 1st and 2nd Petitioners are members of the 2nd Respondent with rights to bring an action against the 1st and 2nd Respondents was a matter raised as a preliminary objection at the initial

stages of this matter in the year 2020 and was abandoned by the Respondents but featured as well in the Misc. Commercial Application No. 62 of 2020 and got rejected. He recited the case of **NBC Limited & Another vs. Bruno Vitus Swalo** (supra).

He maintained his position that the 1st and 2nd Petitioners are fir members of the 2nd Respondent as co-founding members whose shares have been clandestinely dealt with by the 1st Respondent including in a manner to deprive them their lawful ownership at the time when they were already in court.

Mr. Rutaihwa submitted that, the reliance made by the learned counsel for the Respondents on tax payment is misleading and wrong because the subject of transfer of shares and tax compliance are two distinct things governed by separate things governed by two distinct laws. He argued that the process of transfer is solely governed by the company MEMARTS and the company law. He further contended that reliance on **Annexure "A"** in the submissions, which Annexure was procured after the presentment of the Petition in court had been made should not count as it was neither a

pleaded not a document contained in the Respondent's pleadings.

As regard the submissions made on the merits of this Petition, it was Mr. Rutaihwa's submission, that, the Powers of Attorney having been procured by way of undue influence and through duress cannot be regarded as proper Powers of Attorney. He reiterated his earlier submission that the 1st and 2nd Petitioners did not prepare them as such but the 1st Respondent's Advocates and were never executed not witnessed by a Commissioner for Oaths.

As regards the reasons why the Petitioners revoked the Powers of Attorneys, it was Mr. Rutaihwa's submission that, that was a reasonable and indeed logical approach because in the absence of such, the 1st Respondent could still abuse them. On whether the power of attorney can be used to transfer property, Mr. Rutaihwa conceded that it is possible but argued that it will only be so if one has validly executed power of attorney which specify therein such intended acts to be done and the same has to be registered .He argued, on the contrary that, the powers of attorney purported to be executed by the 1st and 2nd Petitioner were invalid and cannot be relied on even if registered.

Concerning the 1st Respondent counsel's submission that the shares were duly transferred in a manner approved by the Directors and evinced by a Board of Directors' Resolution, it was Mr. Rutaihwa's submission that, the Resolution referred to (Annexure "C" in the affidavit supporting the Answer to the Petition), was dated 31st of October 2019 and purportedly showing to be signed by the 1st and 2nd Petitioners and the 1st Respondent but the fact is that, the Petitioners have categorically denied to have done so.

Mr. Rutaihwa reiterated his earlier query regarding how comes if at all true, that, the 1st and 2nd Petitioners issued the Powers of Attorney on the 28th of October 2019 and the same were purportedly signed on the 30th of October 2019 and yet on 31st of October 2019 the 1st and 2nd Petitioners were allowed to sit in as Directors of the 2nd Respondent to pass a valid resolution for transfer of their shares? He contended that, a look at the Annexure "C" shows as well that clause 1 talks of "allotment of shares" which is a completely different thing away from transfer of shares.

Mr. Rutaihwa submitted that, it is a specific submission of the 3rd Petitioner that the process purportedly involving transfer of shares including the power of attorney and the

resolution were clandestinely done if at all, without his involvement or authorization, himself being a legal shareholder and Director of the 2nd Respondent.

Mr. Rutaihwa submitted that, assuming the resolution was the one authorizing the transfers, clause 1 thereof talks of allotment of shares for no value. He queried as to why should the transfer involve consideration in monetary form as indicated in "Annexure D" to the Affidavit? Who received the said monies and in which account? He submitted that, these questions go unanswered by the 1st Respondent, but the responses are with the 1st and 2nd Petitioners to the effect that no transfers ever took place save for the fraudulent moves by the 1st Respondent. He invited this court to take judicial notice of the fact that the 1st Respondent has criminal charges over the fraudulent resolutions and powers of attorney pending at Kisutu Resident Magistrate Court.

As regards the submission by the 1st Respondent's counsel and reliance made on the Capital gain tax certificate, Mr. Rutaihwa submitted in rejoinder that, the same cannot be relied on validly since it is invalid for want of an official seal, a fact not commented upon by the 1st Respondent's counsel

meaning that they affirm to the propositions asserted by the 1st and 2nd Petitioners in that regard.

He rejoined, however that, be that as it may, when one reads the resolution which talks of allotment without value, the transfer which talks of TZS 30,000/= as consideration for the 2nd Petitioner's shares and 40,000 for the 1st Petitioner's shares and the certificates, one misses the point for the paid TZS 172,759,934 as Capital gains Tax. He argued that it is for such clear arguments that the whole process purportedly involving transfer of shares was marred with fraud and illegal conduct all aimed at unfair dealing with the interests of the petitioners and the company.

Mr. Rutaihwa further rejoined that, the 1st and 2nd Petitioners are categorical that they never signed the powers of attorneys on their own volition and paragraph 16 and 17 of the Petition are clear on that. He submitted that, para 16 is clear that the Petitioners were forced to sign or be taken to prison and the purported charges were already with the Police. As such, he submitted that, there was no contradicts in the submissions and what the pleadings stated. He argued that the term "execution" as used in paragraph 9.1 of the Petition should be understood in the context of what it means as

defined by the **Oxford Advanced Learner's Dictionary**: Special Price Edition: *"to make something legally valid: execute a legal document (i.e., by having it signed in the presence of witnesses, sealed and delivered)."*

He reiterated his submission in chief noting that the purported power of Attorney was not properly executed as it was not witnessed, neither sealed nor delivered and that, if such arguments were wrong, then the attesting witness should have proved otherwise as per section 70 of the Evidence Act. As regards the case of Scholastica Mukatesa Ndyanabo, Mr. Rutaihwa submitted that the case is distinguishable from what the present case before this court.

As regards the submission that there has been no demonstration of the nature and extent of coercion agitated to the 1st and 2nd Petitioners, it was submitted in rejoinder that the 1st Respondent began his illegal move by initiating frivolous charges against the Petitioners who having been released on Nolle Prosequi, he took advantage of them and the powers of attorney were ready made whereof the 1st and 2nd Petitioners got forced to sign them all these being intimidations based on the use of Police and at the time when the 1st and 2nd Petitioners were sick.

Finally, concerning the argument that the 1st an 2nd Petitioners being majority shareholders cannot file a matter under section 233 of the Companies Act, it was Mr. Rutaihwa's submission that, such a position is erroneous if one takes into account the decision of this court in the case of **Sabri Muslim Karim (formerly known as Sabri Ally Said) vs. Shivji Karim & 3 Others,** Misc. Commercial Case No.54 of 2022 (unreported). He contended that this is the current position of the law as compared to that of 2019. He rejoined, therefore that, based on the totality of the pleadings and what is averred in the supporting affidavit of the Petitioners, a case on unfair prejudice is fully made out and the Petition is thus well founded. He urged this court to grant it with costs.

Considering the rival submissions which I have laboured to summarize herein, the central issue for my response is whether this court should grant the Petitioners' prayers and reliefs sought in the Petition. As it might be noted from the rival submissions made by the parties herein, there are other collateral questions which need to be addressed and which, in the end, culminate into responding to the central issue at hand.

To begin with, it is a cardinal principle of law that he who alleges must prove. This is a Petition concerning an alleged unfair prejudice. In a case involving an alleged unfair prejudice under section 233 of the Companies Act, the test of such unfairness is an objective one.

A Petitioner seeking remedy under that provision, is duty bound to establish four elements to the satisfaction of the court, that: (1) the conduct of the company's affairs; (2) has prejudiced; (3) unfairly; (4) the petitioner's interests as a member of the company. See the case of **Bhavesh Chandulal Ladwa & 3Others vs. Jitesh Jayantilal Ladwa,** Misc. Commercial Cause No.35 of 2020 (unreported). See also the case of **Velisas Elizabeth Deflosse Ingleton (Petitioning as Legal representative Under the Power of Attorney of Gordon McClymont) vs. Joseph Ignatus Noronha & 2Others,** Misc. Commercial Cause No. 20 of 2021 (unreported).

As regards the first element which needs to be established, this court once stated, in the case of **Bhavesh Chandulal (supra**), that conduct complained of must be conduct of *the company's affairs*", an expression which, must be given a wider connotation within the context in which such

terminology is employed. The cases which laid down such a construction include the English case of **Gross vs. Rackind [2005] *1 WLR 3505,*** *and* **In re Legal Negotiators Limited [1999] BCC 547**. In these cases, emphasis was laid on the need to exhibit that, it is the affairs of the company which are being or have been conducted in an unfairly prejudicial manner or that it is an act or omission of the company that is or would be so prejudicial.

The sort of conducts which may affect the conduct of the company's affairs as it was stated in the **Bhavesh case** (supra), may include "*all matters that may be brought to the attention of the Board of directors for consideration*." This court noted that, even "*refusal by a company to convene a general meeting*" would amount to an act of the company.

However, whether it is to be regarded unfair or prejudicial, it will all depend on the circumstances. From that premise, this court had the following to say regarding what do all that means:

> "It means, therefore, that, actions or omissions in compliance or contravention of the articles of association of a company may or

may not constitute the conduct of the company's affairs depending on the precise facts."

Now, to contextualize the above with the framework discussion of this Petition, one must look at the kernel of the parties' contention and whether it fits within the understanding expressed herein. As noted earlier herein, this is a dispute anchored on parties who claim to be shareholders and directors of the same company. Ordinarily, the cause of shareholders disputes may involve actual or threatened misappropriation of funds or business opportunities of the company.

In the context of the Petition at hand, one of the conducts alleged to be the source of the acrimony so far witnessed amongst the parties herein despite being closely related family members is the alleged conducts of the 1st Respondent involving misappropriation of funds and mishandling of business ventures of the company, these being conducts which directly threaten the continuity of the company's affairs and its very existence. Being conducts which are an affront to the company's wellbeing, they qualify as conducts worth bringing to the attention of the Board of

Directors, and, thus, befits falling under the first element pointed out hereabove.

The issue of misappropriation of funds is to that extent associated with the opening and running of accounts not authorized by the Board of Directors of the 2nd Respondent. Such averment may be gathered from paragraph 9.4 of the Petition. Under that paragraph, the Petitioners averred that whereas the company, under a Board Resolution dated 21st December 2019 (marked **"DCN-5"** and attached to the Petition as forming part thereof), had resolved not to open new accounts and suspended operationalization of three company's bank accounts held at CRDB Bank PLC, the 1st Respondent opened and operated accounts with the CRDB Bank in the name of the 2nd Respondent with number 0250-3979-7850-0 (operated in USD) as well as an account No.0150-3979-7850-0 (operated in TZS) and No. 0250-0430-1112-6 (operated in TZS) without due authorization of the Board.

That fact notwithstanding, what needs to be responded to in my view, is the question whether such alleged conduct has been established. The evidence availed to the court is to be gathered from paragraph 15 of the Affidavit of the 2nd

Petitioner filed in support of the Petition wherein it is affirmed by its affiant that such accounts were opened and are being operated without authorization of the Board of Directors. I have looked at the counter affidavit filed by the 1st Respondent and filed in this court on the 3rd of August 2023.

Unfortunately, as I look at the counter affidavit and at the Answer to the Petition which was also filed by the 1st Respondent earlier on the 19th of March 2020, there is nothing responded to regarding the alleged acts of opening and running of bank accounts in the name of the 2nd Respondent without there being an authorisation of the Board of Directors of the 2nd Respondent. As a matter of established legal principal averments made and contained in an affidavit are expected to be responded to by way of a counter affidavit.

The above cardinal rule was emphasized, not only by this Court, in the cases of **East African Cables (T) Limited vs. Spencon Services Limited, Misc. Application No.61 of 2016 (unreported)** and **Gambalela William Bosire vs. Shrrie Marrie Fenn and 2 Others Misc. Commercial Cause No. 6 of 2019 (Unreported),** but also by the Court of Appeal, in the case of **Gilbert Zebedayo Mrema vs.**

Mohammed Issa Makongoro, Civil Application No.369/17 of 2019, (CAT) (DSM) (unreported).

In view of the above, it follows that, by not appropriately and specifically responding to the averments made under paragraph 9.4 of the Petition in the Answer to the Petition and also by not countering in the counter affidavit filed by the 1st Respondent on the 3rd of August 2023, the averments under paragraph 15 of the Affidavit of one Chandulal Walji Ladwa and paragraph 10 of the Affidavit of Nilesh Jayantilal Ladwa filed in support of the Petition, it means that the averments go uncontested and, consequently, such facts are admitted by the 1st Respondent as they are.

In my considered view, the act of one director to open and operate accounts not sanctioned by the rest of the Board of Directors of a company runs a possibility of mismanagement of funds which are assets of the company and may have a potential negative effects leading to the company failing to do its business profitably as nobody will be able to control the use into which any monies in the said accounts is put to, and whether such use is in the interest of the company or the individual running them.

Essentially, it is worth noting that, transparency in the management of the company's finances, is a paramount issue in corporate governance. Any unauthorized opening and running of company's accounts is thus a conduct which has the potential to adversely affect the affairs of the company and prejudice the interests of its shareholders as well. Without much ado, it is clear, therefore, that, the first element that the conduct complained of must be conduct of the company's affairs", is fully established.

The second and the third elements that need to be established are the element of "prejudice", and that of "unfairness". As this court stated in **Bhavesh's case** (supra),

> " in its nature, the term "prejudice" encompasses a broad meaning, including, but not limited, to financial damage to the value of the petitioner's shares. In the case of Arbuthnott vs. Bonymann & Others [2015] EWCA Civ.536 (20 May 2015), at 630, the Court was of the view, however, that: "Prejudice … may also extend to other financial damage which in the circumstances of the case is bound up with [a petitioner's] position as a member. So, for example, **removal from participation in the management of a**

> **company** and the resulting loss of income or profits from the company in the form of remuneration will constitute prejudice in those cases where the members have rights recognized in equity if not at law, to participate in that way. Similarly, damage to the financial position of a member in relation to a debt due to him from the company can in the appropriate circumstances amount to prejudice. The **prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding**. Moreover, prejudice need not be financial in character. **A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section**." (Emphasis added).

As this court stated in **Bhavesh case** (supra), "*in a Petition as the one at hand, the conduct complained of must be both* ***prejudicial*** and ***unfairly*** **so**" and, that, "*both elements need to be satisfied and, if either is not, the petition will not be well founded*." The rationale given out for such an approach is the fact that conduct complained of, as once observed, and stressed by Lord Hoffmann in **O'Neill vs. Phillips** [1999] UKHL 24, may be prejudicial without being unfair or unfair without being prejudicial. One must as well be

mindful of what Hoffmann LJ, stated regarding "fairness" noting, and referring to **Re Saul D Harrison & Sons plc** [1995] 1 BCLC 14 at 31, (Neill LJ citing Peter Gibson J in **Re Ringtower Holdings Plc** (1989) 5 BCC 82 at 90), that, the concept of fairness must be viewed in the context of a commercial relationship.

In **Bhavesh's case** (supra) this court made it clear that, since:

> "as a matter of law, the commercial relationships of a company's shareholders with the company is governed by its articles of association, …, therefore, … such contractual terms are the ones to be looked at.

However, before I probe what the MEMARTS of the 2nd Respondent provides in relation to the running of the affairs of the company and decision making thereof, I find it pertinent to revisit the allegations levelled against the 1st Respondent in the Petition and the Affidavit in support thereof and how they have been responded to by the 1st Respondent.

One of the allegations levelled against the 1st Respondent is his act of excluding other Directors from taking

part in the affairs of the company, including denying them access to the company premises. Paragraphs 9 of the Petition (from line number 7 thereof) and paragraph 9.1 (regarding transfer of shares without there being knowledge and consent of other directors) (paragraph 9.2 (denial of access supported by **Annex. DCN 4**) as well as paragraph 6 of the Affidavit of the 2nd Petitioner filed in this Court on 26th July 2023 also refers.

In his submission, Mr. Rutaihwa has argued that, the 1st Respondent's conducts of deliberately excluding the Petitioners in the running of the affairs of company which are now at the sole control of the 1st Respondent without reasons, as well as restricting the Petitioners from accessing the company offices and premises and secret opening and running of bank accounts in the name of the company without the involvement of the rest of the members or directors and/or without their sanction are not only acts done in contravention of the Articles of Association of the 2nd Respondent, but are also prejudicial to the interests of the Petitioners and the Company itself.

But before one concludes that the Petitioners have been unfairly treated and, hence, their interests in the

company are prejudiced by the conduct of the 1st Respondent, one must prove or establish that the Petitioners are members of the company itself since, as section 233 (1) of the Companies Act provides, it is an aggrieved member of a company who may file a "Petition" in Court. One of irksome questions that has come to the forefront of this Petition is whether the 1st and 2nd Petitioners are members of the 2nd Respondent, let alone being her directors.

Throughout the Petition and the supporting affidavits as well as the written submissions, however, the 1st and 2nd Petitioners have insisted that they are lawful members of the 2nd Respondent, even as founding members and are as well Directors of the 2nd Respondent. The 1st Respondent has, however, vehemently denied that fact, arguing that they relinquished their shareholding by way of transferring their shares to the 1st Respondent through Powers of Attorney duly executed sometimes in 2019.

The 1st Respondent has gone to the extent of questioning even their *locus standi* in bringing about the Petition. Much as I do not need reopen what this court discussed in some of its previous rulings it was called upon to

issue, I find it pertinent that I devote some time to address this issue.

In his submission, Mr. Rutaihwa has argued that the powers of attorney which the 1st Respondent wield on high as what evinces the transfer of shares of the 1st and 2nd Petitioners to the 1st Respondent and the subsequent processes which culminated with the issuance of a tax clearance certificate were all invalid given the manner in which the whole thing was orchestrated by the 1st Respondent. Mr. Rutaihwa' s argument has been that the purported transfer of shares did not follow the procedures under the MEMARTS and the law and was an attempt to deprive the 1st and 2nd Petitioners of their shares. Part of what he has banked on is a Criminal Case No.54 of 2019 which he argued was levelled against the 1st and 2nd Petitioners at the behests of the 1st Respondent followed by threats agitated against the 3rd Petitioner.

He contended that the 1st Respondent had instigated some dubious complaints after the 1st and 2nd Petitioners were discharged from remand and released on a *Nolle Prosequi* and that, being sick and in need of medical attention, the Petitioners were approached and induced or pressured to

sign already prepared, by the 1st Respondent's Counsels, powers of attorneys, the 1st Respondent attempting to deprive them their shares in the company. Well, in his submission, however, Mr. Rutaihwa has admitted that the facts that it is the 1st Respondent who agitated for the filing of the **Criminal Case No.54 of 2019** at Kisutu Resident Magistrates' Court was not premised on the Petition.

That being said, it follows, therefore, that, it is impossible and impracticable for this court to accept things that are extraneous to the pleadings. However, that does not mean that the whole of what has been submitted cannot be looked at. Far from that. At paragraph 9.1 of the Petition, the Petitioners denounced having executed the Powers of Attorney which the 1st Respondent has defended to be the source of the documents which entitled him to transfer to his fold the shares which belonged to the two Petitioners.

But without much ado, I find doubtful situation regarding the whole process which the 1st Respondent's counsel has earnestly and vehemently defended tooth and nail in his submission. The doubt I entertain first, comes from the fact that, in terms of Directorship and shareholding of the 2nd Respondent, it was not just the 1st and 2nd Petitioners who

were Directors, but the directorship had in its fold the 3rd Petitioners as well.

One immediate follow-up question that follows, however, is that, if at all the 1st and 2nd Petitioners decided to quit and cede their shares to the 1st Respondent as alleged, was there now a formal meeting of the remaining directors of the company, i.e., the 1st Respondent and the 3rd Petitioner, which blessed the whole process in accordance with the dictates of the MEMARTS of the company?

In my reading of the Articles 22, 23, 27, 28, 29, 30, 31 and 32 of the MEMARTS I find that a detailed procedure regarding how shares ought to be transferred as between "retiring and interested members" should be. I see nowhere in the 1st Respondent's submissions and answer to the Petition or affidavit in support thereof, that such a procedure was adhered to. And my reading of those Articles as well suggests to me that, the whole process must also emanate from or have the blessings of all Directors of the Company since all, as members of the Company had equal right to bid for the shares which any of the members of the Company would want to part with.

In this Petition at hand, nowhere has it been shown that a meeting of the 2nd Respondent company was convened to deliberate on any of the alleged offers to cede shares to the 1st Respondent, leave alone to any other member of the company by the 1st and 2nd Petitioners. That means the transfer did not consider the procedure laid down in the Articles of Association of the Company.

In essence, a transfer of shares of members of a company is not a trivial agenda which could be hastily carried out by way of mere signing of a Power of Attorney without there being any resolution of the company which endorses the transfers. I hold it to be the rule of the thumb because the businesses and operations of the company, including matters such as allotment of shares, the call; forfeiture; transfer or re-allotment and appointment of directors and the like, are all matters which must be evinced by the resolutions made in the meetings of the Board of Directors and in all cases those are matters premised on the MEMARTS of the Company. See the case of **Gambalela William Bosire vs. Shrrie Marie Fenn & 2Others**, Misc. Commercial Cause No/6 of 2019 (unreported).

As I stated herein, my reading of the provisions of Articles earlier cited hereabove clearly reveals that meetings of the Directors of the Company would be needed whenever a transaction involving transfer of shares come into question. By all standards, one should not also lose sight of the wisdom expressed by the Court of Appeal in the case of **Morogoro Hunting Safaris Limited vs. Hamima Mohamed Mamunya, Civil Appeal No. 117 of 2011 (unreported).** In that case, the Court of Appeal made the following observations:

> ".....we would like to seize this opportunity to expound the point that **Board Meetings are an integral part of the business of the company, as they inform the Board Members about the condition, strategy and/or failures of the Company**. On that basis, it is crucial for the directors to be served with notice on when and where the meeting will take place to give them opportunity to attend such meetings.... [**A]ny particular company carries out its management functions by**

> **its directors**; and **that the directors must act collectively is, by resolution,** unless provided otherwise in the Articles …." (Emphasis added).

In this Petition, however, even if one was to hold that the 1st and 2nd Petitioners signed-off their shareholding and exited the Company, (which fact I do not agree with) still the lingering question of non-adherence to the dictates of the Articles of Association will still stand to challenge the process since, as 3rd Petitioner who is a member and a Director of the 2nd Respondent testified in his affidavit (see paragraph 9 thereof as well as his see paragraphs, 5, 6, 7, 8, 10 and 11 of the Affidavit in Reply to the 1st Respondent's Counter Affidavit) nowhere was he involved in sanctioning the whole process and has never received any notice of call for a meeting of the company.

As a matter of legal requirement, where a meeting of the company is to be convened, there must be service of a Notice of call for a meeting and served well in time. Where such notice is not issued to a deserving member of the company, he has all rights to denounce any resolution passed

by the attending members of the company since, as a member, he has all rights to attend meetings of the company and pass resolutions. The Court of Appeal made that point clear and certain in the case of **Morogoro Hunting Safaris Limited vs. Hamima Mohamed Mamunya**, (supra) where it was stated as follows:

> "We have also pointed out that, because of that, notices informing them about the board meetings **must always be given to all of them in sufficient time**.... failure to serve the notice to the Respondent requiring her to attend the meeting of 10.8.2004 was not accidental; ipso facto/ it was deliberate. **Consequently, the Board Meeting of 10.8.2004 was invalid**." (Emphasis Added)

The above decision makes it plain that, a resolution of the Board of Directors made in a meeting which was not notified to all members of the Board of Directors in time, let alone one which no notice at all is evinced to have been issued to the members of the Board of Directors as the situation is in

the present Petition in respect of the purported Board Resolution attached to the Affidavit of the 1st Respondent filed in support of the answer to the Petition as **Annexure "C"**, that resolution becomes invalid just as the meeting from which it was procured.

In the present Petition the 3rd Petitioner has averred in his Affidavit and Reply Affidavit filed in this court in support of the Petition that, he has never been served with any notice calling for a meeting from which the resolution attached to the Affidavit of the 1st Respondent filed in support of the answer to the Petition as **Annexure "C**" emanated. Likewise, he has attested through paragraph 12 of his affidavit in support of the Petition that no meeting or notice of meetings were ever availed to him calling for meetings in which he was to be removed from being a director in the 2nd Respondent or that one Michale Gayo Luwongo should replace him as a Director.

Perhaps, one need to be reminded of the decision of this court in the case of **Gambalela William Bosire vs. Shrrie Marie Fenn & 2Others**, Misc. Commercial Cause No/6 of 2019 (unreported) that, where procedures applicable for the termination of a company's director are faulted contrary to the Articles of Association of the Company, that

appointment will be invalid. That will mean that the 3rd Petitioner is still a Director of the 2nd Respondent.

In his affidavit in Reply to the Affidavit of the 3rd Petitioner, however, the 1st Respondent is on record admitting in paragraph 7 thereof that, the shares of the 1st and 2nd Petitioners were transferred without there being any meeting of the company. If that be the case, one would wish to know from which source then was the Board Resolution attached to his Affidavit filed in support of the Answer to the Petition?

As a matter of common knowledge, a company's resolution is a product of its board's meeting. It cannot just be drawn from nowhere. If it was drawn without there being the meeting of the Board of the 2nd Respondent, that fact will also tell and indeed tend to confirm the Petitioners' averments that the 1st Respondent hijacked the 2nd Respondent to manage it in a 'one-man-show' style while it should have been run and managed in accordance with the dictates of its MEMARTS, and that will in itself amount to an act which is unfair and prejudicial to not only the members but also the company itself.

Furthermore, in his answer to the Petition and the supporting affidavit filed by the 1st Respondent, nowhere has it

been shown that the 3rd Petitioner was ever involved in the transaction regarding the transfer of shares to the 1st Respondent by the 1st and 2nd Petitioners. This will mean that, by sidelining the 3rd Petitioner who was a co-director in the 2nd Respondent's company, that fact also paints a black spot on the whole process rendering it *ultra vires* the Articles of Association which requires involvement of all Directors when it comes to transfer of shares amongst the members.

Article 97 of the MEMARTS of the 2nd Respondent provides, for instance, that the quorum necessary for the transaction of the business of the directors shall be two. Further Article 98 of the MEMARTS provides that the:

> "continuing directors" may act notwithstanding any vacancy in their Body (sic) but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purposes of increasing the number of directors to that number or of summoning a general meeting of the Company but for not other."

But all could have ended there with the 3rd Petitioner's lamentations being upheld as valid for being validly made and unchallenged by the Respondents. But one may go a further step and examine the validity of the alleged instruments constituting the Powers of Attorney which are said to be executed by the 1st and 2nd Petitioners.

In his submissions, Mr. Rutaihwa argued that the instruments alleged to be Powers of Attorney were forced on the 1st and 2nd Petitioners for them to sign having been incarcerated for a period of three months and immediately upon their release following a *Nolle prosequi* preferred by the Director of Public Prosecution (DPP).

He argued that the 1st and 2nd Petitioners never signed and if they did, they did it under protest or undue influence since the documents has already been prepared by the learned advocates of the 1st Respondent who demanded that the 1st and 2nd Petitioners sign them lest they risk being sent back behind the bars. The submission made by Mr. Rutaihwa are based on paragraph 7, 8, 9, and 11 of the 2nd Petitioner's Affidavit filed on the 26th of July 2023 and paragraphs 19, 20, 21, of the affidavit filed on the 04th of May 2020, as well as paragraph 5 of the 2nd Petitioner's Reply Affidavit.

As correctly argued by Mr. Rutaihwa, the powers of Attorney (Annexures "**B**" and "**C**") were drawn by the advocates representing the 1st Respondent. There is nowhere is it filed in court an affidavit evincing that the 1st and 2nd Petitioners ever directed the said advocates in the name of "**Lawgical Attorneys"** to draw up for them such instruments. Neither has there been filed in court an affidavit of the commissioner for oath who attested them as section 70 of the evidence Act Cap.6 R.E 2022 would require. The section provides that:

> "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court, capable of giving evidence."

In my considered opinion and, taking into account that the 1st and 2nd Petitioners contested the Powers of Attorney openly in the pleadings, one would have expected that section 70 of the Evidence Act, Cap.6 R.E 2022 would be fully invoked to clear the dusts. However, the Respondents did not invoke

the provision to bring before this court the attesting witness. Failure to adhere to such dictates of the law means that the document cannot be relied on as evidence.

In his submission, Mr. Rutaihwa contended further that the 1st and 2nd Petitioners were subjected to an undue influence meaning that they did not act independently or out of their own free volition. To entangle such a submission, it is my considered view that, one must look at the circumstances surrounding execution of the powers of attorney which are under discussion.

As gathered from the affidavits filed by the Petitioners in support of the Petition, the execution of the respective powers of attorney was done immediately after the 1st and 2nd Petitioners got released from custody following the Nolle Prosequi preferred in their favour by the Director of Public Prosecutions. Second, their health status was unsound, as they were looking forward to seeking for medication as averred in the affidavit of the 2nd Petitioner. Moreover, according to the averments in the affidavit of the 2nd Petitioner, above their heads were the hanging threats reminiscent of the *Swords of Damocle*s that if they do not sign there was possibility to be remanded in custody.

Much as the 1st Respondent countered the averments of there being threats in his counter affidavit, the fact that the 1st and 2nd Petitioners were just released under a Nolle Prosequi remains, coupled with the 1st and 2nd Petitioners denial that they ever instructed the 1st Respondent's counsels to draw-up the Powers of Attorney or that they appeared before the attesting witness who was not sought to testify, raised the sceptre of concerns regarding the whole transaction and whether the 1st and 2nd Petitioners really acted in their free volition.

As a matter of fact, any act carried out under pressure or where a person is made to perform a transaction while under the fears of whatever nature, cannot, if such pressure or threats /fears were exerted as to overpower his volition, such will invalidate any outcome of a transaction which will emanate from such an environment. Whenever there is such an importunity to act or take action, the same tends to take away the free agency of the will of a person and that vitiates the transaction in which he or she might have been involved.

It is from that context that one may as well look at the reliability of the powers of attorney which the 1st Respondent seems to have relied on as being freely donated to him to act.

But, as I stated, even if they were to be valid, still on their own, the powers of attorney could not have effectively transferred the 1st and 2nd Petitioners' shares without adhering to the procedure set out in the MEMARTS. Put differently, the 3rd Petitioner, being a member of the 2nd Respondent, could not have been by-passed considering what the Articles of Association stated regarding transfer of shares among members. Consequently, it is my further findings that the powers of attorney relied on were ineffective, invalid, and illegally obtained.

It follows; therefore, the 1st and 2nd Petitioner were and are still valid members and Directors of the 2nd Respondent. Whatever might have been done suggesting to either transfer their shares or end their directorship in the 2nd Respondent was done outside the purview of the company's MEMARTS and such cannot stand.

In the totality of the above discussion, it is my consider view and, thus, my findings, that the conducts complained of by the Petitioners constituted acts that were unfairly prejudicial to the company and the shareholders. Such acts include those of misappropriating funds of the 2nd Respondent by way of opening and operating accounts which have never

been authorised by the Board of Directors to be opened/operated; denying access to the Petitioners who are still valid directors of the 2nd Respondent and not calling for the valid meetings with valid notices all of which are acts that contravene the Articles of Association of the 2nd Respondent.

A final consideration is what reliefs should this court grant. In this case the Petitioners have sought for the following reliefs:

1. An Order of this court, declaring that, the conduct and operations of the 1st Respondent were unlawful and prejudicial to the interests of the company and the petitioners as shareholders, directors and members of the Company.

From the discussion here and considering the pleadings and submissions made herein, I find that the making of the respective order sought by the Petitioners is warranted. This Court does hereby find and declare that the conduct and operations of the 1st Respondent were unlawful and prejudicial to the interests of the company and the petitioners as shareholders, directors and members of the Company.

2. An Order of this court, restraining the 1st Respondent permanently from taking part in the management of the affairs of the company and an order directing the management of the company to be placed in the hands of the petitioners.

As regards the second relief sought by the Petitioners, I do not find that to be a suitable relief which should be made by this court. I hold that view because, when there is an alleged problem of mismanagement or maladministration within a company as it has been argued and evinced herein, instead of allowing the court to banish some of its members from taking roles or part in the affairs of the company, the appropriate course is to leave the such matters within the powers of those who are entrusted to run the affairs of the company to act on those matters in accordance with the MEMARTS of the respective company.

In the case of Bhavesh Chandulal Ladwa (supra) this court, being confronted with a similar relief sought by Petitioners therein has the following to say, and I quote:

" it is my view that, at the moment, instead of banishing the Respondent

> who is also a director and member of the 4th Petitioner from the affairs of the Company, I find it imperative to leave the matter regarding his membership and involvement in the company affairs in the hands of all Directors for them to decide in their lawful meetings. In my view, I do not think it is appropriate for this Court to go to that length at this time. It suffices to say that, Court's interference in the matters concerning the running of the affairs of a private entity is to be invoked when there is an absolute need to do so. For that matter, this Court directs that, a Directors' meeting be convened to ascertain whether or not their running of the company is serving the intended purposes, and if not, the Company has to make appropriate resolutions in line with the laws."

In the same manner, I will adopt that position even this case, leaving such matters in the hands of the 2nd Respondent's

Directors and members to consider in their annual meeting which this Court hereby direct that it be convened without failure to deliberate and make appropriate resolutions in line with the laws regarding appointment of a new managing director of the company who shall oversee the management of the day to day affairs and running of the company in a manner that serves the interests of not only all shareholders but also the Company at large.

3. An Order of this court directing and authorizing civil proceedings to be brought for, and on behalf of, the company by any of the petitioners or the petitioners jointly to compel the 1st Respondent make good all losses and business distortions incurred because of misappropriation of the company's funds and mismanagement of the company by the 1st Respondent.

The above pointed relief sought by the Petitioners is granted should they consider it necessary and appropriate after they have taken stock of the company's state of affairs financially or otherwise and subject to the passing of an

appropriate resolution authorising such a course of action to be taken.

4. An Order compelling the 1st Respondent to vacate the office and business premises to be used by the company only and relocate his personal business ventures from the company's premises.

Considering the averments made in the Petition I find that the granting of the fourth relief sought by the Petitioners warranted. In view of that, the 1st Respondent is hereby ordered to vacate the Company's office and business premises for use of the Company only and relocate his personal business ventures from the company's premises.

5. Payment of general damages to the Petitioners as the court may assess.

Basically, general damages flow from the wrongs alleged to have been occasioned to the claimant. In the case of **Said Kibwana &General Tyre E.A. Ltd vs. Rose Jumbe, [1993] TLR, (CAT)**, the Court of Appeal held that, if the damage be general, it must be averred that such damages were suffered. In their Petition, however, I see nowhere has

that been averred, except that, it features in the prayers. In that regard, I will decline granting that prayer.

6. Costs of the suit be borne by the 1st Respondent.

As regards costs, I find that the Petitioners are entitled to costs of this petition. The 1st Respondent is thus condemned to pay all costs incurred by the Petitioners.

7. Any other relief or order the honourable court shall deem fit and proper to grant.

Under this prayer I find it necessary to issue the following orders and reliefs:

(i) As I pointed out herein, since there has been no proper meetings in which the appointment of one Michael Gayo Luwongo as a Director of the 2nd Respondent was called, a matter which the 3rd Petitioner averred to have been carried out in violation of the MEMARTS of the 2nd Respondent, his appointment in whatever manner it might have occurred was unlawful and is hereby revoked.

(ii) The directors of the Company, (the 2nd Respondent) (who, for clearance of doubts include the Petitioners herein) are hereby directed to call for an Annual General Meeting of the Company in accordance with the requirements of the law, and one of the agenda of the meeting should include taking stock of the Company's assets and financial status.

(iii) The Directors are further hereby ordered to call for a special meeting of the Directors and, in that Directors' meeting they should, as one of their agenda, appoint in line with Article 78 of the MEMARTS, a managing director who shall run and manage the affairs of the company on a day-to-day manner and in accordance with the MEMERTS of the 2nd Respondent and the law.

It is so ordered.

DATED AT **DAR-ES-SALAAM** ON THIS 17TH DAY OF

NOVEMBER 2023

.....

DEO JOHN NANGELA

JUDGE

Right of Appeal Fully Explained.