

TANZANIA / JUDGMENT

# RUPESH KUMAR SONI VS VINOD KUMAR SONI COMM CASE NO

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1 January 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA COMMERCIAL DIVISION AT DAR ES SALAAM COMMERCIAL CAUSE NO. 8 OF 2023 IN THE MATTER OF THE COMPANIES ACT NO.12 OF 2002 AND IN THE MATTER OF PETITION BY MEMBERS FOR AN UNFAIR PREJUDICE ORDER BETWEEN RUPESH KUMAR SONI..... PETITIONER VERSUS VINOD KUMAR SONI..... 1st RESPONDENT RAJESH KUMAR SONI..... 2nd RESPONDENT GURU ENGINEERING WORKS LIMITED..... 3rd RESPONDENT

## RULING

Date of Last Order: 22/04/2024 Date of Ruling: 28/06/2024 GONZI, J. The Petitioner filed the present petition praying for the following reliefs as can be captured verbatim in the petition:

- i) An Order declaring the conducts and operations of the 1st and 2nd Respondents of denying recognizing the Petitioner's rights and interest as shareholders and Directors of the company were and are unlawful and prejudicial to the 1 interests of the Petitioner as a shareholders, directors and members of the Company. ii) An Order restraining the Respondent permanently from restraining the petitioner from accessing and take part in the management of the affairs of the Company. iii) An order that all directors and shareholders be allowed an access to the Company's office. iv) Payment of general damages to the petitioners as the Court may assess.
- v) Costs of the suit be borne by the 1st and 2nd Respondent. vi) Any other relief or order the honourable court shall deem fit and proper to grant in the circumstances. In the Petition, the Petitioner alleged that the 3rd Respondent Company was incorporated on 21st July, 1982 and that it had three members /shareholders. These were Mr. Sohanlal Rikhiram Soni (the late father of the Petitioner), Chande Kanta Soni (the late mother of the Petitioner) and the 2nd Respondent herein Rajesh Kumar Soni. He stated that the 3rd Respondent Company was incorporated with 1000 shares of TZS 100/= each, hence making up a share capital of TZS 100,000/= but that later on the share capital was increased to TZS 10,000,000/= on 31st December,

1988. He stated that as it can be seen under Article 17 of the Memorandum and Articles of Association, the First Directors of the 3rd Respondent were the three members afore mentioned. He stated that on 3rd February 1998, the Petitioner became a subscriber of shares in the 3rd Respondent whereby he was allotted 5,000 shares which were fully paid up. He stated that, this allotment of shares was communicated to the Registrar of Companies by the 3rd Respondent. The Petitioner stated that from 3rd February 1998, shareholding and directorship in the 3rd Respondent company changed as the Petitioner also became a shareholder with 5,000 shares and a director of the 3rd Respondent Company. In the changes of 3rd February 1998, Sohanlal Rikhiram Soni held 79,900 shares, Rajesh Kumar Soni held 5,000 shares, Chande Kanta Soni held 5,000 shares, Vinod Kumar Soni held 4,980 shares and the Petitioner held 5000 shares. The 3rd Respondent company once again increased its capital on 31st December 2001 from TZS 10,000,000/= to TZS 500,000,000.00 and thus, once again, as the newly created shares were allotted to all shareholders, Sohanlal Rikhiram Soni held 3,220,000 shares, Rajesh Kumar Soni held 495,000 shares, Chande Kanta Soni held 495,000 shares, Vinod Kumar Soni held 495,000 shares and the Petitioner Rupesh Kumar Soni held a total of 200,000 shares. He stated that all the shares allotted were fully 3 paid up shares and that his shareholding was notified to the Registrar of Companies. The petitioner stated that he left his interest of his shareholding in the control of his late father Sohanlal Rikhiram Soni who is now deceased. He stated that without his knowledge nor being notified, his shares were transferred without his knowledge and that he learned that fact in the family meeting that he had been removed from the company. He stated that in November 2021, he triggered an official search at the Registrar of Companies through his lawyers Hallmark Attorneys and came to learn that the Company had a share capital of TZS 700,000,000/= and the shareholders were only Rajesh Kumar Soni with 1,666,668 ordinary shares, Vinod Kumar Soni with 1,666,666 ordinary shares, Sohanlal Rikhiram Soni with 1,666,666 ordinary shares. The petitioner attached the official search report from the Registrar of Companies dated 11th November 2021, as Annexure Soni 7. He stated that upon sending his lawyer for physical search at the office of Registrar of Companies, he was able to obtain Annexure Soni 8 being Form of Annual Return of the company for the year
2003. He learned therefore that he had been removed from membership and directorship in the 3rd respondent company in 2003. He stated that the 4 annual returns filed from 2003, 2009 to 2011, 2013 to 2015 and 2017 all indicated that the Petitioner had been removed from the Company as a member and director. Also, he noted that there was an increase in share capital by TZS 200,000,000/= from the TZs 500,000,000/= which he knew. The increase was done in 2004 by ordinary resolution of the respondent company. He noted that the 3rd Respondent did not file any documents with the Registrar of Companies on how the shares of the petitioner had been transferred in 2003. Hence the petitioner wrote a letter to the Registrar of Companies on 23rd November 2021 through his Lawyers complaining of his irregular and suspicious unlawful removal from membership and shareholding in the 3rd Respondent Company by transfer or disposition of his shares. The Registrar of Companies

responded to the Petitioner's letter on 11th February, 2022 saying that the Registrar had suspended all records of the 3rd Respondent company and had ordered the directors and shareholders of the 3rd Respondent to convene a meeting at the office of the Registrar of Companies over that complaint. The meeting was held on 3rd March, 2022 and the petitioner stated that it was during that meeting that he confirmed that the Respondent had acted in a manner which is prejudicial to him and to the company as there was unknown 5 authorization of transfer of his paid up shares to his late father Sohanlal Rikhiram Soni, and that there was an increase of share capital without his knowledge. He submitted that the purported transfer document is whitewashed hence not making it clear as to who had signed at the execution part of the document. On 31st May, 2022, the Registrar of Companies wrote to the petitioner saying that the agreement for transfer of shares did not bear any signature and that the purported Annual return for 2004 could not be traced and that the records of status of the 3rd Respondent was restored as per the records of 2002 and that the 3rd Respondent was removed from online registration system. The petitioner therefore stated that the Registrar of Companies in effect recognized him as a shareholder. The petitioner concluded that all the misconducts complained of were and are done by the 1st and 2nd Respondents as members and directors of the 3rd Respondent company hence prejudicial to the Petitioner. The petitioner attached to his petition as Annexure Soni 1, the Memorandum and Articles of Association of the 3rd Respondent Company dated 1982, Certificate of incorporation of the 3rd Respondent company, particulars of directors or managers, the company resolution and extract from the resolution of 1988 6 increasing the share capital to TZS 10,000,000/=. Annexure Soni 2 was the Amended Annual Return for 2002 which shows the Petitioner was among the shareholders and directors of the 3rd Respondent company. Annexure Soni 3 was Amended Annual Return for the year 1998 which shows the Petitioner was among the shareholders and directors and the capital of the company was TZS 10,000,000/=. Next after Annexure Soni 3 the petitioner's annexures jumped to Annexure Soni 6 which is made up of the Amended Annual returns for the years 1998 to September 2002 collectively. Annexure Soni 7 is the Search Report from the Registrar of Companies dated 11th November 2021 showing shareholding status in the 3rd Respondent company wherein the Petitioner does not feature anywhere as a shareholder or director. Annexure Soni 8 is Annual return for 2003 which does not name of the Petitioner as a shareholder or director. According to the Petitioner 2003 is the year that his shares were transferred without his knowledge or consent to his late father Sohanlal Rikhiram Soni. Annexure Soni 9 is a letter from Hallmark Attorneys dated 23rd November 2021 to the Registrar of Companies giving notice of irregular transfer of shares in the 3rd Respondent company. Annexure Soni 10 is a letter from the Registrar of Companies, addressed to Hallmark 7 Attorneys inviting the Petitioner and the Respondents to a meeting at the offices of the Registrar of Companies. Annexure Soni 11 is a letter from Rex Attorneys to the Registrar of Companies dated 8th April 2022 being a reply on the alleged irregular transfer of shares formerly owned by Petitioner in the 3rd Respondent Company. Annexure Soni 12 is a letter from the Registrar of Companies dated 31st day of May 2022 replying to the letter of 8th April,

2022 and whereby the Registrar of Companies restored his records in the company register to the status of 2002. Annexure Soni 13 is a letter from Hallmark Attorneys to Managing Director of the 3rd Respondent Company giving notice of visit to the company premises by the Petitioner to discuss operations of the Company. Annexure Soni 14 is a reply letter by Rex Attorneys to Hallmark attorneys urging the Petitioner to desist from visiting the Company's headquarters. The Respondents filed a Joint Answer to the petition resisting the petition vehemently. They stated that the 5000 shares which were being held by the petitioner in the 3rd Respondent company had not been paid up for and that the Petitioner attached no proof of such payment. They stated that the shareholding structure and other changes involving the 3rd Respondent are reflected in its annual returns for 2003, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016 and of 2017 which were filed with the Registrar of Companies pursuant to the laws. They attached the Annual returns for those years as Annexure GURU-1. They stated that on 31st December 2001, the Petitioner was allotted 500 shares and not 5000 shares. They attached a Photostat copy of Extraordinary Resolution passed on 21st December 2001 as annexure GURU-2. They stated that the petitioner had misunderstandings with his late father Sohanlal Rikhiram Soni who decided to issue a written notice to prevent the petitioner to enter the company's factory yard. They attached the Notice as Annexure GURU-3. They stated that the Petitioner voluntarily transferred his shares to his late father making the end of his interest in the 3rd Respondent company and that happened over 19 years before the institution of the case at hand. The Respondents attached annexure GURU 4 being copies of transfer instrument and certificate of authenticity by Sylvester Eusebi Shayo, in respect thereof. The Respondents stated that the decision by the Registrar of Companies aggrieved them and they issued a notice of intention to sue the Registrar of Companies. They attached the Notice as Annexure GURU-5 to the Joint Answer to the Petition. They concluded by stating that the Petitioner has no locus standi to bring this Petition as he is not a shareholder in that he had relinquished his rights as a shareholder and Director in the 3rd Respondent Company since 2003. They prayed for dismissal of the petition with costs. The petitioner filed Reply to the Joint Answer to the Petition. He maintained that he is still a shareholder in the 3rd Respondent Company and that he never transferred his shares. He stated that no necessary documents for transfer of shares were attached. He maintained that he did not sign any documents for transfer of shares and that soon after becoming aware of such changes he made complaints to the Registrar of Companies and instituted Commercial Case No.25 of 2022 which was struck out on 24th February 2023 by Hon. Agatho, J. On 4th May 2024, the Petitioners lodged a Notice of Preliminary Objection raising three preliminary objections that:

1. That the petition is bad in law and unmaintainable for being preferred out of time.
2. That the Petition is premature. io

3. That the Petition is incurably defective for non-joinder of the parties. The respondents prayed for dismissal of the petition with costs. The court ordered the parties to argue simultaneously in respect of both the preliminary objections and the application on merit. The Petitioner was represented by Mr. Jovinson Kagirwa, learned advocate, while the Respondents were represented by Mr. Gidion P. Opanda, learned advocate. The learned counsel for the Respondents, in essence, argued that the petitioner is contesting his removal from the shareholding and directorship in the 3rd Respondent company, an act which happened in 2003, hence over 20 years ago. He argued that time begins to run on the date when right to sue accrues. He cited CRDB (1996) Limited versus Boniface Chimya (2003) TLR 413 where it was held that the period of limitation to any court runs from the date on which the right of such action accrues and the period is prescribed under the Law of Limitation Act. Mr. Opanda learned advocate argued that the correspondences of the Petitioner and BRELA in 2021 and 2022 were mere exchange of correspondences which did not raise any right of action and did not bar the running of the period of limitation. He referred the court to the case of M/S P. International Limited versus the Trustee of Tanzania National Parks, Civil Appeal No. 265 of 2020 decided by the Court of Appeal of Tanzania at Tanga. Therefore, he prayed that under section 3(1) of the Law of Limitation Act, the petition be dismissed with costs. The second preliminary objection was that the petition is premature. Mr. Opanda, learned advocate, submitted that: "at this moment the petitioner is not a member, shareholder or director of the 3rd Respondent. It is our further submission that the Petitioner has not pleaded in any paragraph of the Petition that before lodging the petition he has attempted to resolve the matter in any meeting in the company". He submitted that the Petitioner has not pleaded in the entire petition that before filing the petition he had attempted any meetings with the company to resolve the issue of shareholding. He argued that the acts of the company are those in respect of which a resolution has been passed. The petitioner ought to have ascertained the state of affairs with the Company first. Therefore, Mr. Opanda, learned Advocate, submitted that the present petition has been preferred in court prematurely. 12 On the third preliminary objection, Mr. Opanda submitted that as the petitioner alleged that his shareholding was left to his late father who is now deceased, it follows that those are complaints against the late father of the petitioner. He reasoned that as there are complaints against the deceased, the legal personal representative of the late Sohanlal Rikhram Soni should have been joined so as to be heard on those allegations. For that rule, Mr. Opanda cited Mbeya Rukwa Autoparts & Transport Ltd versus Jestina George Mwakyoma (2003) TLR 251. He submitted that in case the court passes an order reversing the transfer of shares from the estate of the late Sohanlal Rikhram Soni to the Petitioner, it will be an order against a stranger to the case. He cited the case of Mexons Investment Limited versus CRDB Bank PLC, Civil Appeal No. 222 of 2018 decided by the court of appeal which insisted on the need to ensure right to be heard to an interested party by adding him to the suit. Mr. Opanda, learned advocate for the Respondents prayed for dismissal of the petition. Mr. Jovinson Kagirwa, learned advocate for the Petitioner, submitted in reply that similar preliminary objections were raised previously in Misc. Commercial Cause No. 25/2022 and were determined by Hon. Agatho, J in 13 his Ruling of 24th February 2023

whereby all the preliminary objections were overruled except that the Misc. Commercial Cause No.25/2022 was struck out due to its contravention with Rule 19(1) of the Commercial Court Rules. He argued that the present petition is similar to the previous one and is based on the same subject matter involving the same parties. He argued therefore that this court is now functus officio. He relied on the case of Maria Chrysostom Lwekamwa versus Placid Richard Lwekamwa and Lucas Richard Kami, Civil Application No.549/17 of 2019 where the Court of appeal faulted the practice of one judicial officer making a different decision over the same matter thereby contradicting a decision by his predecessor judicial officer of the same level. Mr. Kagirwa, learned advocate, submitted in alternative, that the petition is not time barred. He cited section 5 of the Law of Limitation Act, CAP 89 that right of action shall accrue on the date on which the cause of action arises. He submitted that the cause of action of the Petitioner is unfair prejudice under section 233(1), (2) and (3) of the Companies Act, CAP

212. He submitted that the cause of action accrued on 8th June 2022 when the 3rd Respondent through its directors, (the 1st and 2nd respondents), denied the petitioner's request to recognize him as a shareholder and 14 director in the 3rd Respondent company. He insisted that in the petition, repeatedly, the Petitioner has been pleading unfair prejudice under paragraphs 32, 33, and 35 and not paragraphs 14,16,17,20 and 21. Therefore, he argued, the allegation that the cause of action arose in 2003, is misconceived. He cited the Misc. Commercial Cause No.25 of 2022 between the same parties herein where at page 13 Hon. Agatho, J in determining a similar objection held that: " Since the cause of action arose in August 2021 as paragraph 15 of the Petition, it would be erroneous to hold that the filing of the petition in July 2022 was after expiry of statutory period of limitation. The petition is therefore not time barred. Therefore, the first PO is overwhelmed." On the preliminary objection that the petition is premature, Mr.Kagirwa, learned advocate, submitted that section 233(1),(2) and (3) (a),(b),(c) and
- (d) of the Companies Act, has no requirement that a petitioner for unfair prejudice must, prior to institution of his petition, seek the holding of a Company's meeting. He argued that the petitioner is complaining about misconducts of the Respondents who have denied to recognize the petitioner's rights and interests as a shareholder in the 3rd Respondent 15 company. He argued that the argument that the matter is premature is misconceived. Specifically Mr.Kagirwa, learned advocate, argued that: " one cannot raise a point of preliminary objection that the matter is time barred and at the same time raise a preliminary objection that the matter is premature, this is tantamount to riding two horses with one hand at the same time and expect them to deliver you to the same destination...in alternative to what we have submitted in paragraph!..13 and 2.14 of our submission herein, the Respondents alleged that the petition is premature before this Honourable Court for failure of/by the Petitioner to conduct a meeting in the company (the third respondent) as required under the Articles of Associations of the third Respondent and to support their submission they have relied in the provision of section 233(1),(2) and (3) (a) (b)

(c) (d) of the Company Act....without going back and forth, it is our submission that by looking at the above quoted provision of section 233(1),(2) and (3) (a) (b) (c) (d) of the Company Act, there is no requirement that has been stipulated or laid out which requires a party (the petitioner in the petition for unfair prejudice) prior to institution of his/her petition for unfair prejudice to hold/conduct a meeting." On non-joinder of an interested party, Mr. Kagirwa, learned advocate, submitted that it is an issue of fact that needs evidence as to whether or not a person is a necessary party in the given circumstances. He cited the 16 case of Abdullatif Mohamed Hamis versus Mehboob Yusuf Osman and Another, Civil Revision No.06 of 2017 decided by the Court of Appeal of Tanzania held that: "the tests for determining whether a particular party is necessary to the proceedings: first, there has to be a right or relief against such party in respect of the matter involved in the suit; and second, the court must not be in a position to pass an effective decree in the absence of such party." Mr. Kagirwa submitted that the reliefs sought in the petition are against the 1st and 2nd respondents and not the deceased father of the Petitioner, the late Sohanlal Rikhram Soni. Also, he argued that an effective decree can be passed by the court even in the absence of the said Sohanlal Rikhram Soni alone. He referred to the Misc.Commercial Cause No.25/2022 between the same parties herein where at page 29 Hon.Agatho,!, determined a similar preliminary objection and held that: It is common ground that the petitioner sued the directors and the company itself. Sohanlal Rikhram Soni and Chande Kanta Soni are deceased. They may be shareholders, but it is unclear if they were directors. It should be remembered that management of the company is in the hands of the directors. Looking at the reliefs sought, Sohanlal Rikhram Soni and Chande Kanta Soni on the one hand and BRELA on the other, they are not necessary parties. No 17 relief is sought against them. Their absence does not affect a decree that will be issued. Mr. Kagirwa, distinguished the case of Mexons Investment Limited versus CRDB Bank PLC (supra) that it does not fit in the circumstances of the present case because in the present case neither the shareholders nor the legal personal representatives are necessary parties. He prayed for dismissal of the preliminary objections with costs. Upon hearing the parties in their submissions for the preliminary objections, it is now time to dispose of the same. In Misc. Commercial Cause No.25 of 2022 between Rupesh Kumar Soni versus Vinod Kumar Soni, Rajesh Kumar Soni and Guru Engineering Works Limited, the Respondents therein raised five preliminary objections that:

1. The petition is bad in law and unattainable for being filed out of time.
2. That the Petition is bad in law and defective for contravening the provisions of rule 19(1) of the HCT (Commercial Division) Procedures Rules of 2012 as amended in 2019.
3. That the petition is bad in law and unattainable for relief sought to be granted contravenes the provisions of Section 233(3) of the Companies Act of 2002. 18
4. The petition is incurably defective for non-joinder of necessary parties.

5. The petitioner has no cause of action against the 1st and 2nd Respondents. The 3rd Preliminary Objection was abandoned and therefore the parties were heard on the remaining four preliminary objections which were ultimately determined by the Court. The second Preliminary Objection was sustained and the Petition was struck out. The Petitioner subsequently filed the present petition on the same basis against the same parties. The Respondents this time have raised three preliminary objections that:
  1. That the petition is bad in law and unmaintainable for being preferred out of time. Z. That the Petition is premature.
  3. That the Petition is incurably defective for non-joinder of the parties. It is clear that out of the three preliminary objections raised herein, 2 were raised and determined in the Misc. Commercial Cause No.25 of 2022 between Rupesh Kumar Soni versus Vinod Kumar Soni, Rajesh Kumar Soni and Guru Engineering Works Limited. The first preliminary objection that the petition is bad in law and unmaintainable for being preferred out of time; and the third preliminary objection that the Petition is incurably 19 defective for non-joinder of the parties, were specifically raised by the same respondents against the same petitioner and a decision thereon was passed by this very Court as per Hon. Agatho, J. Mr. Kagirwa, learned advocate for the Petitioner, submitted that this court is now functus officio in respect of those two Preliminary Objections. I agree with him. The Court of Appeal of Tanzania in Civil Application No. 33 of 2012, Mohamed Enterprises (T) Limited Versus Masoud Mohamed Nasser, at page 15 held that: We do so bearing in mind that there should be no room open to the High Court and courts subordinate thereto whereby one judge would enter judgment and draw up a decree in one case (thus bring such a case to a finality) only to find another judge of the High Court soon thereafter setting aside the said judgment and decree and substituting therefor with a contrary judgment and decree in a subsequent application. To do so in our considered opinion, amounts to a gross abuse of the court process. Such abuse should not be allowed to win ground in this jurisdiction. Once judgment and decree are issued by a given court, judges (or magistrates) of that court become " functus officio" in so far as that matter is concerned. Should a new fact arise which should have been brought to the attention of the court during trial, then Cap 33 provides for procedures for Review (Order XLII) and where appropriate, Revision before a higher court, i.e. this Court (Section 4 of 20 Cap 141). An aggrieved party may, if he so wishes, institute a new suit challenging the findings in the earlier one. The issues as to whether or not the act of the Petitioner to challenge transfer of his shares to his late father which happened in 2003, is time barred, was determined by Hon. Agatho, J., in Misc. Commercial Cause No.25 of 2003. The issue as to whether the petition was bad for misjoinder of a necessary party, was also determined by Hon. Agatho, J. in Misc. Commercial Cause No.25 of 2003. If I were to determine those same issues now I might end up with a different conclusion and thereby impliedly set aside the said Ruling and Order of my fellow Judge thereby substituting therefor with a contrary decision. Such decision would be but a nullity for want of jurisdiction. Counsel for the Respondents ought to have known that position of the law when he raised the two preliminary objections like the ones which had been overruled. I have read the Ruling of

Hon. Agatho, J., in Misc. Commercial Cause No.25 of 2022 between Rupesh Kumar Soni versus Vinod Kumar Soni, Rajesh Kumar Soni and Guru Engineering Works Limited. Four preliminary objections were determined to finality by the Court, including the preliminary objection number 1 and the preliminary objection number 3. 21 Therefore, as a determination thereon has been done, and the Ruling has not been quashed by a superior Court, it is the record of this court. The High Court is therefore functus officio in respect of the preliminary objections therein determined. I will therefore determine only the second point of preliminary objection raised herein. It was neither argued nor determined in Misc. Commercial Cause No.25 of 2022 between Rupesh Kumar Soni versus Vinod Kumar Soni, Rajesh Kumar Soni and Guru Engineering Works Limited. The point of preliminary objection stated: "2. That the Petition is premature." For clarity, I will reproduce the submissions by Mr. Opanda learned advocate for the Respondents, and Mr. Kagirwa, learned Advocate for the Petitioner. Mr. Opanda, learned advocate, submitted that: "at this moment the petitioner is not a member, shareholder or director of the 3rd Respondent. It is our further submission that the Petitioner has not pleaded in any paragraph of the Petition that before lodging the petition he has attempted to resolve the matter in any meeting in the company". Mr. Kagirwa, learned advocate, argued in response that: 22 " one cannot raise a point of preliminary objection that the matter is time barred and at the same time raise a preliminary objection that the matter is premature, this is tantamount to riding two horses with one hand at the same time and expect them to deliver you to the same destination...in alternative to what we have submitted in paragraph 1.13 and 2.14 of our submission herein, the Respondents alleged that the petition is premature before this Honourable Court for failure of/by the Petitioner to conduct a meeting in the company (the third respondent) as required under the Articles of Associations of the third Respondent and to support their submission they have relied in the provision of section 233(1),(2) and (3) (a) (b)

- (c) (d) of the Company Act....without going back and forth, it is our submission that by looking at the above quoted provision of section 233(1),(2) and (3) (a) (b) (c) (d) of the Company Act, there is no requirement that has been stipulated or laid out which requires a party (the petitioner in the petition for unfair prejudice) prior to institution of his/her petition for unfair prejudice to hold/conduct a meeting." Reading the submissions of Mr. Opanda, learned Advocate, he advanced two reasons which in his view make the present petition premature. The first was that "at this moment the petitioner is not a member, shareholder or director of the 3rd Respondent". The second was "it is our further submission that the Petitioner has not pleaded in any paragraph of the 23 Petition that before lodging the petition he has attempted to resolve the matter in any meeting in the company". On the part of Mr. Kagirwa, learned advocate for the Petitioner, his response was two-fold and made in alternative. His response underscored the following alternative arguments, namely that:
- i. One cannot raise a point of preliminary objection that the matter is time barred and at the same time raise a preliminary objection that the matter is premature. ii. by looking at the above quoted provision of section 233(1), (2) and

- (3) (a) (b) (c) (d) of the Companies Act, there is no requirement that has been stipulated or laid out which requires a party (the petitioner in the petition for unfair prejudice) prior to institution of his/her petition for unfair prejudice to hold/conduct a meeting. I have asked myself whether or not the preliminary objection as raised was proper? Mr. Kagirwa, learned advocate submitted that one cannot raise a point of preliminary objection that the matter is time barred and at the same time raise a preliminary objection that the same matter is premature. In my view, Mr. Kagirwa missed the point here. Arguing that a matter is 24 "The Concept of time in Law: Basis of Laws of Limitation and Prescription," (Journal of the Indian Law Institute, July-September 1990, Vol. 32, No. 3, page 339) where he writes that: "Time is a moral concept and it has something to do with the establishment of truth concerning rights, claims and evidence. There is the law of limitation that restricts claims and civil suits - within how much time, for example, can an insurance be claimed or a suit be filed for the loss or damages. On the other hand there is the law of prescription that prescribes the time that must elapse before an entitlement or a right can be claimed." Therefore, what may cause prematurity of the case may have nothing to do with the law of limitation but rather with the law of prescription and the two are different, although they both have bearing to the concept of time. Some cases may be caught by both the law of limitation for being filed outside the period of limitation and by also by the law of prescription for being filed before fulfilment of certain legal prerequisites. For example, the law of prescription requires that ordinarily a spouse shall not file for divorce until after expiry of at least 2 years from the date of contracting the marriage. Another instance is that no suit shall be filed against the government before the lapse of at least 90 days from the date of serving the Notice of intention to sue. Therefore, I find the argument by Mr. Kagirwa, learned advocate, 25 that "one cannot raise a point of preliminary objection that the matter is time barred and at the same time raise a preliminary objection that the matter is premature", to be devoid of merits. I will therefore proceed to determine, the second preliminary objection raised by the Respondents. Looking at the reply submissions by the learned counsel for the Petitioner, it is clear that the learned counsel replied to the first component of the arguments raised by Mr. Opanda, learned counsel, in the second ground of preliminary objection. After having attempted to discredit the entire preliminary objection with its two limbs, for being invalid, Mr. Kagirwa learned advocate, specifically addressed only one limb of the submissions by Mr. Opanda, learned Advocate. That limb was about the requirement for a member or shareholder to convene a company meeting before filing a petition for unfair prejudice. On this my settled position is that, Mr. Kagirwa, learned advocate, is correct. It is not a mandatory legal requirement but, in my view, it is desirable where practicable. The desirability stems from the fact that: "Each company had its common law in the form of its memorandum and articles of association which should be sufficient for its disputes." (see In Re Cuthbert Cooper & Sons Ltd [1937] Ch 392). 26 Therefore, it is desirable for the shareholder or member to attempt to exhaust the internal dispute settlement mechanism where the same is sufficient for its disputes, under the common law of the company which is expressed in the form of its memorandum and articles of association. However, such a requirement cannot be said to be a mandatory requirement in every situation where a

member is in conflict with the company or other members and or directors. The rationale is not far to see. The complainant petitioner may be unable to enforce the Articles of association due to holding minority shares or for other sufficient causes his resorting to the internal dispute settlement mechanism within the company may be impracticable in the circumstances of the dispute. Therefore, the argument by Mr. Opanda, learned advocate, does not have a legal back-up. I decline the argument by Mr. Opanda, learned advocate for the Respondents that it was a mandatory prerequisite for the petitioner to convene a company's meeting before petitioning the Court for unfair prejudice. Now, there is left the second limb of the second preliminary objection raised by Mr. Opanda, learned Advocate. Mr. Opanda, learned counsel, in his written submissions made a "further submission" in addition to the alleged need of convening a company meeting, that the Petitioner could not file the 27 petition without firstly being a member, shareholder or director of the 3rd Respondent. There was no response to this when Mr. Kagirwa filed reply submissions on the preliminary objection in this aspect. The questions which arise are whether or not there is a requirement for the petitioner under section 233(1) of the Companies Act to be a member, shareholder or director of the Respondent Company before he could resort to the remedy therein provided? If the answer is in the affirmative, whether or not the Petitioner was a member, shareholder or director of the 3rd Respondent Company at the time of filing the petition? In the Petition, the Petitioner has stated that he is still a member of the 3rd respondent company because he did not authorize the transfer of his shares to his late father in

2003. He stated that the Registrar of Companies has restored the current status of records of the respondent Company to as they were in 2002 at a time before the shares of the petitioner were transferred to his late father Sohanlal Rikhrami Soni. The Respondents on the other hand have deponed that the Annual returns from 2003 up to 2017 filed with the Registrar of Companies, all convey the fact that the Petitioner is not a shareholder or member of the 3rd Respondent company. They even attached the share transfer instrument evidencing the transfer of shares of the Petitioner to his late father Sohanlal Rikhiram Soni. Now, how can the court determine this issue? It needs to look at the evidence produced by both parties through the petition, Answer to petition and the reply to answer to the petition, as well as the affidavits verifying the petition, Answer to Petition and Reply to answer to petition. The court has to consider the statements in the petition and the responses thereto which upon being verified by the affidavits verifying the petitions, turned into evidence. Further each party attached some supporting documents as annexures. However, before casting a glance at the evidence, I am mindful that by agreement of the learned counsel for both sides, this case was argued by combining the preliminary objections and the petition on merit. At this juncture, I am still determining the preliminary objections only. Should I look at the evidence on whether or not the petitioner "at this moment is not a member, shareholder or director of the 3rd Respondent"? My answer is in the negative. That issue is factual and not a pure point of law capable of being disposed of as a preliminary objection without the need to take into account the necessary evidence. The issue as to whether or

not there is a requirement for the petitioner under section 233(1) of the Companies Act to be a member, shareholder or director of the Respondent Company before 29 he could resort to the remedy therein provided, is a pure point of law and can be determined as such. However, the corresponding issue of shareholding, membership and directorship of the petitioner in the 3rd Respondent Company, is strongly disputed by parties, hence it is factual. In my view the two issues are inseparable and must be determined together for a meaningful determination of the case. For now, the issue raised by Mr. Opanda, learned advocate falls on both the legal and the factual sides. It is a mixed point of law and fact, not a pure point of law. I find that where an issue depends on evidence for its determination, it cannot be properly raised and determined as a preliminary objection. To quote the Court of Appeal for Eastern Africa in the case of Mukisa Biscuits Manufacturing Company LTD v West End Distributors LTD (1969) EA 696, at page 701, Sir Charles Newbold P., had this to say:- A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion, (emphasis supplied) Where evidence is needed, the issue cannot be disposed of by way of a preliminary objection even if it touches on matters whose name tags signal 30 the common grounds for raising preliminary objections, such as the matter being time barred by the law of limitation, lack of cause of action, lack of jurisdiction, lack of locus standi and the like. The issue as to whether or not the petitioner "at this moment is not a member, shareholder or director of the 3rd Respondent" is contested by the parties to this petition in their pleadings. As such it needs evidence. Once issue needs evidence to be resolved, it fails the test of being a pure point of law which passes the test of self-proof. It may be a point of law but not purely so, since it involves evidence for its determination, hence failing the test of self-proof. Therefore, as the preliminary objection raised in this matter does not qualify as a pure point of law, I will not determine it as a preliminary objection. I have already found that this court is functus officio in respect of the first and third preliminary objections. I have found the second preliminary objection raised herein is misconceived because, on one part, there is no mandatory legal requirement for a petitioner before invoking Section 233(1) of the Companies Act to firstly convene company meetings. On the other, part I have also found that the issue as to whether or not the petitioner "at this moment is a member, shareholder or director of the 3rd Respondent" is not a pure point of law capable of being disposed of by way of preliminary objection in the 31 circumstances of the present case. I therefore dismiss all the three preliminary objections without any order as to costs. As parties have also argued on the merit of the Petition, I proceed to determine the Petition on its merit on the basis of the evidence the parties submitted. The Petitioner in his submissions argued that Annexure Guru 4 to the Reply to Petition is an alleged "transfer of share or stock" dated 14th February 2003. He argued that the document has no signature of the Petitioner and at the signature part it is whitewashed. In effect the Petitioner denied to have ever transferred his shares to his late father but that his signature was forged and were manufactured to deprive him of his property. The Petitioner also complained that the MEMARTS of the Company annexed as

Soni 1 require a shareholder intending to transfer shares to give notice in writing informing the other members of his intention to sell his shares. He argued that there was no such notice. The Petitioner relied on Shirin Moosaje versus Juzer Zakiuddin Mohamed and 2 Others Misc. Commercial Application No.2 of 2021 and the case of Afriscan Group (T) Limited versus David Joseph Mahende, Commercial Case No.86 of 2013. The rule he derived from the two cases is that for a valid share transfer, there must have been conformity with the requirements in the MEMARTS including both transferor and transferee signing the share transfer instrument. He argued that the contract of share transfer was not valid. He summed up that by the Respondents maintaining their position alleging that the petitioner had lawfully transferred all his shares to their late father, the Respondents thereby prejudiced him. It was his argument that they thereby denied him his right to participate in the management of the 3rd Respondent company and that amounted to unfair prejudice. The respondents refuted any unfair prejudice towards the Petitioner. In addition, they raised, once again, a preliminary matter for determination by the court on the basis of the available evidence, it is still their argument that the petitioner lacks locus standi to file the present petition for not being a member, shareholder or director in the 3rd Respondent company. The Respondents argued that the detailed report from the Registrar of Companies, annexure Soni 7 to the Petition, is an online register of the 3rd respondent company which shows that the Petitioner is not a shareholder in the company. They submitted that the petitioner ceased to be a shareholder in 2003 and annexure Soni 7 to the petition shows that the company has only 3 shareholders namely Sohanlal Rikhirami Soni, Rajesh Kumar Soni and 33 Vinod Soni. Also, they argued that the Transfer of shares or stock annexed as Guru 4 to the reply answer to the petition was backed up by an affidavit of the Advocate who attested the share transfer instrument in 2003 by which the shares of the Petitioner were transferred to his late Father Sohanlal Rikhirami Soni. They relied on Afriscan Group (T) Limited versus Said Msangi, Commercial Case No. 87 of 2013 which was decided by this court, for the rule that the evidence of a person before whom the document was signed is credible. They argued that no evidence was brought by the petitioner to prove forgery and no handwriting expert evidence was brought either to vitiate the validity of the signature of the Petitioner. They argued that the share transfer document (annexture Guru 4) exists and the same was presented to Court and the Petitioner was given a copy thereof. They argued that if he disputes its genuineness, the burden was on him to invoke relevant remedies including sending it for forensic examination to examine its authenticity. The respondents relied on the case of Re Grierson's Trust Fund Deed (1938) AC 475, for the rule that in matters of fraud and forgery the burden of proof is on the part making the allegations hence it was upon the petitioner to bring evidence that the share transfer instrument of 2003 was forged. The Respondents questioned the non-involvement of the 34 Petitioner for 19 years and yet still calling himself a director of the company. They referred to Morogoro Hunting Safaris Limited versus Hamima Mohamed Mamunya, Civil Appeal No.117 of 2011 decided by the Court of Appeal for the rule that a company carries out its duties through directors who must act collectively. They cited the case of Bruder versus Dennis

(1973) 1WLR 935 for the rule that court should be cautious where the motives of the petitioner are questionable. They argued that the motives of the petitioner in this case are very questionable. The Respondents challenged the Petitioner's claims as being time barred. They relied on *Margareth Lothar Roland Purucker versus Lothar Roland Purucker and Elevctrical Equip,ents Assembly Ltd Misc. Commercial Application No.20 of 2022* by the High court. In that case the court held that the time limit for unfair prejudice petition is 60 days for applications and 6 years for suits. In rejoinder, the Petitioner insisted that the petition is calling upon the court to determine whether the Petitioner transferred his shares to his father and thus excluded himself from being a shareholder and director in the 3rd respondent company? He also insisted that the next issue is whether such an act was unfair and prejudicial to the Petitioner? He submitted that the 35 issue of time limit has already been determined by Hon. Agatho, J., in *Misc. Commercial Cause No.25/2022* between the same parties herein. He argued that if Annexure Guru 3 dated 7th April 2003 was resisting the Petitioner's request to his late father to visit the premises of the 3rd Respondent company, while at the same time Annexure Guru 4 shows that the petitioner had already transferred his shares on 14th February 2003, why was it still necessary for the Directors of the 3rd Respondent to restrain the petitioner from accessing the company's premises even months after he had allegedly transferred his shares? He argued that the move evidences impliedly that he was still a shareholder even at that time in April 2003 and thus his shares had not been transferred, that is why he was insisting of visiting the company's premises and the 3rd Respondent's directors felt obliged to stop him. After hearing the petition on merits, in essence all arguments ultimately lead to three major issues. The first issue is on locus standi of the petitioner to bring the petition while currently not being in the list of members of the 3rd respondent company. The second issue is on the petition being time barred as the Petitioner is seeking to challenge the share transfer transaction of 2003 when allegedly his shares were transferred to his late father. The third 36 issue is on the validity of the alleged share transfer from the Petitioner to his late father Sohanlal Rikhiram Soni in 2003. The Petitioner is making a case that since his shares in the company were not transferred lawfully in 2003, he is still a shareholder in the 3rd respondent company, and since he is still a shareholder, he is entitled to be involved in the management of the affairs of the 3rd respondent company. He argues that as he is not being involved, that amounts to unfair prejudice. He is of the view that the Registrar of Companies by his letter of 2022 has restored the state of affairs in the 3rd Respondent Company to 2002 before the disputed transfer took place. The Respondents in essence are arguing that the Petitioner should firstly prove to be a shareholder before he can come under section 233(1) of the Companies Act. They argue that as it stands, he has no locus standi nor cause of action and that if the claims are challenging the share transfer transaction of 2003, the petition is time barred. On my part, like I held in the preliminary objections herein, I am functus officio to determine or even comment anything on whether or not the law of limitation bars the claims of the Petitioner. My brother Judge, Hon. Agatho, J., in *Misc. Commmercial Application No.25/2022* between the same parties herein held that the petitioner's claims are not caught by the law of limitation 37 taking

into account the recent date when the Petitioner became aware of the circumstances giving rise to his cause of action and therefore time started to run as from that date. I will therefore proceed to consider the issue of locus standi. In case I find the Petitioner has locus standi, I will proceed to determine the issue as to whether he is entitled to the prayers made or not. In case I find that the petitioner has no locus standi, I will down-tool since I will lack the requisite jurisdiction. Locus standi is a matter that touches on jurisdiction of the court. In *Peter Mpalanzi vs Christina Mbaruku* (Civil Appeal 153 of 2019) [2021] TZCA 510 (23 September 2021), it was held that: Locus standi is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject matter. Unless a person stands in a sufficient close relation to the subject matter so as to give a right which requires protection or infringement of which he brings the action, he cannot sue on it- see *Godbless Lerna v. Mussa Hamis Mkanga and 2 Others*, Civil Appeal No. 47 of 2012 (unreported). Further, locus standi is a point of law rooted into jurisdiction. It is for that reason that it must be considered by a court at the earliest opportunity or once it is raised. (Emphasis supplied) I will address four main questions which in my view need to be answered in determination of the present petition. The first is whether or not it is mandatory for a petitioner who wants to rely on or resort to section 233(1) of the Companies Act, CAP 212, to be a member of the company in question? The second question is, if membership is a necessary requirement, at what moment in time should the petitioner be vested with the standing of such membership? The third question is that, if the first question is answered in the affirmative, whether or not the Petitioner was a member of the 3rd Respondent Company at the material time for purposes of the present petition? Finally, if the 1st question is answered in the negative, the fourth question is whether the petitioner is entitled under section 233(1) to the reliefs claimed? I start with the first question on whether or not it is mandatory for a petitioner who wants to rely on or resort to section 233(1) of the Companies Act, CAP 212, to be a member of the company in question. The starting point is the Statute itself. I reproduce the relevant part of section 233(1) of the Companies Act, CAP 212 thus: 233.-(1) Any member of a company may make an application to the court by petition for an order on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. If the court is satisfied that the petition is well founded, it may make such interim or final order as it sees fit for giving relief in respect of the matters complained of.

- (2) This section shall apply to a person who is not a member of a company but to whom shares in the company have been transferred by operation of law, as those provisions apply to a member of a company; and references to a member or members are to be construed accordingly. This provision shows the petition should be brought by a member of the company. The provision also requires that the affected interests due to the unfair conduct of the company's affairs, should affect the interests of its members generally or of some part of

its members. Where the petitioner complains of the effect of the unfair conduct as affecting some part of the company's members, the law requires himself to be within the "part of its members" who are prejudiced. The phrase "including at least himself" is significant. It demands the petitioner to have at least an individual locus standi to bring the petition for unfair prejudice. That phrase underscores the statutory requirement for the petitioner to have locus standi as a member before he can petition for unfair prejudice. The provision in further insisting on the need for the petitioner to be a member, again, makes it mandatory for the petitioner to prove that the prejudice should have been suffered by the members generally, that is all members including the petitioner or by a part of the members including the petitioner. The words "would be so prejudicial" relate back to membership of the persons or person suffering the prejudice that they should have suffered as all members generally including the petitioner or as part of the members including the petitioner. The only exception where a non-member can apply under section 233(1) of the Companies Act, CAP 212 is where a legal personal representative of the deceased member of the company holds shares in the company without himself being a member but he is a shareholder by virtue of share transmission. The emphasis here is on the phrase "although the persona! representative is not himself a member of the company. This provision underscores the fact that, as an exception, a legal personal representative of a deceased member may hold shares in a company as a shareholder in the company but enjoy the benefits of a member in the company even without himself becoming a member therein. There is no other exception to membership criteria under section 233(1) of the Companies Act, CAP 212. The locus standi under section 233(1) of the Companies Act, CAP 212 is deeply rooted in "membership". 41 In *Velisas Elizabeth Deflosse Ingleton (Petitioning as Legal representative Under the Power of Attorney of Gordon Me Clymont) versus JOSEPH IGNATUS NORONHA and 2 others*, Misc. Commercial Cause No. 20 of 2021, HCCD at pages 23-26, Hon. Nangela,!, held that: Essentially, an unfair prejudice petition stands out as an important legal arsenal in the hands of those shareholders who, for some reasons, may lack sufficient power or influence over decisions touching the affairs of the Company or critical matters affecting the business of the Company. Instances regarding abuse of power or breaches of the articles of association or exclusion of a shareholder from the management or decision making over the affairs in instances where there is a legitimate expectation of being involved, all attract complaints based on unfair prejudice.... 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. (Emphasis supplied). In *Yasmin Haji versus Kenyatta Drive Properties Limited and Antony Amin Haji*, Hon Agatho, J., held: The unfair prejudice doctrine has its own elements as echoed in *Velisas Elizabeth Deflose (petitioning as legal representative under the Power of Attorney of Gordon McClymont) v Joseph Ignatius Noronha*, Misc. Commercial 42 Cause No. 20 of 2021, HCCD at pages 23-26. The elements ought to exist are namely, that (1) the conduct of the company's affairs, (2) has prejudiced; (3) unfairly; (4) the petitioner's interest as a member of the company. Consistently, the above quoted holdings insist on membership as a prerequisite

before a person may bring a petition for unfair prejudice. I will add another equally very persuasive authority. It is the case of in *Re HLHP Oriental Food Ltd* (also known as *Maggie Otto v Inner Mongolia Happy Lamb Catering Management Company Ltd*) [2024] EWHC 497 Ch. It is a case that has dealt with determination of locus standi for unfair prejudice applications under the UK Companies Act, 2006. For the purpose of the present petition, the relevant portion of section 994 of the UK Companies Act 2006, provides: (1) A member of a company may apply to the court by petition for an order under this Part on the ground—

- (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
  - (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. 43
- (2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company. In *Re HLHP Oriental Food Ltd* (supra), in the judgment handed down on 5 March 2024, the brief facts were that the Respondents on the first day of the trial of the Unfair Prejudice Petition, applied to amend the Defence to challenge three of the Petitioners' standing. The challenge was made on the basis that the Petitioners' names did not appear on the register of members and, further, that they were unable to establish that they had received shares by way of valid transfers pursuant to duly executed instruments of transfer. It transpired, in fact, that the relevant registers of members had been included within the Petitioners' disclosure, albeit within a sub-group of documents, but had only come to the attention of the parties shortly before the trial of the Petition was listed to begin. As a result of this discovery, the Respondent challenged three of the Petitioners' standing. It was held, in particular, that: it is for the Petitioners to establish standing and that the Court would have to be satisfied that there is standing irrespective of what was said in the Defence, since this is a 'gateway' requirement for the 44 purposes of the statutory jurisdiction under section 994 of the Companies Act 2006. I quote the contents of paragraphs 26 and 28 of the decision thus: First, it is for the Petitioners to establish standing. In preparing the Petition they ought to have considered how they could prove that they were entitled to petition. They wholly failed to do so. As I have noted, the register was in their possession all along, and it was incumbent on them - or their legal advisers - to be satisfied that they were indeed members of the company. That failure was neither caused by nor contributed to in any way by the Respondents' later admissions. The court must be satisfied that the Petitioners have standing with regard to the 'gateway' requirements that a Petitioner must fall within s 994(1) or (2) CA 2006. Therefore, irrespective of the fact the Respondents conceded in their Defence that they believed (erroneously) the Petitioners to be members, the court must independently verify that the Petitioners have such standing. On my part, I find that the requirement for membership is deeply entrenched into the provisions of section 233(1) of the Companies Act, CAP 212. It is incumbent on the petitioner who comes

under section 233(1) of the Companies Act, CAP 212 to prove that he is indeed a member not an alleged member of the particular company. Since the locus standi to invoke section 233(1) of the Companies Act, CAP 212 is entrenched and rooted in 45 membership, and as locus standi has a root to the jurisdiction of the court, it is equally the duty of the court, even where there is no challenge from the other side, to satisfy itself that the petitioner is a member of the particular company as part of the exercise of ascertaining that it is clothed with the requisite jurisdiction to determine the petition. Proof of membership is the only gate way for the petitioner to reach the avenue of section 233(1) of the Companies Act CAP 212 and hence a prerequisite for one to petition for an unfair prejudice. Perhaps, I should underscore a point here which seems to elude not a few persons. And the illusion, in my view, is caused by taking for granted what the etymological meaning of the words "company" and "member" entail in the context of business associations. For Swahili speakers the name "Kampuni" has no etymological reference to the concept it seeks to convey its meaning. The word "company" is derived from two Latin words that are "com" & "panis" which means "together" & "bread" respectively. It originally described how merchants would gather, share stories, eat together and trade. In Roman era, those who worked together shared the product of their labour among themselves; they shared "the bread" (panis) "with" each other (cum). The combined efforts towards any productive goal gained the name 46 "cumpanis", which ultimately developed in the English word "company" So, it literally means that a company is an association of persons who took their meals together. The history of "company" is also traced from old French, meaning compaignie, or companionship. In this context of a "company" as companionship or togetherness, membership becomes a paramount necessity before one can demand of companionship and togetherness of others. Exclusion of a member or some members from participation in the affairs of the company, would therefore amount to gross violation of the very basis and understanding upon which their association was built, namely togetherness and companionship in the affairs of the company. It amounts to betrayal of the members' pledge of inclusiveness, involvement and participation in the affairs of their company. In absence of members' inclusiveness, involvement and participation in the affairs of their company, the very notion of there being a "company" in existence is offended. This sense of companionship and togetherness of members of the company stems from the historical context of a company as a mode of doing business that evolved through the guild system and partnership. Indispensably, companionship, involvement, participation by all members was a common pact of the members. Section 233(1) of the Companies Act, CAP 212 is 47 seeking to enforce that common pact that is to be inferred as applicable to all members of the company regardless of their shareholding. The term 'members' is more inclusive. One reason is that members can describe owners of the company while shareholders may just be investors. Members' rights in management affairs of companies are therefore deeply entrenched into the very nature of company as a mode of doing business. Members owe no duty of involvement in the affairs of the company towards non-members since they have no pact of companionship and togetherness with them. Membership therefore becomes critically important as a matter of locus standi and a jurisdictional issue for the court, when a person petitions the

court on the ground of unfair prejudice. Perhaps what I have endeavoured to explain above can be better understood legally by referring to the following two persuasive cases which try to explain the nature of the equitable remedy under the ground of unfair prejudice. In *Ebrahimi v Westbourne Galleries* ([1973] AC 360, 379), Lord Wilberforce held that: the courts need not look exclusively at a company's constitution when deciding the nature of the obligations undertaken by its participants. What is important is the giving of effect to the full set of terms and understandings on which it has been agreed the company will operate, be they expressed or implied. Thus, for example, where there is a reasonable expectation that all shareholders will participate in the company's management, exclusion from management may be considered unfairly prejudicial, and a remedy will be available under s 241. This was the case in *Diligenti v RWMD Operations Kelowna Ltd* where the court concluded that, in such circumstances, there are 'rights, expectations and obligations inter se', which are not submerged into the company structure, and these rights are enjoyed by a member as part of his status as a shareholder in the company ... Although [the applicant's] fellow members may be entitled, as a matter of strict law, to remove him as a director, for them to do so in fact is unjust and inequitable, and is a breach of the equitable rights which he in fact possesses as a member. There are some circumstances where the courts have not been willing to give effect to minority shareholders' expectations. Such circumstances are illustrated by cases like *Jackman v Jackets Enterprises Ltd*, 14 (1977) 4 BCLR 358) where a shareholder was denied relief for her exclusion from the company's management as she had been given her shares only as a gift and, therefore, had no real expectation of having any management role. Farley J held that: those expectations which the courts will consider are not 'those that a shareholder has as his individual "wish list". They must be expectations which could be said to have been for ought to have been considered as part of the compact of the shareholders'. Now that I have found membership in the company to be a necessary precondition for one to petition for unfair prejudice, the next question is at what moment specifically is such membership required? I have read an online article by James Whitaker and Riku Ode, *Developments in Unfair Prejudice Litigation*, in Harvard Law School Forum on Corporate Governance posted on 2nd July 2022 (<https://corpgov.law.harvard.edu/2022/07/02/developments-in-unfair-prejudice-litigation/>). The Article is dealing with the applicability of sections 994 to 996 of the Companies Act of the United Kingdom which is substantially in parimateria to Section 233(1), (2) of the Companies Act of Tanzania. The learned authors observe at page 2 that: "There is some uncertainty as to the point(s) in time at which the petitioning party must satisfy the standing requirements; this has been the subject of recent disputes. Whilst a party must satisfy those requirements at the time the petition is filed, it is not necessarily the case that it must continue to do so through the course of the action and through to judgment; recent authority suggests that standing is not lost upon the petitioner ceasing to be a member." 50 I subscribe to the view expressed by the learned authors above. Standing to petition for unfair prejudice must exist at the time of filing the petition. As I have pointed out herein that locus standi is rooted into court's jurisdiction. Absence of locus standing at the time of instituting the petition for unfair prejudice would deprive the court of jurisdiction. However, if the standing is lost by

removal of the shareholder or member from the company while the proceedings are pending in court, it will not vitiate the court's jurisdiction in the same way that increase in the value, or change of geographical location, of property subject to a suit would not affect jurisdiction of the court after the court having been seized with the case. If standing were to be a requirement throughout the judicial proceedings, unscrupulous respondents would abuse it by terminating proceedings against them simply by removing a shareholder or member from the company's register during pendency of judicial proceedings. That would be inequitable as wrong-doers would benefit from their own wrongs. However, if a member is removed from membership prior to filing a petition for unfair prejudice, all is not lost for him since there are other alternative remedies available including applying for rectification of the members' register so as to be restored into the register of members. 51 I am settled therefore in my view that it is for the Petitioner to establish standing as a member at the time of filing the petition for unfair prejudice under section 233(1) of the Companies Act, CAP 212 and that it is further the duty of the Court dealing with a petition for unfair prejudice under section 233(1) of the Companies Act, CAP 212 to be satisfied that there is standing by the petitioner as a member of the respective company regardless of what was said in the Defence, since this standing is the 'gateway' requirement for the purposes of the statutory jurisdiction of the Court under section 233(1) of the Companies Act 2002. Members should hold the locus standi not later than at the time of instituting the petition for unfair prejudice. The pertinent question in this case is whether or not the petitioner was a member of the 3rd Respondent Company at the time of filing the petition for unfair prejudice in court? The preliminary question is who is a member of the company in law? In the article by Corporate finance institute, CFI on <https://corporatefinanceinstitute.com/about-cfi/> in "Limited Liability Company (LLC), Combining the aspects of both partnerships and corporations, observe that: 52 "Rather than shareholders, business owners of limited liability companies are referred to as members." Section 24(1) and (2) of the Companies Act, Cap 212 defines a member thus: "The subscribers to the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members. 24 (2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company." The High Court of India in the case of Kedar Nath Agarwal v. Jay Engineering Works Limited (1963) 33 Com Case 102 Cal., Gowans,!, observed that: in some situations and contingencies, the "member" may be different from a "holder". A member may be a holder of shares but a holder may not be a member... "member" has a distinct connotation in the Companies Act. He is either a subscriber of a memorandum of a company or a person who agrees to become a member of a company and whose name is entered in the register of members. In the case of Ashura Saidi Ndundu versus Buyuni Company Limited, Misc Civil Cause No. 508 of 2020, High Court of Tanzania, Dar es Salaam District Registry, his Lordship Mlyambina,!, at page 7 quoted with approval the holding in the English case of Gursharan Randhawa 53 and Another v. Andrew Turpin and Another (2017) EWCA, Civil 1201, where the Court of Appeal Civil Division stated: The administrator of the deceased shareholders of the Company will only become members after being

appointed so and not by merely being granted letters of administration. Membership is attained by one's name being entered in the register of members of the company. There are two sources of register of members of the company. The first is the one maintained by the Company itself and the second is the one maintained by the Registrar of Companies. The two mirror each other. The register at the Office of Registrar of Companies is fed by information received from the company directors. The details of their indoor management affairs are communicated to the Government authority and through it to the members of the general public when directors of the company file various documents updating their company's details with the Registrar of companies. Any information filed with the Registrar of Companies becomes public notice to the entire public under the doctrine of imputed or constructive notice. Shares in a company are controlled by the directors of the particular company, not by the Registrar of Companies. The details filed with the Registrar of Companies mirror the situation inside the company in all crucial aspects like shareholding, capital, directorship, objectives, accounts and the like. The Petitioner in this case has alleged that he is a shareholder. He relied on Annexure Soni 12 which is a letter from the Registrar of Companies dated 31st day of May 2022 replying the letter of 8th April 2022 and whereby the Registrar of Companies is said to have restored the company register to the status of 2002. I must hasten to say that the said Registrar of Companies is not a party to the petition. As such it will be very unfair to condemn him unheard on the assumption that what the petitioner has said is true. However, since the Petitioner has raised that argument, the court is duty bound to consider it on the basis of the documents supplied by the parties and in line with the law. Going by the Petitioner's own documents obtained from the Office of the Registrar of Companies, he is not on the register of members or shareholders of the 3rd Respondent company. Annexure Soni 7 is Detailed Information from Register of Companies dated 11/11/2021. In item 12 it names shareholders as Rajesh Kumar Soni, Vinod Kumar Soni and Sohanlal Rikhiram Soni. The petitioner is actually not a member/ shareholder. Section 123 of the Companies Act CAP 212 stipulates that. 55 The register of members shall be prima facie evidence of any matters by this Act directed or authorised to be inserted therein. The Petitioner has brought to court register of the 3rd respondent company in the form of annexure Soni 7 showing that he is not a shareholder and hence not a member. I referred to S. Evelyn Thomas, Commerce its theory and Practice, 11th Edition published by Cassell, London (1981) who at pages 35 and 36 writes that membership of a company may be lost by transfer of shares, transmission of shares or forfeiture of shares. I quote: "Membership ceases when a person's name is removed from the Register for any proper cause. The most common causes are: 1) Transfer of shares, following sale, or as security for a loan from the transferee or to give effect to a gift.

- 2) Transmission, which occurs upon the death or bankruptcy of the shareholder; the personal representative or trustee secures the registration of shares in his own name upon production of evidence of his authority, or transfers them to a beneficiary, etc.

- 3) Forfeiture of the shares by the directors where the shareholder has failed to pay calls or other sums due on the shares; this permits the directors to re-issue the shares to someone able to pay the amounts in question." 56 The shares of the petitioner were transferred in 2003 to his late father. He thereby ceased to be a shareholder and director. He ceased to be a member. If he is aggrieved by that transfer for the reasons he has advanced herein, his remedy was to challenge the transfer itself and restore his shareholding status before he could make use of section 233(1) of the Companies Act which is for members only of which he is not. The petitioner has brought a letter from the Registrar of Companies purporting to making him a shareholder. Shareholding is not established by a letter from the Registrar of Companies. Shareholding is proved by one possessing a share certificate duly issued by directors of the respective company or through the register of members or shareholders of the company maintained at the Company's registered office or at the office of the Registrar of Companies who is entitled by law to possess all the updated information of the company from the directors at the threat of a penalty. When filed, that information is deemed to be prima facie truthful in terms of section 123 of the Companies Act. There is no law that vouches the authenticity, role and status of a letter on shareholding in a company. 57 For the sake of justice and so as to be sure, I took liberty to read the reply letter from the office of registrar of Companies to the Petitioner's lawyers. The letter is dated 11th February 2022 from the Registrar of Companies to Hallmark Attorneys. It ends with the following sentence: " Moreover, the Company Directors/shareholders are duty- bound to bring the original annual return forms from 2003 to 2021." The above sentence speaks volumes against the allegation by the Petitioner that it restored his shareholding status in the 3rd respondent company to the status quo of 2002 when the Petitioner was also a shareholder in the company. First of all, that is not possible. Shareholding in a company can not simply be reversed back to 20 years ago as if it were reversing of a car from one direction to another. Shareholding in a company involves critical legal processes and issues relating to the contract law. Transfer of shares is a contractual arrangement. The mandate to declare a sale agreement void and thereby restoring parties to their original position, to me would set upon the courts of law. Shareholding involves serious legal issues pertaining to company law under section 121 of CAP 212. Who can and who cannot become shareholders in a private company, is dictated by the memorandum 58 and articles of association and in particular the pre-emption clauses. The law vests control of shares in a company upon the directors of the company. Share transfer process entails tax obligations along the way. In law, the members of the public are entitled to rely on the information kept by the Registrar of Companies as their basis in understanding the internal management affairs of the company. The records of the Registrar of Companies are public documents over which all members of the public have an imputed notice thereon. I cannot imagine of a situation where members of the public have relied on the records kept and availed to them by the office of the Registrar of Companies, only one day after lapse of even 20 years to be told that actually the true situation in the company is as it was some 20 years back. That is when the share capital was different, the shareholders were different, the directors were different, the financial statements were different, the fixed and floating assets were different, the good will of the

company was different and so on. In a company like the 3rd Respondent herein where the majority shareholder is dead, restoring default settings of 20 years back, unfortunately could not revive him, and as such, there would be deficiency in decision making in the company. It would be absurd if that letter, were to have the effect of undoing all that had been 59 done throughout the period whose status is reset to default settings of 20 years earlier. What would happen of the rights and liabilities of the persons who might have dealt with the company in between. If that were to be the true as the implications of such a letter, then limited liability company, as a mode of doing business in Tanzania, would have been very unreliable and unpredictable. All these events could not be undone by a simple letter as the petitioner would want it to be. I refuse to accept the argument by Mr.Kagirwa that the Petitioner is a shareholder by virtue of a reply letter from BRELA restoring shareholding status in the 3rd respondent company to 20 years ago from 2022 to 2002 when the petitioner was also a member. I have gone through the reply letter from the Registrar of Companies dated 11th November 2022. I could not see the implications alluded to by the Petitioner. The letter ends with the following sentence: " Moreover, the Company Directors/shareholders are duty- bound to bring the original annual return forms from 2003 to 2021." This sentence means that the Registrar of Companies actually is not decisive on his investigation over the 3rd respondent company. And the Registrar of Companies depends on records from the 3rd respondent company's 60 directors. The Registrar of Companies does not generate the records of the company himself. Under section 458A of the Act, the Registrar is empowered to ascertain or verify the documents. At the end of the day the true status of the shareholding and other details will be known after the investigation and facts gathering exercise by the Registrar of companies will be complete, and who knows, the default settings may be fast forwarded to 22 years later after 2002. All along the back and forth oscillation on the current status of the companies inevitably rotates with the national economies tied to the companies. While the letter from BRELA is calling for directors of the company to submit the original annual return forms from 2003 to 2021, the position of the law on, the other hand, is that the Registrar of Companies has no duty to keep records of the company which are over 10 years old. Section 455(2) of the Companies Act, 2002 is clear on this that "the originals of documents delivered to the Registrar in paper form shall be kept by him for ten years, after which they may be destroyed". Equally, the Respondents Directors, have no duty to maintain any records of companies for a period over 10 years. They are allowed to destroy such records. The Companies (retention and Disposal of Company Documents) Rules of 2023 relieve the directors of 61 a company from the duty to keep records of over 10 years old. According to Rule 6 thereof: "The Company may on its own dispose its documents upon expiry of the retention period prescribed under the Regulations". The Rules fix a maximum retention period of 10 years for any company document including Memarts, Certificate of Incorporation, Annual Returns, return of allotment of shares, Company register of members, instruments for transfer and transmission of shares and many others. By prescribing the maximum retention periods for the keeping of original documents, the law thereby recognized that there is a limit to what could be undone by the competent authorities in respect of the records and state of affairs of

the company. Time is intertwined with acquisition and loss of rights and is the tool by which proof or otherwise of those acquired or lost rights can be made. In the meantime, as it stands, the records from the Registrar of Companies as well as the records from the directors of the 3rd Respondent company show that the Petitioner is not a shareholder. He is not a member. (■ He has no locus standi to petition for unfair prejudice under section 233(1) of CAP 212. The petitioner is alleging to be a shareholder. 62 Persons alleging to be shareholders or disputing their being removed from shareholding and membership of a company have a remedy under section 121 of the Companies Act. CAP 212. On the rights of alleged shareholders, in YASMIN HAJI versus KENYATTA DRIVE PROPERTIES LIMITED and ANTONY AMIN HAJI, MISCELLANEOUS COMMERCIAL CASE NO. 14 OF 2022, Hon. Agatho, J., held: On reading of Section 121(3) of the Companies Act, it is conspicuous that the mandate extended to the Court on rectification of register may relate to the entering or omission of the name of the person in the register or questions arising between the members or alleged members or between members on the one hand and the company on the other hand as with regards to the register. The Court may decide any question regarding rectification of the register. Therefore, the Respondent's argument that the Petitioner lacks locus standi is misleading considering that the provision of Section 121 of the Companies Act TCap 212 R.E. 20021 covers even alleged members. (Emphasis supplied) Based on the records brought in this cases, I find that the Petitioner was a member prior to 2003 but was removed in 2003. He ceased to be a member. If he was aggrieved by the removal of his name from register of members, section 121 of the Companies Act was available to him s an alleged member 63 so as to reclaim his shares but he could not travel through the road of section 233(1) of the Companies Act which is otherwise reserved for members only. In the upshot, I find that the petitioner lacks locus standi to file the petition for unfair prejudice under section 233(1) of the Companies Act. As the rule of locus standi is rooted in jurisdiction, I find that I have no jurisdiction to determine the rest of the Petitioners' claims and arguments. I dismiss the petition with no order as to costs because of the relationship of the parties and the fact that the petitioner won the preliminary objections against the Ruling is delivered in court this 28th June 2024 in the presence of Phares Kabitina, learned Advocate for the Petitioner and Patrick Malewo, learned Advocate for the 64

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Prepared on 14 October 2026 · Esheria