

TANZANIA / JUDGMENT

velisas elizabeth deffosse ingleton petitioning as legal representation under the power of attorney of gordon mc clymont v japhet ignatus noronha another 2022 tzhccomd

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IN THE HIGH COURT OF UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISC. COMMERCIAL CAUSE NO. 20 OF 2021
IN THE MATTER OF COMPANIES ACT, CAP 212 RE 2002
AND
IN THE MATTER OF COVELL MATHEWS PARTNERSHIP LIMITED
AND

IN THE MATTER
APPLICATION BY:

VELISAS ELIZABETH DEFLOSSE INGLETON
(Petitioning as Legal representative Under the Power of
Attorney of Gordon McClymont)..... PETITIONER
VERSUS
JOSEPH IGNATUS NORONHA.....1ST RESPONDENT
GAUTAM JAYRAM CHAVDA.....2ND RESPONDENT
COVELL MATHEWS PARTNERSHIP LIMITED.....3RD RESPONDENT
Last Order: 12/7/2022
Ruling: 26/8/2022

RULING

NANGELA, J.: The facts which constitute this Petition which was initially filed on 30th April, 2021, are fairly brief. The 3rd Respondent is a Company registered under the Tanzanian law following Page 1 of 38 dissolution of an architect's partnership in the name of Covell Mathews Partnership, a firm which was comprised of two partners: the Petitioner and one Derek John Carter. The 3rd Respondent was 'mid-wived' and given to birth by the Petitioner and the 1st Respondent as a shareholders on the 9th February 1998 with a share capital of TZS 1,000,000/= divided in 1000 shares worth TZS 1000 per share. As such, the first shareholders who were the Petitioner and the 1st Respondent owned a 40/60 shares and were also Directors together with the 2nd Respondent and one Mr. Daniel Yona. The initial Secretary to the Company was the 1st Respondent and the profile of the Company never got updated later. According to the Company's Articles of Association, the 3rd Respondent was to proceed with the business and take over all assets and liabilities of Covell Mathews Partnership. However, there was an exception which involved a property at Plot No.77A Kawe, Dar-es-Salaam which was, by Board Resolution dated 9th February, 1998 excluded from the ambits of the 3rd Respondent's portfolio. Page 2 of 38 In the year 2002 the Petitioner left the country returning to Australia where he is currently based but remained a Director and shareholder. He also remained in touch and continued to be updated by the 1st Respondent. In his absence, however, several case ensued in courts one of such cases being Civil Case No.62 of 2002 between the 3rd Respondent and the 2nd Respondent. On the 17th day of October 2013, the 3rd Respondent executed a Deed of Settlement in respect of the said suit. The Deed of settlement was signed by the 1st Respondent, 2nd Respondent and one Hamida Sheikh as Secretary to the 3rd Respondent. Under the said Deed it was agreed, inter alia, as follows:

1. That, there be disposal of properties: House on Plot No.77A Msasani Beach, Dar-es-Salaam comprised in CT.No.21198, Land Office No.40725 and the Ppty on Plots. No. 2386/12, 2388/12 and 2389/12 Central Area Dar-es-Salaam Land Office No.190451, comprised in CT.No.50551. Page 3 of 38
2. That, the proceeds of the disposition be divided in the following order: 2nd Respondent 48% and the 3rd Respondent 52%;
3. The proceeds of the disposed properties be operated by Advocate Mabere Marando and Hamida Sheikh. The Deed of Settlement was recorded by the Court as constituting a decree of the Court. However, according to the Petitioner, the above decisions were made/arrived at without involving him and he neither executed the Deed of Settlement nor was he consulted by the Respondents. Aggrieved by what transpired so far as stated herein above, the Petitioner has brought this Petition under sections 233 (1), (2) and (3) of the Companies Act, No.12, Cap 212 RE 2002 and any other enabling provision of the law, seeking for the following orders:

- (a) A declaration that the 1st and 2nd Respondents' fraudulent acts, omissions and conducts are contrary Page 4 of 38 to and prejudicial to the interests of the petitioner and the 3rd Respondent.
- (b) A declaration that the 1st Respondent and 2nd Respondent act of executing the settlement deed dated 17th day of October 2013 without consultation with the members/Board resolution is contrary to the articles of the Company and prejudicial to the interest of the petitioner and the 3rd Respondent.
- (c) An order of this Honourable Court authorizing the Petitioner to commence civil proceedings in the name and on behalf of the 3rd Respondent as against the 1st Respondent, 2nd Respondent and any other person(s) as shall deem necessary in order to protect the interests of the Petitioner and the 3rd Respondent. Page 5 of 38
- (d) An order to nullify the fraudulently procured Deed of settlement dated 17th day of October 2013 and the Decree dated 18th October 2013.
- (e) An order nullifying all acts, deed and decisions made by the 1st and 2nd Respondents in the 3rd Respondent Company without prior consultation with the petitioner. When this petition was called on for hearing on the 12th day of May 2022, Mr. Rico Adolf, learned advocate, represented the Petitioner while Mr. Dickson Sanga, who was in the company of Mr. Noel Sanga, learned advocates, represented the 2nd Respondent. The 1st and 3rd Respondents were absent and unrepresented in Court. This Court invited oral submissions from the learned advocates for the parties, but, since there have been allegations of fraud; it was also deemed necessary to have the deponent of the affidavits further cross-examined by the parties. To begin with, Mr. Rico prayed to adopt the contents of the petition, the affidavit supporting the petition and reply to the Page 6 of 38 affidavit in opposition to the petition. He informed this Court that, trigger of this petition was a fraudulently executed Deed of Settlement dated 17th October 2013 which led to the issuance of a Decree in Misc. Civil Cause No. 62 of 2000, executed on October, 2013. The particular Deed of Settlement was attached to the petition, as Annexure 8. He further submitted that, the said Deed of settlement was executed by the 1st Respondent and 2nd Respondent who is also a director of the 3rd Respondent Company. As regards the 3rd Respondent (hereafter referred to as "the company"), however, it was Mr. Rico's submission that, the person who signed the Deed on her behalf was the 1st Respondent, who is both a director and shareholder, as well as one, Ms Hamida Sheikh, who purported to be the Company secretary of the 3rd Respondent. Mr. Rico contended that, surprisingly, although the Petitioner is an owner of 40 shares of the Company as indicated under Annexure 4 and 5, he was never informed of the alleged transactions even if such transaction had direct consequences to his interest as a shareholder of the Company. He contended Page 7 of 38 that, it was on such a ground that, aggrieved by the fraudulently acts of the 1st and 2nd Respondent, the Petitioner decided to file this Petition under the unfair prejudice provisions, i.e., under section 233 (1) of the Company Act, 2002, Cap. 212, [R.E 2002]. According to Mr Rico, the gravamen of the Petitioner's lamentation, in essence, is contained under paragraph 17 of the Petition wherein

the Petitioner laments the acts of the directors as being fraudulent due to the following reasons, that:

- (a) No meeting of the members of the company in respect to the deliberation and execution of the deed as required under Article 5(a) of the Companies Act (annexure A4 to the petition)
- (b) No notification or Notice as per article 5(a) of the Act.
- (c) There was no Board Resolution
- (d) The Deed of Settlement did not bare the Company seal as per section 39
- (1) of the Companies Act Page 8 of 38
- (e) The Deed was signed by one Ms Hamida Sheikh who was/is not and had never been the secretary to the company of which violate section 39
- (2) of the Companies Act, 2002 which requires any official document to be executed by
 - (i) Two (2) directors of the Company or (ii) A director and the secretary of the Company.
- (f) The Deed included the property which does not belong to the Company. Mr. Rico submitted that, the 2nd Respondent who is a director of the company, has failed, in his counter affidavit, to explain about the kind of irregularities pointed out by the Petitioner in respect of the transaction complained of. He submitted that, what was offered was a mere evasive denial without any supporting document or evidence to back up the transactions. Page 9 of 38 In his submission, Mr Rico argued that, since the 2nd Respondent is a director of the 3rd Respondent since 1999, he ought to have understood the regulations and procedures which ought to have been followed as per the law and the Memorandum and Articles of Association of the Company. Mr. Rico was anxious about the validity of the settlement agreement executed by the 1st Respondent (who is shareholder and director) together with a person who is a mere share holder whereby the later agreed to part with 48% of the proceeds of sale of the company's property. In his view, it was unimaginable for a mere director of a company to get 48% of all shares and the one share holder and director to get 52% of all shares and all that to be done without any knowledge of the Petitioner. Mr. Rico cemented his submission by arguing that, a Deed of Settlement, being a Company's document, needed signatures of the two directors or at least a signature of one director and of the company's secretary. He contended that, since the two Respondents had decided to collude and engage in a Page 10 of 38 fraudulently transaction, they introduced a fictitious company secretary in the name of Ms Hamida Sheikh. According to Mr Rico, the said Ms. Hamida Sheikh do not appear in the BRELA's search or in annexure A.9 (annual return) to the Petition. He contended that, from the records of BRELA, it was clearly shown that, the said Company secretary was not legally appointed, and further, the same record indicates that the company records have never been updated. Concerning the property mentioned in the Decree extracted from the consent decision in Misc. Civil Cause No. 62 of 2000, Mr. Rico stated that, while the property bears the names of Covell Mathews Partnership, the name

included in the settlement was that of a property of Covell Mathews Partnership Ltd, which is a quite different entity altogether as reflected in annexure A10 (Certificate of Title). Mr Rico submitted further that, according to the current search report, it is clearly indicated that, the property in question is not in the company's name. He posited that, as clear as it should be seen, the only proof of ownership can be found in the Certificate of Title. He pointed out and relied on the case Page 11 of 38 of, Amina Mohamed Hambali vs. Ramadhani Juma, Civil Appeal No. 35 of 2019, (unreported), to buttress his submission. It was a further submission by Mr Rico that, the legal consequence of the acts done by the 1st and 2nd Respondents is a total nullification of the Decree, and contended that, this Court has the power to do so. He relied on the case of The Government of Libya vs. Meis Indi Company Ltd & 2 others, Civil Case No. 225 of 2012 (unreported) and in the case of Motor Vessel Sepideh & another vs. Yusuf Mohamed & 2 others, Civil Appeal No. 237 of 2013 (unreported). In view of the above, Mr Rico contended that, based on the decisions provided and the acts of the 1st and 2nd Respondents, this Court should be pleased to grant the prayers sought in the Petition and nullify the Decree in Misc. Civil Cause No. 62 of 2000. For his part, Mr Dickson Sanga, who appeared for the 2nd Respondent, made a swift and sweeping reply to Mr Rico's submissions. In the first place, he adopted the amended reply to the Petition as forming part of his submission. He contended that, since his colleague's submission was pegged on the Page 12 of 38 allegation of fraud in respect of the Deed of Settlement executed on 17th October 2013 and which resulted into a decree in Misc. Cause No. 62 of 2000, the same should be rejected. According to Mr Sanga, this Court should decline granting the prayer to set aside the Decree in Misc. Civil Cause No. 62 of 2000, because a Judge of the same Court cannot set aside the decree issued by another Judge of the same Court. He contended that, the only remedial avenues open to the Petitioner was to either apply for review or for setting aside the ex-parte judgment. To support his argument, he cited to the Court the case of Mohamed Enterprises (T) Ltd vs. Masoud Mohamed Nasser, Civil Appeal No. 33 of 2012 (unreported) and, that of Mwasiti Ally vs. Diamond Trust Bank Tanzania Ltd, Civil case No. 53 of 2016, (unreported). In the latter case, the Court of Appeal was of the view that, a judgment obtained by fraud cannot be set aside by another Judge of the same court. Page 13 of 38 It was a further submission by Mr Sanga that, on the basis of the above decisions by the Court of Appeal, this Court cannot as well set aside a compromise decree procured by fraud. Referring to page 17 of the Mohamed Enterprises (T) Ltd's case (supra), he submitted that, in the circumstances of where fraud is pleaded, a fresh suit must be established to deal with it and not a Petition as the one at hand which was made under section 233 of the companies Act. Responding further to the issue regarding the 3rd Respondent's company secretary, Mr Sanga referred to paragraph 17 of the petition which stated that, the deed was procured fraudulently because Ms. Hamida Sheikh presented herself as a company secretary while she was not. According to Mr Sanga, the said allegation needs to be proved by the petitioner because he relied on the BRELA's search as reflected on annexure A.5 and the Annual Report found in BRELA Annexure A.9 while these were in respect of the year 2021. It was his further submission, that, the said annexure had nothing to do with what happened in 2013 and, in the said Annual Report, nowhere does it describe

the status of the year Page 14 of 38 2013 and, hence, it was his contention that, the said Annual Report cannot tell the Court whether on 2013 Ms Hamida Sheikh was a company secretary or not. He insisted that, according to section 110 of the Evidence Act, it is the Petitioner who bears the duty to prove such a fact. Mr. Sanga contended further that, while it is true that the Company Returns were filed in the office of the Registrar at BRELA, the correctness of what has been filed is a different issue altogether. Concerning the issue that the Deed of Settlement was lacking the Company's seal, Mr. Sanga submitted that, that argument was a misconception because the original Deed of Settlement had a seal and, hence, the Deed of Settlement was proper. Besides, and submitting on the issue of transfer of the Plot No.77A, which is alleged that it was wrongly included in the Deed of Settlement, Mr Sanga insisted that, such a fact was erroneous on a number of reasons. One, as per the 6th paragraph of the Petition, it is clear that the entity in the name of "the Covell Mathew Partnership" was dissolved. He Page 15 of 38 wondered how it could still own the property. Secondly, he submitted that, transfer of property is a process. As such, he submitted that, the mere fact that the property was not transferred does not mean that the 3rd Respondent does not own it. He therefore distinguished the cited case of Civil Appeal No. 237 (supra) and urged this Court to dismiss the Petition in its entirety and with costs. In a brief rejoinder Mr. Rico rejoined, on the basis of the issue arising from the decision of the Court of Appeal in Mohamed Enterprises' case (supra), that, indeed, on page 17 of that case, the Court of Appeal was clear that, a consent decree tainted with fraud, misrepresentation or the like, can be set aside on such grounds by way of filing a fresh suit. He argued, however, that, the word suit was given interpretation in the case of Burafox Ltd vs. Registrar of Titles, Civil Appeal No.235 of 2019 at pg 8 and, that, based on its meaning the present Petition does qualify as a suit. In that regard, he contended that, the Petitioner had taken a right course in praying for the setting aside of the decree procured fraudulently. Page 16 of 38 As regards the matter concerning Ms Hamida Sheikh's status in the 3rd Respondent's Company, Mr Rico rejoined that, the Company' annual returns were submitted to BRELA and had official stamp of the Company, meaning that, such suffices as evidence that, by the year 2013 Ms Hamida Sheikh was not a company secretary of the 3rd Respondent. He insisted that, according to section 182 of the Companies Act, Directors of the company being the 1 st and 2nd Respondent are required to act in good faith and to the best interest of the company. He reasoned that, since the Petitioner ought to have known that Ms Hamida was a company secretary, the same ought to have been disclosed. He pointed out that, even in the counter affidavit of the 2nd Respondent, such a fact was not indicated, but evasively denied as the deponent knew that Ms Hamida Sheikh he was not the Company Secretary and /or has never been one. As regards the issue of the Original Seal of the Company being present on the original Deed of Settlement, Mr. Rico rejoined that, such a fact was not stated in the counter affidavit Page 17 of 38 and, hence, the submissions to that effect amount to an afterthought. He rejoined further, concerning the issue of dissolution of the partnership, that, the fact that the same was dissolved does not extinguish its partnership right over the property until when the proper procedures for transfer of such property are followed. According to Mr Rico, it is trite that, where a partner dies in a partnership, the remaining property is taken

by a surviving partner and here the surviving partner is the Petitioner. He contended, therefore, that, the inclusion of the property in the settlement deed while the directors knew it is not in the company's name was deliberately calculated to alienate the property from the Petitioner through a Court Order. For that reason, he reiterated his submission in chief and prayed that the prayers in the Petition be granted. Being mindful of its noble duty of upholding the truth and administering justice in a fair manner and, while fully aware that in case of allegation of fraud the proof thereof cannot be by Page 18 of 38 affidavit alone, this Court gave chances to both counsels to address it on that issue. After hearing submissions from the respective counsels for the parties herein, on 18th May 2022 this Court, ordered the deponents of the affidavits filed in Court be made to appear in court for cross-examination. When Mr. Gordon McClymont, (PW1) the Petitioner, was cross examined by Mr. Sanga, he told this Court that, out of the four directors of the 3rd Respondent, two directors were not shareholders and, that, the shareholders were only two. He stated further that, in 1998 Mr. Chavda was a managing director but was not a shareholder. He stated that, it was only the shareholders (who were Mr McClymont and Mr. Noronha) who passed the resolution as Mr Chavda was not a shareholder. Besides, Mr. McClymont told this Court that, the location of Plot No. 77A, Msasani, Beach Area, Title No. 21198, used also to be known or referred to as Msasani area as well as Kawe area. Upon being further cross-examined, Mr. McClymont further informed this Court that, in 2013 Mr. Noronha was a Page 19 of 38 Managing Director and was also a Company secretary and that, he ought to have consulted the shareholders before executing the settlement deed dated 17th day of October 2013, a fact which was not done. He told the Court that, as a director and shareholder he should have been informed even if he was not in Tanzania. Upon being re-examined by Mr. Rico, Mr. McClymont told this Court that he knew Mr. Noronha as a colleague and friend and also a director of the company. He then replied that he did not know Ms Sheikh as a company secretary at the time and he never knew whether the company had such a secretary. He told the Court that, ordinarily if there was to be such a matter as appointment of a secretary, Mr. Noronha would have linked up with him as he used to on all matters but he did not in that respect. Mr. McClymont told this Court that, they bought the property as a partnership property for the company and that, originally, the Covell Mathews Partnership Ltd was a UK- based company and he was made a director in Tanzania with small number of shares. He told this Court that, the Property on Page 20 of 38 Plot.77A, was bought before the Company changed its name as he had bought the Covell Mathews Partnership Ltd from the UK-based Company. As for the Respondents, the only witness who appeared for cross-examination was Mr Chavda, the 2nd Respondent, whom I shall refer to as Dw-1. Upon being cross-examined, DW1 admitted that, the Covell Mathews Partnership and Covell Mathews Partnership Ltd are two different entities. He stated that, the Decree in Misc. Civil Cause No. 62 of 2000 was in respect of the Covell Mathews Partnership Ltd and not otherwise. He was also emphatic that, he was a shareholder of the Covell Mathews Partnership Ltd. However, much as he stated so, he failed to tender in Court any document evidencing his shareholding admitting that he did not have such in Court and his name does not appear in the Memorandum and Articles of the Company, the Covell Mathews Partnership Ltd. Dw-1 stated that, as Managing

Director, he had attempted to call for several meetings of the Covell Mathews Partnership Ltd in respect of the Decree in Page 21 of 38 Misc. Civil Cause No. 62 of 2000, but he failed to produce any of such notices of the calls for meetings in Court. He presumed that, the name appearing on the Deed of Settlement is of Ms. Hamida Sheikh and, that, she was a company secretary. DW1 stated, upon being cross-examined further, that, he moved out of office in 2000 and he had no role or access to any document after he had been locked out. Dw-1 made a reply upon being asked a question in regards to annexure A9 that, according to that document, the person who was the Company secretary in the year 2013, was Mr. Noronha and not Ms. Hamida Sheikh. He admitted that, the decree was executed on the same year, 2013. Upon being referred to Annexure A3, (the BRELA's search Report) Dw-1 admitted that, nowhere was it showing that Ms. Hamida Sheikh was ever a secretary to the Company (the 3rd Respondent). Upon being shown Annexure GJC-1, Dw-1 stated that, from that document, what he reads is that, the property named as Plot No. 77A, was never transferred from "the Covell Mathews Partnership" to "the Covell Mathews Partnership Ltd". He admitted, however, that, the property Page 22 of 38 was included in the Deed of Settlement even if it was never transferred to Covell Mathews Partnership Ltd. Upon being re-examined by Mr. Sanga, Dw-1 stated that, "the Covell Mathews Partnership" as an entity in Tanzania existed from 1989 when its parent Company in UK decided to sell their interest in Tanzania and Kenya branches. According to Dw-1, in 1989 there was held a Directors' Meeting whereby he was made a shareholder and, that, it was decided at the time, to continue trading as Covell Mathews Partnership, a decision which went on until 1997 when by a company's resolution, it was decided to change the name to be "the Covell Mathews Partnership Ltd". So far that is what transpired in the hearing. Before I delve into the nitty-gritty of this present Petition, it is worth noting that, the same was brought under section 233 (1), (2) and (3) of the Companies Act, No.12 Cap 212 RE 2002. That section deals with the issue of unfair prejudice and it provides as follows: "233.-(I) Any member of a company may make an application to the court by petition for an Page 23 of 38 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." (3) Without prejudice to the generality of subsection (1), the court's order may:

- (a) regulate the conduct of the company's affairs in the future,
- (b) require the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do,
- (c) authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct, Page 24 of 38

- (d) provide for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.” (Emphasis added).

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. In that regard, 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 Page 25 of 38 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 this particular Petition, the Petitioner's unfair prejudice complaints are premised on the various acts and conduct of the 1st and 2nd Respondents acting as directors of the 3rd Respondents, which are alleged to have been tainted with fraud. As it has been once held, “fraud avoids all judicial acts, ecclesiastical and temporal”. Essentially, fraud is considered to be an act of trickery or deception. It has received varied definitions over time. For instance, according to Websters Third New International Dictionary, fraud in equity has been defined as an act or omission to act, or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Page 26 of 38 Blacks Law Dictionary, fraud is defined as an intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. Besides, The Concise Oxford Dictionary defines fraud as a criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. The Halsburys Laws of England considers fraud as a representation deemed to be false if it was, at the material date, false in substance and in fact. In the case of Pan Africa Tanzania Equipment Ltd vs. KAS Freight Ltd, Commercial Case No.116 of 2021 (Ruling) (Unreported), this Court stated, as a matter of principle, that, when fraud is pleaded, particulars of it must be given and proven. It is as well trite that, the standard of proof of fraud in civil cases is higher than a mere balance of probabilities. See the case of International Commercial Bank Limited vs. Jadecam Estate Limited [2021] TZCA 673. From the perspective of corporate law, fraud may be perpetrated on the minority shareholders by the majority and Page 27 of 38 instances of such fraud may include a scenario where such a shareholder relied on falsified information about the state of affairs of the Company's financial performance and took steps to invest in the Company. Fraud or

waste committed by the majority may also constitute the so-called shareholder oppression. In the case of *Laura Lucas Chogo vs. International Commercial Bank (T) Limited and Another*, Misc. Commercial Appl. No. 88 of 2020 (unreported) this Court made it clear, as a long established proposition of law, that: "Fraud avoids all judicial acts, ecclesiastical or temporal a judgment, decree or an order obtained by fraud upon a Courts, binds not such Court nor any other, and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding." See also Willes, J., in the old case of in the *Queen v. Saddlers Company* (1863) 10 H.L.C, 404(431). See also Page 28 of 38 the decision of the Indian Supreme Court in the case of *A.V. Papayya Sastry & Ors vs. Govt. of A.P. & Ors*, (2007) 4SCC 221. As I stated herein earlier, the gist of the Petitioner's complaint is that the conduct leading to the Deed of Settlement forming the Decree of the Court were fraudulent and constituted unfair prejudice on the part of the Petitioner. In the course of hearing from the Petitioner and the 2nd Respondent during their cross-examination, however, it was clear to me, and several observations were in the open. Firstly, it was made clear to me that, no Board Resolution was ever made available to this Court to prove that Ms Hamida Sheikh was ever appointed as a Company Secretary of the 3rd Respondent. This means that, whatever she signed as Secretary to the Company was a total fraud. I hold it to be so because, in his testimony during cross- examination, Dw-1 (the 2nd Respondent) told this Court that, the Deed of Settlement was initiated by the 1st Respondent and Ms Sheikh had advised the 1st Respondent that she could act as the Company Secretary. In my view, however, Ms Sheikh could Page 29 of 38 not have imposed herself as Company Secretary without being duly appointed by a lawful Board meeting of the Board of Directors of the 3rd Respondent. That is what Article 13 of the Articles of Association of the 3rd Respondent provides. Secondly, Dw-1 did acknowledge that, the Property on Plot 77A Msasani Beach (previously also referred as Kawe) was never made to be part of properties owned by the 3rd Respondent but was excluded by way of a Resolution Dated 9th February 1998 as a personal property of the Petitioner. Thirdly, the 2nd Respondent has never been a shareholder of the 3rd Respondent Company as he was unable to prove to this Court such a fact. No share certificate or even a Board resolution was tendered in Court by Dw-2 showing that he was ever made a shareholder of the 3rd Respondent. Moreover, according to the Articles of Association, which were never challenged, it is indicated that the shareholders of the 3rd Respondent were only two, i.e., the Petitioner and the 1st Respondent. However, it has not been disputed that the 2nd Respondent and one Daniel Yona were Directors of the 3rd Respondent. Page 30 of 38 Fourthly, the Consent Decree agreed upon by the 1st Respondent, and purportedly signed by Ms Hamida Sheikh as Company Secretary was never real but fraudulently obtained as no evidence was ever adduced to show that the Petitioner was ever involved in any of the decisions made or arrived at by the 1st and 2nd Respondents. Definitely, as a Director and shareholder whose interests were also being affected, the Petitioner ought to have been fully involved because, evidence did indicate that, he was not beyond reach. The act of by-passing the Petitioner in the decision making process in which a conclusion of the Deed of Settlement was arrived at, while the Petitioner is not only a member but also a director of the 3rd Respondent was by itself, in breach of his legitimate rights to participate

in the affairs of the Company and, thus unfairly prejudicial. In the case of Morogoro Hunting Safaris Limited vs. Hamima Mohamed Mamunya, Civil Appeal No.117 of 2011 (unreported), the Court of Appeal made a point that: "... any particular company carries out its management functions by its directors; and that the directors must act collectively..." Page 31 of 38 A similar observation was made by this Court (Mambi, J.) in the case of Irene Kahemele vs Ndiyo United Co & 2 Others, Misc.Civil Cause No.3 of 2018, (unreported), where the learned judge had the following to say regarding the right of shareholders to participate in the affairs of the Company: "As part of the business and company owners, the petitioner, as one of the shareholders, [has] the right to participate in a business and company's affairs and profitability as long she own the shares and contributed to the capital and growth of the business. It should be noted that as the shareholder and contributor to the business and company capital, the petitioner has inalienable rights to be consulted or informed before the company takes a particular action. The Law gives a shareholder or part of the company owner like the petitioner the right to inspect the books, register, annual returns and other business affairs. See Leary vs Foley, 884 S02d 655 [La App 2004]." Page 32 of 38 Looking at the evidence and the testimonies adduced in this Petition, I am convinced that, the Petitioner has fully proved to this Court that, the incidences which involved the 1 st and 2nd Respondent in relation to the conclusion of Deed of Settlement and disposition of the properties located on Plot No.77A Msasani Beach (the area being also previously known as Kawe) as per the Deed of Settlement, were tainted with fraud. Where fraud exists, the consequences are dire. It was stated in the Indian case of Kasani Gnaneshwar vs The Joint Collector, Writ Appeal No.268 of 2018, (3 April, 2018) that: "No judgment of a Court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. Fraud vitiates all transactions known to the law of however high a degree of solemnity.... No court will allow itself to be used as an instrument of fraud and no court, by way of rule of evidence and procedure, can allow Page 33 of 38 its eyes to be closed to the fact that it is being used as an instrument of fraud. The basic principle is that a party who secures the judgment by taking recourse to fraud should not be enabled to enjoy the fruits thereof. ... A person whose case is based on falsehood has no right to approach the Court...A judgment obtained by fraud or collusion may be treated as a nullity. Sanction procured by fraud or collusion, cannot withstand invalidity because, otherwise, high public policy will be given as hostage to successful collusion." Taking into account the circumstances of this Petition and the observations made by this Court, I find it difficult to deny the prayers sought by the Petitioner or accede to the submissions made by the Respondents. In my view, the Petitioner had a right to be fully involved in the affairs of the Company as both a Director and a shareholder. Page 34 of 38 In the case of Bhavesh Chandulal Ladwa and 3 Others vs. Jitesh Jayantilal Ladwa, Misc. Comm. Cause No. 35 of 2020 (unreported), this Court was of the view that, the expression "the company's affairs" is, of wide ambit and need to be understood within the context in which it is considered. In particular, such may include all matters that may be brought to the attention of the Board of directors for consideration. In the context of this Petition, for instance, if at all Ms Sheikh who acted as Company Secretary to the 3 rd Respondent and signed the Deed of Settlement in that capacity was to have been

lawfully appointed, such was, as per the Articles of the Association, a matter for the Board and constitute an affair of the Company. It means, therefore, that, actions or omissions in compliance or contravention of the articles of association of a company may or may not constitute the conduct of the company's affairs depending on the precise facts. In this case, it precisely did. In the Bhavesh Chandulal Ladwa and 3 Others' case (supra) this Court did also state, referring to the case of Arbuthnott vs. Bonymann & Others [2015] EWCA Civ.536 Page 35 of 38 (20 May 2015), at 630, that, removal or exclusion from participation in the management of the affairs of a company constituted an unfair prejudice act on the part of the Petitioner in his capacity as a member just as a disregard of the rights of a member may, even without any financial consequences to him/her, amount to prejudice falling within the section. In the upshot of what has been discussed herein above, it is my findings that this Petition must succeed, and, this Court, therefore, proceeds to make the following Declaration/Orders, that:

- (a) This Court hereby declares that, the 1st and 2 nd Respondents' fraudulent acts, omissions and conducts are contrary to and prejudicial to the interests of the petitioner and the 3rd Respondent.
- (b) This Court hereby declares that, the 1st and 2nd Respondents' act of executing the settlement deed dated 17th day of October 2013 without consultation with the Page 36 of 38 members/Board resolution is contrary to the articles of the Company and prejudicial to the interest of the petitioner and the 3rd Respondent.
- (c) This Court do hereby authorize the Petitioner to commence civil proceedings in the name and on behalf of the 3rd Respondent as against the 1st Respondent, 2nd Respondent and any other person(s) as shall deem necessary in order to protect the interests of the Petitioner and the 3rd Respondent.
- (d) The Deed of settlement dated 17th day of October 2013 and the Decree dated 18th October 2013 were fraudulently procured and, consequently, a nullity.
- (e) All acts, deed and decisions made by the 1st and 2nd Respondents in the 3rd Respondent Company without prior consultation with the petitioner Page 37 of 38 were unfairly prejudicial to the rights of the Petitioner and are hereby nullified.
- (f) The Respondents shall bear all costs of this Petition. It is so ordered. DATED at DAR-ES-SALAAM, ON THIS 26 th DAY OF AUGUST 2022 HON. DEO JOHN NANGELA JUDGE Right of Appeal Explained. Page 38 of 38

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