

TANZANIA / JUDGMENT

rajiv bharat bhesania another vs hardeep kaur chaggar another 2024 tzhccomd 4 15 january 2024

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TZHCCOMDDECIDED
15 January 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT DAR-ES-SALAAM MISC. COMMERCIAL CAUSE. NO. 21 OF 2023 IN THE MATTER OF THE COMPANIES ACT, ACT NO.12 OF 2002 AND IN THE MATTER OF AN APPLICATION BY RAJIV BHARAT BHESANIA1ST PETITIONER EKTA VINESH KARSANJI.....2ND PETITIONER VERSUS HARDEEP KAUR CHAGGAR.....1 ST RESPONDENT PAMUTITU TRUST COMPANY LTD.....2ND RESPONDENT Last order: 03/11/2023 Ruling: 15/01/2024

RULING

NANGELA, J.: This petition was brought to the attention of this court under section 233 (1) and (3) (a) of the Companies Act, Cap.212 R.E 2002. The Petitioners seek for the following: -

1. A declaration that the document entitled “Declaration of Trust” annexed and marked as “B” of this petition filed at BRELA is illegal Page 1 of 32 and, therefore, null and void and of no effect.
2. A declaration that the shareholding position in the 2nd Respondent Company, namely Pamutitu Trust Company Limited is as appearing in the Memorandum and Articles of Association filed in BRELA during the incorporation of the 2nd Respondent.
3. A declaration that the Directors of the 2nd Respondent Company, namely Pamutitu Trust Company Limited are as they appear in the Memorandum and Articles of Association filed at BRELA during the incorporation of the 2nd Respondent and any change in the shareholding structure of the of the 2nd Respondent subsequent to its incorporation are irregular and ought to be expunged from the Company Register at BRELA.
4. A declaration that the Promoter and first Company Secretary of the 2nd Respondent Company, Mr. Roman Stephen Urassa, was in breach of trust to the Petitioners and in dereliction of his duties to the 2nd Respondent. Page 2 of 32

5. A Declaration that the Minutes of the Extraordinary Resolutions dated 19th August 2022 and Annexed and marked as “C” of this Petition are legal decision of the Board of Directors of the 2nd Respondent and the same to be registered to Business Registration and Licensing Agency (BRELA).
 6. An Order that the 1st Respondent pay the Petitioners the costs of this Petition.
 7. Any other orders as this Honorable court may deem just. On the 06th of June 2023, the Respondents filed their “answers to the petition” including an affidavit in opposition. On the 12th of June 2023, the Petitioners filed their reply to the “answer to the petition.” The Petitioners responded by a reply to the Respondent’s answer to the petition as well as affidavits in reply to the affidavit filed in opposition. Earlier the Respondents had raised preliminary points of law in objection to the petition. However, these were overruled in a ruling of this dated 04th of August 2023. The parties were thereby directed to dispose of the petition by way of filing written submissions. Having duly complied with the orders of this court I will now proceed to analyze their respective submissions before I render my final verdict. In his submission in support of the petition, Mr. Msengezi, the learned advocate appearing for the Petitioners Page 3 of 32 commenced his submission by adopting the contents of the petition as well as those of the 1st and 2nd Petitioners’ Reply to the 1st Respondent’s ‘Answer to the Petition’ as well the ‘Reply to the 2nd Respondent’s “Affidavit in Opposition”. He prayed that the same be considered part of his submission in chief. He submitted that this petition is brought under Section 233
- (1) and (3) of the Companies Act, No.12 of 2002, Cap.212 R.E 2002. He argued that a ‘Petition’ is more like an affidavit than an ordinary pleading like a ‘Plaint’ because, while the latter is devoid of evidence (see Order VI Rule 3 of the Civil Procedure Code, (CPC) Cap.33 R.E 2019) and affidavit is written evidence (see Order XIX of the CPC). He submitted that, as a corollary of the above submissions, a pleading that contains evidence is defective, just as an affidavit that is devoid of factual evidence. In his view, an affidavit or a petition purporting to controvert facts stated in another affidavit or petition by stating that those facts are “denied”, “disputed”, or “challenged” without adducing any factual evidence to controvert the disputed facts lacks potency. Mr. Kamara, who appeared for the 1st Respondent has opposed Mr. Msengezi’s submission on this point and I think I should address it right away. Mr. Kamara has submitted that a Petition is a pleading as well and Mr. Msengezi’s view is distorted. He submitted that, much as the Petition herein consists of an “Affidavit of verification”, such style of verification does not convert a Petition into an affidavit. Page 4 of 32 In my view, both counsels’ submissions have truths in them. In Mr. Kamara’s submission, for instance, he is correct in saying that a petition is also pleading. The decision of this court in the case of Re: Red Dot Distribution Ltd vs. Hakam Investment Ltd, Misc. Commercial Case No.20 of 2021 may be relied upon for sake of clarity. But a Petition is not on equal footing with an affidavit in all fours even if all will form “pleadings” in the generality of the meaning of what the term “pleadings” means. According to Blacks Law Dictionary, 4th Edn., on page 1302, the term ‘Petition’ is defined as: A written address, embodying an application or prayer from the

person or persons preferring it, to the power, body, or person to whom it is presented, for the exercise of his or their authority in the redress of some wrong, or the grant of some favor, privilege, or license... The word "petition" is generally used in judicial proceedings to describe an application in writing, in contra- distinction to a motion, which may be viva voce” On the other hand, an affidavit is a written statement voluntarily made by an affiant or deponent under an oath or affirmation which is administered by a person who is authorized to do so by law. An affidavit does replace oral evidence as it is itself evidence. In short it is written evidence Page 5 of 32 given under oath and is, therefore, a substitute of oral evidence. In principle, however, what Mr. Msengezi stated when it comes to responding to averments made in a petition or an affidavit, is indeed a correct proposition if one considers the cases of East African Cables (T) Limited vs. Spencon Services Limited, Misc. Application No.61 of 2016 (unreported), Gilbert Zebedayo Mrema vs. Mohammed Issa Makongoro, Civil Application No.369/17 of 2019, (CAT)(DSM) (unreported) or Janeth William Kimaro & 2Others vs. Pelagia Auye Mrema & 2 Others, Misc. Commercial Application No.2 of 2020 (unreported). It follows; therefore, where a matter filed by way of a petition duly verified by a verifying affidavit, the same may proceed to determination without necessarily calling for viva voce evidence or hearing. That having been said, I do agree that it will not be enough when responding to averments raised in a petition to merely state that paragraphs so and so are denied. One must give the controverting evidence of what was averred in the first place. In his submissions, Mr. Msengezi has contended that the affidavits filed to challenge the Petition are replete with bald denials that adduce no substantive evidence to controvert the facts adduced in the Petition. Whether that is correct or not is a matter which I will address later. Notably, however, is the fact that Mr. Msengezi proposed seven issues which need Page 6 of 32 to be considered when determining this Petition. The issues he has raised and addressed are as follows:

1. Whether Advocate Steven Roman Urassa acted in conflict of interest for the 1st Respondent against the Petitioners when incorporating the 2nd Respondent Company and when directing the Petitioners to sign the Declaration of Trust (Annexure “B” to the Petition) and subsequently filing it at BRELA.
2. Whether Advocate Stephen Urassa had legal capacity to represent the Petitioners in the drawing, execution, introduction in attestation, and filing of the Declaration of Trust (Annexure “B” to the Petition).
3. Whether the Declaration of Trust is sanctioned by the 2nd Respondent’s Articles of Association (Annexure “A” to the Petition).
4. Whether the contents of the Declaration of Trust have any legal validity under the Companies Act, Cap.212 R.E 2002.
5. Whether the net effect of the Declaration of Trust is illegal for evading the structures of Tanzanian land ownership laws.

6. Whether any changes in the board of directors of the 2nd Respondent and its shareholding structure on the Page 7 of 32 basis, and in furtherance, of the Declaration of Trust is lawful; and
7. What points of relief(s) are the Petitioners entitled? Analyzing the first and the second issues, Mr. Msengezi submitted that as a trite legal position, an Advocate cannot represent two parties with conflicting interests in the same matter. He argued that Mr. Steven Roman Urassa is an Advocate who was engaged by, and worked for, the 1 st Respondent and, that, even if paragraph 9 of the “Answer to the Petition” refutes the Petitioners’ perception that Mr. Urassa was engaged in by the three shareholders in the 2 nd Respondent arguing that he was rather engaged by the 1 st Respondent, the fact remains that the learned Advocate Urassa purported to be an advisor and an advocate for the Petitioner. He relied on a cash receipt dated 14 th of September 2015 for TZS 3,700,000 from Imara Attorneys of 3 rd Floor, Avalon Building, Dar-es-Salaam, which he contended to be the same Law Firm in which Mr. Urassa operates. He submitted that the receipt was a clear and substantiated admission. As such, he argued that to advise and purporting to be the same advocate for the Petitioners is nothing short of conflict of interest and any fruits of any labours from such a conflict of interest are void and the Declaration of Trust is void for that very reason. Mr. Msengezi argued that; as per the averments of the Petitioners made under oath, Mr. Urassa misdirected them in Page 8 of 32 making them sign a document that would take away all their rights as members of the 2nd Respondent Company. Relying on paragraph 2(a) of the 1st and 2nd Petitioners’ Reply to the 2nd Respondent’s Affidavit in Opposition, he counteracted the 1st Respondent’s argument made in paragraph 10 of 1st Respondent’s ‘Answer to the Petition’ arguing that the 1st Respondent was not there when the documents were being signed to be able to argue that the signing was freely done after reading and understanding the contents and their full implications and import thereof. In that regard, Mr. Msengezi submitted, Mr. Steven Roman Urassa was masquerading as the advocate for the Petitioner while in fact was the exclusive advocate for the 1 st Respondent who admittedly drew the Declaration of Trust and was guarding the 1st Respondent’s interest for good pay. He argued that there was no wonder, therefore, that the Petitioners acted in complete trust of Mr. Urassa and signed all and every document he told them was necessary in incorporating the 2nd Respondent Company. He argued that it is in these circumstances that a clear conflict is manifest and where an advocate deliberately misdirects the adverse party to make them sign a document they would otherwise have never signed. Mr. Msengezi submitted that, the Petitioners had a complete trust that Mr. Urassa was their bona fide advocate and, thus, reasonably trusted him. He contended, therefore, that it is in those circumstances of glaring possibility of deliberate misdirection Page 9 of 32 by an advocate for the adverse party in executing a document that this Honorable Court should strike down that document and declare it null and void ab initio. Submitting on the third issue, Mr. Msengezi argued that the Articles 11 in the Memorandum and Articles of Association (MEMARTS) (annexure “A” to the Petition) of the 2 nd Respondent which Mr. Urassa acknowledged to have been involved in drawing it, forbids the Declaration of Trust which is another document which Mr. Urassa drew and filed

the same day he incorporated the 2nd Respondent. As regards the fourth issue, even if the glaring shortcomings and improprieties he had pointed out about the Declaration of Trust were non-existent (which is not the case) still the Declaration of Trust would be void for going contrary to the Tanzanian Company Law. It was Mr. Msengezi's argument that the net effect of the Declaration of Trust is that it effectively deprived and dispossessed the Petitioners of their rights as members of the 2nd Respondent Company even though it acknowledges in its preamble that each of the Petitioners is the "registered owner" of their respective shares. He argued that the dispossession brought about by the Declaration of Trust in favour of the 1st Respondent who is stated to be Dubai-base, is absolute, has no basis, and is totally devoid of consideration. He submitted further that its terms are onerous, one-side, and unjust and did reduce the number of Members of the 2nd Respondent from three to one, Page 10 of 32 thus infringing Sections 3 (1) and 26 of the Companies Act, Cap.212 R.E 2002. Concerning the fifth issue, Mr. Msengezi submitted that, as a rule, a foreigner cannot own land in Tanzania unless it is for investment purposes and that land can be held by the Tanzania Investment Centre (TIC) which grants derivative rights to use such land for investment purposes by a foreigner. He contended that the unlawful act of the 1st Respondent who is a foreigner with her Advocate Steven Urassa to hold that the 1st Respondent who is a foreigner is, through the purported Declaration of Trust, the Sole Owner of the 2nd Respondent Company which owns several landed properties in Tanzania contrary to sections 20 (1) and (4) of the Land Act, Cap.113 R.E 2019. Mr. Msengezi listed the landed property as being:

1. Plot No.1081, C.T No. 23664, Msasani Peninsula, Dar-es-Salaam.
 2. Farm No.1217, CT.No.34-IRLR, Kilolo Urban Area, Iringa Region.
 3. Apartment No. B42 with CT No.6843/34, Msasani Kinondoni Municipality Dar-es-Salaam.
 4. Apartment No. B43 with CT No. 6843/34 Msasani Kinondoni Municipality Dar- es-Salaam.
- Mr. Msengezi submitted that since ownership of land is a matter regulated by law, foreigners should not be allowed to circumvent the law and own landed properties in Tanzania by clever stratagems such as Declaration of Trust. He submitted Page 11 of 32 that, section 20 (1) and (4) of the Land Act, Cap.113 R.E 2019 is very clear regarding how a foreigner may own land in Tanzania. He contended that section 20 (4) of the Act extends to foreign company and the criteria of determining a foreign company is by looking at the ownership structure to see if the majority shareholders are foreigners. He submitted that, although the 2nd Respondent is, on the face of it, a Tanzanian Company by being owned by the Petitioners, the 2nd Defendant owns land and the land is not for investment purposes and then, comes the Declaration of Trust which is shrouded in underhand intentions. He argued that its creation, execution, filing, and operation has been irregular and surreptitious, thus, making it a document intended to deceive both the Petitioners and the Authorities. He argued that the effect of the Declaration has been to secretly transform a Tanzanian company into a foreign company in the hands of a South African, Dubai-based individual, and all these are facts admitted by the Respondents. He submitted that, in principle the 2nd

Respondent is a wholly foreign owned under the purported operation of the Declaration of Trust and, for that matter, it cannot own land in Tanzania. He submitted that, the Declaration of Trust has, without a scintilla of doubt, the effect of circumventing the strictures of foreign land ownership stipulated by the Land Act, Cap.113 R.E 2019. Addressing the six issue, Mr. Msengezi submitted that over the years, following the incorporation of the 2nd Page 12 of 32 Respondent, several acts and many omissions were done by the 2nd Respondent and the Company Secretary, Mr. Urassa, the learned Advocate in furtherance of the Declaration of Trust. He argued that as an example, the company has failed to convene its annual general meetings, it has failed to appoint auditors, and has failed to convene its board meetings. He submitted that, the explanation given and some of which is in the evidence on record, is that the Petitioners had sold their rights to the 1st Respondent by virtue of the Declaration of Trust. It was his argument that, later acting in collusion with Mr. Urassa, appointed a director in addition to existing directors of the 2nd Respondent, and may even have changed the share structure of the 2nd Respondent. He argued, therefore, that, the state of the 2nd Respondent as evinced by Annexure "A" to the Petition, has, on the purported Declaration of Trust, been unilaterally changed by one minority shareholder of the 2nd Respondent acting in collusion with Mr. Steven Roman Urassa, the Company Secretary. For that matter, ne urged this court, if it tears down the Declaration of Trust, to hold that all company changes done in the 2 nd Respondent have to be voided as well. Lastly, it was his submission regarding the seventh issue that, the reliefs which the Petitioners have enlisted hereabove are what they are entitled to, once this court find that the Declaration of Trust is unjust, irregular, unlawful, and, therefore, void ab initio. Page 13 of 32 In response to the submission by the Petitioners, Mr. Mpaya Kamara, the learned counsel for 1 st Respondent put up a spirited fight back as well. Part of what he responded to regarding whether a Petition is a pleading or not has been dealt with hereabove and I need not reopen the discussion. In his submission, Mr. Kamara has argued that the Petitioners have failed to lay evidence before this court as they did not file any affidavit or move the court to direct how evidence should be given. He relied on Rules 414 and 420 (1) and (2) of the Company (Insolvency Rules), G.N. No.43 of 2005. Mr. Kamara submitted that, even if the Petition is to be treated like an affidavit, he contended that the same will need to be subjected to the rules of evidence, wondering how would one receive photocopies? To that extent, he relied on the case of Ecobank Tanzania Limited vs. Dabenco Enterprises Limited & 30thers, Commercial Case No. 52 of 2019 (unreported), where the court dismissed the Plaintiff's suit seeking a default judgement because the original documents were not availed to the court. However, the above cited case by Mr. Kamara no longer stand as good law considering what the Court of Appeal stated in the case of Bruno Wenselaus Nyalifa vs. The Permanent Secretary, Ministry of Home Affairs & Another, Civil Appeal No. 82 of 2017 (unreported), as well as the case of Life Insurance Corporation of India vs. Panesar [1967] 1 EA 614. In Bruno Wenceslaus Nyalifa (supra), the Court of Appeal stated as follows: - Page 14 of 32 "We find further that the documents which were annexed to the appellant's affidavit should not have been disregarded on the ground that they were not tendered in evidence. This is for the obvious reason that affidavit is evidence and the

annexture thereto is intended to substantiate the allegation made in the affidavit." In the same vein, in the case of Life Insurance Corporation of India (supra), it was held inter alia that, unless otherwise provided for in a written law, the rules of evidence do not apply to affidavits. See also the recent case of Exim Bank Tanzania Ltd vs. Truelite Investment Ltd and Others (Civil Application 446 of 2020) [2023] TZCA 171 (4 April 2023). It follows, therefore, that what Mr. Kamara suggested is an erroneous position. In my view, the Petition having been verified by an affidavit it suffices for it stand and all attachments thereto will not necessarily require further evidence. In his alternative submission, however, Mr. Kamara argued that the Petition is grossly lacking in merits as their alleged conflict of interest on the part of Advocate Urassa who incorporate the 2nd Respondent is unfounded. He submitted that right from the start it was understood and agreed by and amongst the Petitioners and the 1st Respondent that the Petitioners would hold shares for and on behalf of the 1st Respondent in the 2nd Respondent. He submitted that, in Page 15 of 32 consideration, the Petitioners were fully indemnified by the 1st Respondent for any liability as and when such liability would arise in the course and because of their holding of shares for and in trust of the 1st Respondent in the 2nd Respondent. He contended that the Petitioners had other, including for instance, that the 1st Petitioner ably used the Companies' assets to secure a loan of TZS 100,000,000 from Diamond Trust Bank. He contended, therefore, that the Petitioners signed the incorporation documents aware that they in fact owned no shares in the Company but in trust for the 1st Respondent, hence, their signing of the Declaration of Trust to that effect. He submitted that the Petitioners cannot surface after seven years in utter betrayal of trust bestowed on them by the 1st Respondent to short-change the 1st Respondent with alleged conflict of interests on the part of Mr. Urassa and unfeigned ignorance of the contents and full import of the Deeds. He wondered why it took too long if at all the Petitioners were genuine in their claims. He regarded their claims as sheer after thoughts. Mr. Kamara argued further that, the Petitioners signed the Deeds not before Advocate Urassa but before another Advocate in the name of Jacqueline Rweyongeza whom the Petitioners are now complaining against. More so, he submitted that, the complaints against Mr. Urassa are made without joining him as a party. He contended that the claim cannot fall within the ambit of section 233 (1) of the Companies Act. He submitted that the Petitioner's allegations that Mr. Urassa has Page 16 of 32 mislead them is a gross distortion of the truth. He argued that the Respondents contention that the Petitioners freely signed the Deeds after a thorough reading of their contents cannot be weak defence as contended but rather a credible account. Mr. Kamara submitted that, the issue regarding whether the Trust is sanctioned by the Company Articles of Association is to be looked at from the context of the understanding and agreements by and amongst those who appear as shareholders of the 2nd Respondent. He submitted that, by their agreements the 2nd Respondent was incorporated as a Trust Company and the Deeds must be read in juxtaposition with the Memorandum and Articles of Association (MEMARTS) of the Company. He submitted that, the Petitioners, though appearing as shareholders were in fact holding those shares in trust for the 1st Respondent and, to that extent the Trust was sanctioned. He argued further that the holding of shares in trust that appears to be not sanctioned by virtue of Article 11 of the

MEMARTS has nothing to do with the shares that the Petitioner were holding in trust for the 1st Respondent. To back up his submissions Mr. Kamara referred to this court the cases of *In Re Saul D. Harrison & Sons Plc* [1995] 1 BCLC at 19, cited by this court in *Jitesh Jayantilal Ladwa vs. Bhavesh Chandulal Ladwa & 5 Others*, Misc. Commercial Cause No. 148 of 2022. He submitted that; it is not strange to find an Article that does not fully reflect the understanding upon which the shareholders are associated. He submitted that the agreement by and amongst the 1st Page 17 of 32 Respondent and the Petitioners is as it is stated in the Deeds and so the Petitioners' reliance on Article 11 cannot eclipse the Deeds which is binding on them. He submitted that, the Petitioners' attempted narrative in the absence of any Deed to the contrary goes against the decision of the Court of Appeal in *UMICO Ltd vs. Salu Ltd*, Civil Appeal No. 91 of 2015 to the effect that oral evidence cannot be allowed to contradict written evidence as that will be contrary to section 100 and 101 of the Evidence Act, Cap. 6 R.E 2019. His further reliance was on the English case of *VBFA vs. Blackpool FC (Properties) Ltd & Others* [2017] EWHC 2767 (cited in *Jitesh Jayantilal Ladwa's* case (supra) on page 18 where it was argued that "parties involved in a private company must comply with non-contractual arrangements and/or undertakings between them...." Mr. Kamara submitted that, as regards the possibility of there being a company with one shareholder, section 23 of Business Law Amendments Act No. 3 of 2012 does provide for a room to that effect. He submitted, therefore, that, the court should steer clear of and shun the Petitioner's frantic attempts to use the court process under the pretext of unfair prejudice on allegation that the Trust is not sanctioned by the Company Law because the conduct complained of as constituting 'unfair prejudice' need not be unlawful but must be inequitable. His further reliance was on the English case of *VBFA vs. Blackpool FC (Properties) Ltd & Others* (supra) as cited in *Jitesh Jayantilal Ladwa's* case (supra). Page 18 of 32 Concerning the Petitioners' contention that the Declaration of Trust seeks to evade foreigners' land ownership structure, it was Mr. Kamara's submission that, such an argument is yet another trick to shortchange the 1st Respondent under the very Deed which the Petitioners themselves freely signed to indicate their knowledge that the shares are held in trust for the 1st Respondent. He argued that questions or issues regarding ownership of land and non-compliance or breach of laws relating to them are matters which are outside the scope of this court because they should be subject to land disputes resolution jurisdiction. Mr. Kamara submitted that the proper recourse for failure to call meetings is not through unfair prejudice action but rather, the Petitioners should have lodged an application to the Minister under section 133 (4) of the Companies Act, Cap. 212 R.E 2002. He also contended that the purported minutes of Extraordinary General Meeting and Extraordinary Resolution attached to the Petition as Annexure "C" are a nullity, under Articles 43 of the MEMARTS. He urged this court to dismiss this Petition in its entirety and with costs. In his submissions on behalf of the 2nd Respondent, Mr. Mwanri argued that raised an issue regarding the failure on the part of the Petitioners to file an affidavit to supplement their petition. This point was earlier raised by Mr. Kamara and, as I stated earlier, I do not think this should detain me since the facts stated in the Petition were duly verified by a verifying affidavit. Page 19 of 32 In his submission, Mr. Mwanri contended that,

the Petition is intended to supersede the intentions of formulating the 2nd Respondent. Adopting the Affidavit in opposition to the Petition as forming part of his submissions, he argued that what the Petitioners are trying to do is to go against what they had agreed in 2015 where they incorporated the 2nd Respondent. He submitted that; the said Declaration of Trust Agreement had the same bearing in mind to all shareholders of the 2nd Respondent that the shares are held in trust by the Petitioners. He relied on the Companies (Beneficial Ownership) Regulations, 2021 (GN.No.391 of 2021) which has since then been replaced by GN. No.478 of 2023 he argued that one of the persons falling under it includes a natural person who holds or acquires a beneficial interest in the company not registered in his name. He submitted that there are other laws applicable to a beneficial owner which include the Companies Act and the Income Tax Act, Cap.332 R.E 2019. He submitted, in reference to paragraph 4 and 5 of the Affidavit filed by the 2nd Respondent in opposition that, the trust was drafted on the same day with the MEMARTS and registered at BRELA on the same day. In view of that fact, he contended that it was legal because it complied with the laws and regulations regarding the beneficial owner. He submitted that the Petitioners understood that the 2nd Respondent would be engage in real estate and will be leasing or owning leased properties as per Annexure "TITU-3" to the 2nd Respondent's affidavit. Page 20 of 32 Mr. Mwanri argued further that the Petitioners understood documents regarding the Trust and never questioned them till 2023. He submitted that the provisions which could be used to move the court are those under the contract law and not company law. He argued that the Trust documents are just gentlemen agreement like a shareholders' agreement and create a fiduciary relationship which cannot be challenged in the matter the Petitioners have chosen to challenge them. He maintained, therefore, that the Petitioners were in no way mislead or forced to sign the documents. Concerning whether the changes by the 2nd Respondent which were incorporated at BRELA are binding to the Petitioners, he submitted that they followed all due process. As regards the claim that the 2nd Respondent has never held any meeting since her inception, it was Mr. Mwanri's submission that the remedy is to be found under section 133(4) of the Companies Act. He also castigated the attack on the Company Secretary Mr. Urassa as mere afterthoughts. Relying on the case of M/s Universal Electronics & Hardware (T) Ltd vs. Strabag International GmbH (Tanzania), Civil Appeal No.122 of 2017, he charged that the Petitioners have a duty to prove. He contended that being a promoter of the company and later its secretary has never been an issue. He thus urged this court to dismiss the Petition. In rejoinder submission to what the counsels for the Respondents have stated in their response, Mr. Msengezi urged this court to uphold the Petitioners' averments and grant Page 21 of 32 her prayers. Mr. Msengezi rejoined further that, the Government Notice No.478 of 2023 did not sanction owning shares in trust for a party who does not appear in the legally required Company information. Moreover, it was his rejoinder that the GN.No.478 of 2023 cannot and could not have sanctioned evasion and contravention of the existing laws and did not apply retrospectively. He rejoined that the counsels who purported to act for Petitioners duped them as his services were reserved and paid for by the 1st Respondent who in turn was the beneficiary of the illegal Declaration of Trust. He considered the cases relied upon by the Respondents as distinguishable and reiterated his

main submission. I have carefully gone through the rival submissions made by the counsels for the parties herein. This Petition has been preferred under section 233 (1) and (3) of the Company Act, Cap.212 R.E 2002. This provision deals with issues which are considered prejudicial to the interests of not only the company but also the shareholders or members of the company. In *McKillen vs. Misland (Cyprus) Investments Ltd & Others* [2013] EWCA Civ.781 (03 July 2013) the Court pointed out that, for an unfair prejudice petition to succeed, the Petitioner must prove that (i) there is an act or omission on the part of the Company and, (ii) that, the act or omission is unfairly prejudicial to the Petitioner. In the case of *Bhavesh Chandulal Ladwa & 3 Others vs. Jitesh Chandulal Ladwa*, Misc. Commercial Cause No.35 of 2020 (unreported), this court stated that: Page 22 of 32 “the conduct complained of must be conduct of the company’s affairs.... it is the affairs of the company which are being or have been conducted in an unfairly prejudicial manner or that it is an act or omission of the company that is or would be so prejudicial.... Refusal by a company to convene a general meeting, for instance, would be an act of the company, although whether it was either unfair or prejudicial it will all depend on the circumstances. 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 matter before me, the Petitioners have inter alia raised the issue of absence of annual general meetings of the company and acts which contravened the Articles of Association of the Company. In my view, these are acts which as the above cited case indicated, may duly fall under section 233(1) and (3) of the Companies Act because all those matters are matters touching on the conduct of the affairs of the company. See the case of *Scholastica Mukatesi* Page 23 of 32 *Ndyanabo vs. IPSOS Tanzania Limited*, Commercial Cause No.36 of 2002 (unreported). In the Petition, the Petitioners are concerned that the company secretary Mr. Urassa ignored, neglected, or refused to call for members meeting of the company. As I stated hereabove, this is a conduct prejudicial to the interest of the company and may constitute a breach of trust to the Petitioners and a dereliction of his duties to the 2nd Respondent. Since the court is empowered to make appropriate orders, the 2nd Respondent must be called upon to convene the appropriate meetings hence forth to remedy the anomaly. It is worth noting, however, that, conduct considered unfairly prejudicial to the interests of the members of the company cannot be exhaustively listed. This court captured that fact in the above case of *Bhavesh Chandulal Ladwa & 3 Others vs. Jitesh Chandulal Ladwa*, Misc. Commercial Cause No.35 of 2020 (unreported). The court made it clear that: “As a concept, unfair prejudice is a flexible one, and incapable of exhaustive definition. The list of conduct complained of under this provision is, therefore, not closed. Of particular importance is that this particular provision is one of effective tools meant to bring the control of a company to an order or ensure that its Page 24 of 32 conduct is properly and beneficially regulated going forward.” As it may be noted hereabove, section 233 of the Companies Act is also meant to bring a company to a “proper and beneficial regulation”. What has been raised in this Petition include allegation which touches on the Articles of Association and the Petitioners’ concerns that they have been shortchanged by not being given a full disclosure by the Promoter of the 2nd Respondent who they came to learn

afterwards that he was acting for and in the interest of the 1 st Respondent. This, in my view is a question of acting unfairly. In the case of *O'Neill vs. Phillips* [1999] UKHL 24. Lord Hoffmann, LJ, referring to the case of *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 31, (Neill LJ citing *Peter Gibson J in Re Ringtower Holdings Plc* (1989) 5 BCC 82 at 90), stressed that, when it comes to considerations of fairness, such are to be viewed in the context of a commercial relationship. He proposed, as a matter of law, that, since the commercial relationships of a company's shareholders with the company is governed by its articles of association, consequently, such contractual terms are the ones to be looked at. A similar position was expressed in the English case of *Ebrahimi vs. Westbourne Galleries*

[1973] AC 360, 379, In this Petition, the Petitioners have contended that, in relation to the Trust Declaration Agreement, that, the same Page 25 of 32 infringes Article 11 of the Articles of Association. The respective Article reads as follows: "Except as required by law, no person shall be recognized by the company as holding any share upon trust, and the company shall not be bound by or compelled in any way to recognize (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any interest in any fractional part of a share of (except as otherwise provided by the Articles or by law) any rights or interests in respect of any share except an absolute right to the entirety thereof in the registered holder." In the case of *Mohamed Said Kiluwa vs. Wang Shengju & Another*, Commercial Case No. 23 of 2022, this court observed that, generally, courts interpret Articles of Association of a company by applying the same principles used when interpreting any written contract. Citing the English case of *Arnold vs. Britton* [2015] UKSC 36, the court noted that: "That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions ..., (iii) the overall purpose of the clause and ..., (iv) the facts and circumstances known or Page 26 of 32 assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions." From the above considerations and looking at the above cited Article 11 of the MEMARTS and what it indicates, it is clear to me that the same does not recognize a person holding shares upon the trust. It also means that the Articles of Association being the contract binding upon the members of the company, it will follow that, at the time of executing it, the members were clear about that position of theirs. As argued by Mr. Msengezi, therefore, the Declaration of Trust cannot eclipse the Articles, and should be held to be inoperative. But even if such were to outshine what the Articles specifically provides (which should not be the case) still one must look at the true effect of the Trust Deeds. If such were executed with an ulterior motive, whether express or implied, to circumvent the law, the Trust Declaration will be of no effect. It is a fact that trusts may be utilized for ulterior and abusive motives. They can be used for purposes of evading taxes or even for purposes of money laundering and that is why the law requires them to be duly registered and their beneficial owners be known. Page 27 of 32 The Report of UK Law Commission (Law Com.No.320) titled: -The Illegality Defence, 2010 does make it clear, in relation to trusts, that: "There is wide potential for constructive or resulting trusts to raise issues of illegality,

although the actual number of cases taken to court each year is low. The parties may attempt to hide assets from creditors, or potential creditors, or ... People may also use trust arrangements to evade tax or to claim state benefits to which they are not entitled.... Many trusts may involve some connection with illegality in their formation, performance, or purpose, which under the present law would not affect the trust's validity or enforcement." Contextualizing the above to the current Petition, it does make it clear, for instance, that there is a reason why the Petitioners raised concern that if things are to be left as they are, there will be an infringement of the laws governing land ownership. In particular, the 1st Defendant being a foreigner, is indirectly using the trust to own land contrary to the existing provisions which regulate how a foreigner should own land. In my humble view, any contravention of any law, regardless of the kind of the law so infringed and, whether that is done directly or indirectly as the case may be here, Page 28 of 32 constitutes an illegality and, as a rule of law, no court will assist anyone whose action or conduct constitutes an illegality. See *Catic International Engineering T. Ltd vs University of Dar Es Salaam* (Misc. Commercial Case 1 of 2020) [2020] TZHCComD 17 (3 March 2020). The above proposition was once made clear in the case of *Mirza vs. Patel* [2016] UKSC 42, at para.2 where the court stated that: "Illegality has the potential to provide a defence to civil claims of all sorts, whether relating to contract, property, tort or unjust enrichment, and in a wide variety of circumstances..." In this Petition, the Petitioners have raised a concern that the effect of the Trust Declaration is dire as it deprives them of their rightful ownership of the shares in the 2nd Respondent. In particular, it has been argued that, the deprivation or dispossession brought about by the Declaration of Trust in favour of the 1st Respondent who is stated to be Dubai-base, is onerous and unjust and reduce the number of Members of the 2nd Respondent from three to one, thus infringing Sections 3 (1) and 26 of the Companies Act, Cap.212 R.E 2002. I am mindful of Mr. Kamara's reliance of section 23 of Business Law Amendments Act No.3 of 2012 as regards the possibility of there being a company with one shareholder. However, where a company is to be incorporated and be in that form, the law is clear that there are formalities that need Page 29 of 32 to be adhered to. There has been no evidence that the incorporation of the 2nd Respondent was fashioned in that manner. What both parties herein admit, however, is that the ultimate effect of the Declaration of Trust is to impliedly change the structure of the ownership the 2nd Respondent and make it a one shareholder company contrary to the true picture of it at the surface. In my opinion, therefore, business matters and arrangements need not be shrouded in secrecy or ambiguous outlook. Allowing things to remain as they are is to cultivate a fertile ground for all evils to be nurtured beneath the pretentious facial outlook of what everybody thinks it a genuine look of things. For those stated reasons, the Declaration of Trust which is shrouded in underhand deceptive and surreptitious intentions cannot stand as it becomes void ab initio and any changes made to the 2nd Respondent are likewise avoided. From the foregoing discussion, I tend to agree with the submissions of Mr. Msengezi that the Petitioners have made a point and are entitled to what they have sought from this court as reliefs. In the upshot of all that, this court settles to the following:

- (i) That, this court does find and declare that the document entitled “Declaration of Trust” annexed to the petition and marked as “B” which was filed at BRELA is illegal Page 30 of 32 and, therefore, null and void and is of no legal effect. (ii) That, this court does find and declare that the shareholding position in the 2nd Respondent Company, namely Pamutitu Trust Company Limited is as appearing in the Memorandum and Articles of Association filed in BRELA during the incorporation of the 2nd Respondent. (iii) That, this court finds and declare that the Directors of the 2nd Respondent Company, namely Pamutitu Trust Company Limited are as they appear in the Memorandum and Articles of Association filed at BRELA during the incorporation of the 2nd Respondent and any change in the shareholding structure of the of the 2nd Respondent subsequent to its incorporation are irregular and ought to be expunged from the Company Register at BRELA. (iv) That, this court finds and declare that the Promoter and first Company Secretary of the 2nd Respondent Company, Mr. Roman Stephen Urassa, was in breach of trust to the Petitioners and in dereliction of his duties to the 2nd Page 31 of 32 Respondent for not calling the appropriate statutory meetings of the Company.
- (v) That, since the company has not been calling for annual meetings the Company Secretary Mr. Urassa is directed to issue notices and call for an extra-ordinary general meeting of the members within 90 days (three months) from the date of this decision where in the members shall deliberate on the matters pertaining to the welfare of the 2nd Respondent and set a date for its annual general meeting. (vi) That, the 1st Respondent shall bear all costs incurred by the Petitioners the costs of this Petition. It is so ordered. DATED AT DAR-ES-SALAAM ON THIS 15TH DAY OF JANUARY 2024 DEO JOHN NANGELA
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