

TANZANIA / JUDGMENT

irene simon kahemele vs ndiyo united co ltd and others 2020 tzhc 1842 26 june 2020

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26 June 2020

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF MBEYA AT MBEYA MISC. CIVIL CAUSE NO. 3 OF 2018 IN THE MATTER OF COMPANIES ACT, 2002 [CAP. 212] AND IN THE MATTER OF PETITION FOR ORDERS REGULATING COMPANY AFFAIRS BETWEEN IRENE SIMON KAHEMELE.....PETITIONER AND NDIYO UNITED COMPANY LIMITED.....1st RESPONDENT WILLIE AUGUSTINE HOWARD.....2nd RESPONDENT MARINA KAHEMELE HOWARD.....3 rd RESPONDENT

JUDGMENT

Date of last Order: 13.05.2020 Date of Judgment: 26.06. 2020 DR. A. J. MAMBI, J. This Judgment emanates from the suit (In The Matter of Companies Act, CAP. 212) filed by the Petitioner (IRENE SIMON KAHEMELE) against the three respondents namely; NDIYO UNITED COMPANY LIMITED (1st respondent), WILLIE AUGUSTINE HOWARD (2^{TM*} respondent) and MARINA KAHEMELE HOWARD (3rd respondent). Briefly the Petitioner in her petition show that she is among the shareholders of the first respondent (NDIYO UNITED COMPANY LIMITED). The petitioner instituted in this court a petition against the respondents praying for the reliefs orders that:-

- (a) The Respondents be ordered to furnish the petitioner with copies of the minutes and resolutions of the meetings of shareholders and directors of the first Respondent conducted from January 2016 through 2017 to date;
- (b) The Respondents be ordered to avail the petitioner with the first Respondent's Daily Stock Sheets (Opening and Closing Stocks); Daily Sales Reports and EDF reports by each salesman, purchases and sales invoices and payment slips as from January, 2016 through 2017 to date;
- (c) The Respondents be ordered to furnish the petitioner with the copies of the Book Cash Sale Journal as from January, 2016 through 2017 up to date;
- (d) The Respondents be ordered to furnish the petitioner with information of all creditors and debtors account statements of the first Respondent as from January, 2016 through 2017 to date;

- (e) The Respondents be ordered to furnish the petitioner with the report o f monthly commission received by the first Respondent from Tanzania Breweries Ltd, Tanzania Distillers Ltd and other suppliers as from January, 2016 through 2017 to date;
- (f) The Respondents be ordered to avail the petitioner with the first Respondent's bank statement from CRDB Bank PLC; Uwamu Saccos and other banks as from January, 2016 through 2017 to date. 2
- (g) The Respondent be ordered to furnish the petitioner with the current status o f the first Respondent's scheme account at or with Tanzania Breweries Ltd;
- (h) The Respondents be ordered to furnish the petitioner with last or current back - up from vision 7 system and Quick Books System, administrators passwords and other operators password from the period starting January, 2016 through 2017 to date;
- (i) The Respondents be ordered to provide all the e - mails addresses and their passwords fo r the first Respondent;
- (j) The Respondents be ordered to provide the copies o f all the communication done with creditors and debtors o f the first Respondent fo r the periods starting from January, 2016 through 2017 to date;
- (k) The Respondents be ordered to provide the copies o f the correspondence letters and payments to TRA starting from January, 2016 through 2017 to date; (I) The Respondents to be ordered to furnish the petitioner with the copies o f the audited accounts and VAT returns fo r the year starting January, 2016 through 2017 to date;
- (m) The Respondents be ordered to provide the copies o f the contracts fo r all the employees o f the 1st Respondent, their responsibilities and duties.
- (n) The Respondents to be ordered to provide the copies o f the payroll expenditures fo r the period from January, 2016 through 2017 to date;
- (o) The Respondents be ordered to furnish the petitioner with all the operations expenditures occurred by the 1st Respondent from January, 2016 through 2017 to date;
- (p) The Respondents be ordered to furnish the petitioner with the current valuation report o f the first Respondent's assets;
- (q) The Respondents be ordered to furnish the petitioner with the Lease Agreements between the first Respondent and all the landlords as from January, 2016 through 2017 to date;
- (r) The Respondents be ordered to furnish the petitioner with copies o f all business contracts between the first Respondent and third parties from January, 2016 through 2017 to date;

- (s) The first and third Respondents be ordered to complete the legal transfer process of the land donated by the third Respondent to the first Respondent, that is Plot No. 592, Block “M ” Forest Area, Mbeya or in the alternative the third Respondent be ordered to refund all the money contributed by the first Respondent to build a 3 story build over the said plot with interest thereon.
- (t) The second and third Respondents be ordered to declare and recommend to the first Respondent’s general meeting the payment of dividends for the years 2015/2016 and 2016/2017;
- (u) The Respondents be ordered to disclose the petitioner all payments paid to the second and third Respondents as directors fees from January, 2016 to date;
- (v) The Respondents be ordered to allow the petitioner to access all the documents relating to the business of the first Respondent without any hindrance;
- (w) The Respondents be ordered to pay the petitioner costs of and incidental to this petition; During hearing the petitioner was represented by the Learned Counsels Mr. Baraka Mbwilo, Mr. Munisi and Mr. Isaya respectively while the respondents were represented by the learned Counsels Mr. Alex Mgongolwa, Mr. Mwabukusi and Ms. Rose Kayumbo. All parties called their witnesses to testify in line with their submissions. The parties also tendered various documents admitted by this court as exhibits. For easy reference I will summarize the evidence of all parties and their submissions before making analysis and evaluating to answer the key issues. Starting with petitioner witnesses, the first petitioner (PW1) namely Irene Kahemela who was the petitioner testified that she was married a Tanzanian one Simon Kahemele (the brother of Marina Kahemele, the third respondent) on 24/09/1994 in Ukraine after they completed their studies. PW1 testified that her husband Simon asked her to come to Tanzania after his study to support a family business and join the company in Tanzania. She stated that when she arrived in Tanzania her sister in-law Marina Kahemele (the third respondent) and Willie Haward (the second respondent) took her to Mbeya. PW1 stated that she became a Tanzania by naturalization in 1996. PW1 testified that she stayed with her husband (Simon), the second Respondent and the third Respondent in one of the flats where the family business is located. She stated that she joined the family business by taking over the duty of her sister in-law. PW1 further testified that she was responsible for purchasing goods for our business, repacking and checking the goods including selling prices arraigning stores attending customers and making all payment business expenses. PW1 further testified that the name of the business was Ndiyo Min Market registered by Marina Kahemele (the third respondent). She testified that her late husband joined the business in July, 1995. She said that by then, the nature of the business was only the Grocery with two rooms where they were selling food stuffs and cosmetics. PW1 testified that when she joined, the company had the remaining capital of about three (3) to four (4) million Tanzania shillings only. She stated that at that time from 1994 there was no accounting system. She said that they also had other businesses with her late husband. She stated that her husband had a contract with a Germany Company namely Alcatel between 1996 and

1997. PW1 testified that her husband had a Toyota Double Cabin pickup from Germany Development services through an action and written under his name. She stated that her husband was renting the pick-up with registration Number TZD 7755 to different construction companies. PW1 testified that in 1999, her husband bought Isuzu Tipper Lorry with Reg. No. MB 6425 and registered under the business of SIM SAM SALAMBI business entity. PW1 stated that in 2000 her husband bought Mercedes Benz Track and Trailer Model Udimod and he used to rent these cars to different companies. She stated that in the year 2002, she opened her own recharge voucher business entity for telecommunications, in the rented premises in Town. She stated that she had vehicles which were parked at Ndiyo Min Market premises. She stated that she was keeping her vouchers under the store at the rented house. PW1 further stated that she was managing family business, since at one time her sister in-law joined (the third respondent) her husband in Kenya, since her husband namely Willy Howard had a terrible accident in Kenya in 2000. She stated that her sister in-law, Marina (the third respondent) was also injured and treated in Mombasa for a long time before she come back to Tanzania. She stated that at that time, she and her husband were the ones who were managing the companies. She stated that her sister in-law (the third respondent) came back to Tanzania in 2010 for one month and 2012 when she stayed for one or two months. PW1 also testified that they developed the whole sale of the drinks section with her husband under the company and they also introduced new products in or retail business. She stated that in 2008 she with her husband had a Contract with Tanzania Breweries for whole sale distributor contract where they were supposed to build distribution go-downs and warehousing. PW1 testified that in 2008 they bought plot No. 5 at block M (Forest) Mbeya and the plot was transferred to Marina's name in 2009. PW1 testified that they used to have retail and wholesale section in their business. In her testimony, PW1 testified that in 2008 they purchased a Plot No. 595 block M forest together with another plot 594 that they purchased in 2005 for building warehousing in Mbeya while the respondent (Marina) was around. PW1 testified that in December, 2009 she used the money from her own communication business and ordered a distribution vehicle from Japan with Reg. No. T540 BFF (Mitsubishi Canter) under the name of Ndiyo Min Market. In her evidence, PW1 further testified that in August, 2010, she ordered another distribution Canter from Japan registered with number T850 BKY where it was registered under the family business (Ndiyo Min Market) but she used money from her communication business. In 2012 July, she purchased a distribution Canter with Registration No. T802 CAQ using money from her communication business registered under Ndiyo Min Market. PW1 also testified that in 2009, she engaged buka contractors to construct warehouse in the plots no. 594 and 595 which was completed in June, 2012. PW1 further testified that they employed 25 people working at Ndiyo Min Market and they established computer networking where they introduced accounting software and security camera system including training key employers. In her evidence, PW1 further testified that in 2012, her sister in-law (the third respondent) and Willie Howard (second respondent) came back to Tanzania from USA and agreed to form YATENGA Company Ltd and they agreed the YATENGA Company Ltd to take over the retail business of Ndiyo Min Market under the same all premises. She testified that

this meant NDIYO Min Market was to operate for the second ware house dealing with distribution, retail on drinks. PW1 further testified that the distribution of shares in YATENGA Company Ltd was as follows:- (1)Irene Simon Kahemele (me/Petitioner) 2, 000 shares.

- (2) Simon Kahemele (Petitioner's husband) 1,500 shares (3)Willie Howard 1,500 shares. In her evidence, PW1 further testified that she had more shares due to her great contribution to the growth of the business and company. She testified that remember that she and her husband formed a company called SIRA Company Ltd incorporated on 14/07/2009 No. 71870. PW1 testified that she also signed a distributable contract with Zanzibar Telecom (Zantel). She sad that she knows Michael Mywanga was his customer in voucher business and he offered her to pay him off twenty million shillings that he can give me his business premises rented from Municipality at Mwanjelwa area. PW1 further testified that she used 20 million from her voucher business, and signed the Contract with the Municipality for renting the premises. She stated that she allowed NDIYO MIN MARKET to use the premises were rented under her name. PW1 stated that from 2016, she paid all the rent (8 million) of charge to the Mbeya Municipality. PW1 further testified that after she joined NDIYO MIN MARKET, Marina (the third respondent) did not inject any capital. She stated that in September, 2014 when Marina Kahemela (third respondent) was visiting to Tanzania, there was an idea to form NDIYO MARKET COMPANY LTD. PW1 further testified that she remember Marina (the third respondent) suggested that each of the following should have the following shares
(1)Irene S. Kahemele 25% 9
- (2) Simon Kahemele 25%
- (3) Marina Kahemele 25%
- (4) Willy A. Howard 25% She stated that they all agreed the idea, and it was agreed that she (petitioner) and her husband to assist in running the business. She stated that her husband died before they fully registered NDIYO UNITED COMPANY LTD and the Company was incorporated on 13/02/2015. PW1 further testified that she prepared the Memorandum and Article of Association. She stated that after the death of her husband, the dispute on the shares arose and they later agreed to register the company NDIYO UNITED COMPANY LTD. She stated that they all agreed that there of them will the shares as follows (1)Irene S. Kahemele 37 V2 %
- (2) Willy A. Howard 37 V2 %
- (3) Marina Kahemele 25% PW1 further testified that her contribution in NDIYO United Company Ltd contains two parts namely; NDIYO Min Market and NDIYO United Company after it was incorporated. She stated that in NDIYO Min Market, she contributed four vehicles, (three Mitsubishi canter and one saloon car) in the following registration numbers
(1) Mitsubishi Canter T540BFF

- (2) Mitsubishi Canter T850BKY
- (3) Mitsubishi Canter T802 CAQ
- (4) Saloon Car (Nissan) T415 CPJ. 10 In her testimony, PW1 further informed this court that she also contributed in construction of go-down at the amount of 90 million shillings. She stated this contribution on the constriction of the building was after 20 years of management since December, 1994 to February, 13, 2015. She testified that in March, 2015 she purchased Suzuki gymny with Registration Number T928 DDQ using money from her Communication Company. PW 1 further informed this court that in April, 2015, she contributed 30 million shillings from YATENGA Company through purchase of Toyota Land Cruiser hardtop with Registration No. T362 DDB. She stated that she also contributed 65 million shillings towards the purchase of the same vehicle registered under the name of NDIYO UNITED. PW1 further testified that in July, 2015, she transferred ownership of the vehicle Mitsubishi Canter No. T591 A W from her name to NDIYO United Company Ltd. She said that she purchased this vehicle for 15 million shillings in 2015. She stated that she also allowed the NDIYO United Market to use the Go- down at Mwanjelwa registered with her name. He stated that in December, 2015, he renovated premises in Ndiyo United Branch using money from her business that was more than 9 million shillings. PW1 testified that she also contribute over 100 million shillings to the construction of storage building or business premises. She said that on Plot 592 Block "M" she contributed almost 100 million shillings which was supposed to be transferred to the NDIYO United Company as indicated under the Financial Audited Report of Ndiyo Min Market of 15th May, 2015 and audited report of 31st December, 2015. She stated that the reports show that the vehicles (with Registration No. T928 DDQ Suzuki gym and another vehicle with Registration No. n T362 DDV) she contributed were not purchased by Ndiyo Min Market. She said that on vehicle was purchased by me 26/03/2015 under the name of Ndiyo United Co. Ltd at 34,132,500/ = . She testified that the dispute is the Ndiyo United Company started in October, 2015 as the second and third respondents were using Company money for private business. She testified that she wrote the letter to them to stop use of company on constructing the private buildings. She stated that Marina (third Respondent) and her husband Willie Howard (second respondent) decided to buy the vehicle with Registration No. T672 and three Mercedes Benz using the company money without her consent. She testified that Marina also refused to transfer Plot 592 at Block M from her name towards company name contrary to the board resolution agreement. She said that Marina also defrauded to transfer plot no. 594 and 595 where the warehouse was built toward company name as it was argued to be to be transferred in January, 2016. PW1 testified that she due to dispute, she left the business premises on 08/04/2016 since she was being harassed by Marina (third respondent) and her husband (second respondent) in front of the customers. She stated that when she left the premises the estimate of the capital value of the business was 1.3 to 1.4 Billion Tanzania shillings. She said that these include NDIYO United properties movable and immovable, stocks, skimmed account with TBL Creditors, Debtors and Banks. PW1 testified that after she left the premises in 12 2016, (April) she continued with her voucher business located at Lupa Street and the second and third

respondent Marina filed the case against her. She said that on 08/09/2017 she went to the business registered of NDIYO United Company warehouse and met with Managing Director Willie Howard and told him that she wanted to leave the company and pull out her shares. She stated that she wrote a letter to a Managing Director (Willie Howard) tell requesting the appointment date to discuss the value of the shares of the company. PW1 testified that on 13/09/2017 she went to Ndiyo United Company to inspect the document of the company but the accountant refused to give her any document. PW1 testified that when she came to Tanzania she had 5,000 USD and she first invested her money with her husband by buying vehicles in

1998. She stated that she injected the money to the business company known as SIM SAM SALAMBY which was first owned by her husband. She started that she later joined NDIYO Min Market which was a very small business in 1994 where the business for NDIYO Min Market was operating in two rooms. She stated that she invested her capital in NDIYO Min Market through her three vehicles. She testified that she and her husband bought vehicles that become part of the NDIYO United Company She stated that she was part of the business company not as a wife of Kahemele only. She stated that she had 2,000 (37.8%) of shares in YATENGA Market Company. She said that when she was leaving the business, the amount of capital was 1.5 billion. 13 On the other hand the second witness (PW2) for the petitioner namely Mohamed Bano Ndangilo testified that he knows Irene Kahemele as his usual client. He testified that in 2009 between September and October he was assigned the work to build a go-down building by Irene Kahemele at forest area, Mbeya. He said that he started building the go-down building in 2009. PW2 testified that he used to be paid by Irene Kahemele through her cashier after his work of constructing the building. PW2 in his testimony further testified that Irene Kahemele (the petitioner) used to buy building materials for the construction of the go-down. He testified that the total amount for construction was 50,000,000/= . The supervision of the construction was being done by Irene Kahemele. He said that when he was building the go-down, Willy Augustine (2nd respondent) and Marina Kahemele (3rd respondent) were not there. He testified that the name of the plot in the document was written Irene Kahemele and he knew the owner of the building was Irene Kahemele. He said that:-“Kwenye ubao wa matangazo wa ujenzi ilianidkwa jina la Marina Kahemele The third Petitioner witness (PW3) namely Hilda William who was the Sales Woman, Mbeya Telecom testified that she was employed by Irene since 2009 as date clerk and store keeper. She said that as store- keeper, she used to make orders to suppliers such as Vodacom under Alphatel and she kept the records of store items and deliver the items to their clients from Mbeya, Sumbawanga and Tunduma. PW3 further testified as a clerk her duty was posting of payment, office expenditure etc. She said that in 2009 (December) she posted the purchase core, counter type worth 30,000,000/= and in 2010 there was another posting for purchase of car (canter) worth 30 million. PW3 further 14 testified that in 2012 she posted the purchase of another vehicle (canter) worth 35,000,000/=. She said that all these vehicles were bought by Irene Kahemele under her Company. PW3 further testified in 2009 there were some companies such as SIRA, NDIYO

Min Market, Irene and SIM SAM SALAMBY and in all these companies Irene was there as part of the shareholder of the companies. PW3 further testified she used to work for all those companies since they were all under one database under one computer. PW3 said that she used to make stock-taking for NDIYO Min Market and other companies. PW3 stated that she used to be paid by Irene Kahemele as her employer and Director in all companies. PW3 stated that she was posting data in the uses and expenditure under the directives of Irene Kahemele. The last Petitioner witness (PW4) was Aziza Rajabu who was the Store Keeper, for Mbeya Telecom. In her testimony PW4 testified that in 2013 she was transferred from sales department to the department of stores and data under Ndiyo Min Market. PW4 testified that as store keeper her duty was to keep company items and make order for the company. She stated that she also used to keep data related to the company (NDIYO Min Market). PW4 further testified that in 2014 there was payment for the car, canter type; worth 15,000,000/= . She testified that in 2014 June there was also payment for the room that was 20 million. She stated that in 2015 there was also the purchase of the car for around 34 million Tanzania shillings. PW4 further testified she remember the purchase of Toyota land cruiser worth of 65,000,000/=. She told this court that there was also payment of renovation of the business room in Chunya for 9,000,000/= (nine million Tanzania shillings). PW4 further testified that there was also purchase of building materials for the building of NDIYO United Company and in the post she made from the data the payment was 100,000,000/= (hundred million Tanzania shillings). She stated that in 2016 to 2018 there was payment for rent for the business room in Mwanjelwa worth around eight million shillings (8,000,000/=) and all money was coming from her boss Irene Kahemele. PW4 further testified Irene used to do business for vouchers and M-Pesa. He said that she remember Simon Kahemele was also the Director at NDIYO Min Market Company. PW4 testified that she used to be employed by NDIYO Min Market. She stated that she knows NDIYO Min Market was changed to be the NDIYO United Company Limited. PW4 stated that she was employed by NDIYO Min Market since Irene was part of that company. She said that the payment post of 34 million and 64 million were for purchase for the cars by Irene. The respondents in their defence had three witnesses. The first defence witness (DW1) who was an Engineer by profession namely Willie Augustino Howard in his testimony testified that he knows Irene Kahemele (the petitioner) was married to his brother in-law Mr. Simon Kahemele. He stated that he first met Irene Kahemele in International Airport Dar es Salaam while he was with other relatives of his wife. He said that since Irene left her husband in Ukraine, she needed a guarantor and he agreed and signed as a guarantor for Irene. DW1 stated that his wife paid the ticket for Irene to come to Tanzania. He said that he was the founder of the NDIYO Min Market and Marina was working as a supervisor. DW1 further testified that between 1990 and 1991 he invested 145,000USD in a business for Marina under NDIYO Min Market. He said that they first acquired plot 593 Block "M" in Mbeya and later constructed a three storey building in block m including a 27 cubic metres underground term ark. DW1 stated that the building in plot 593 was the first three storey building. He testified that they opened NDIYO Min Market in 1993 and registered in

1993. He stated that the business was registered under the name and ownership of Marina Kahemele and no any Kahemele family contributed the business. DW1 testified that Irene Kahemele (petitioner) was not invited as an investor and he just gave an opportunity to Irene Kahemele to work with them and not as partnership. He said that we when they built the building in plot no. 13, Irene and her husband stayed in that building for a long time free of rent. DW1 further testified that they allowed Irene and her husband Simon to make sales out of their business. He told this court that NDIYO Min Market which was not a sole proprietorship had various sections such as voucher division, min market division and distributor for Tanzania breweries and Tanzania distilleries. He said that he with his wife had a big business and they employed more people. DW1 also testified that they authorized his brother in-law and his wife (Irene) to form subsidiary companies such as SIM SOMB Salambi, Irene, SIRA Companies. He testified that these business entities were formed using money from NDIYO Min Market and they never called up shares for NDIYO United Company. He said that NDIYO United Company was still under NDIYO Min Market. 17 DW1 also testified that he doesn't recognize the transfer of 90 million and 100 million. He said that NDIYO Min Market had also voucher business and YATENGA was a supermarket founded using the money from NDIYO Min Market. He testified that YATENGA had 2,000 shares for Irene and 1,000 shares for Simon Kahemele and 5,000 shares to him (DW1) where Irene was among the Director of YATENGA Company. Irene later left the Company. He stated that the vehicle T415CPG was bought from his wife by NDIYO Min Market where they later changed the use of vehicle to be NDIYO Min Market. He testified that other vehicles were initially purchased by NDIYO Min Market but we later transferred to the NDIYO United Market. The Mercedes Benz was bought by NDIYO Min Market. DW1 further testified that there were other subsidiary companies run by Simon Kahemele and his wife Irene Kahemele. He said that Irene later refused to share the pass code and pass word of software for running business in 2015. In his testimony, DW1 also testified the dispute over this mater stated in 2013 about the ownership of four plots in block M that belonged to Marina. He said that there was also dispute on the administrator of the estate of Simon Kahemele (Petitioner's husband) after his death. He said that when Simon died, there were only about five items belonged to the late Simon. DW1 stated that he took 1.5 billion from the bank and gave the late Simon and Irene. He stated that as of now there is only one shareholder in NDIYO Market United as part of NDIYO Min Market that is Marina. DW1 testified that he, Kahemela and Irene Kahemela had paid up the shares. He testified that they had an ongoing concern on transforming NDIYO Min Market to NDIYO United Company and NDIYO United Company was just for taxation 18 purposes only. DW1 further testified that according to MEMAT there are three shareholders namely: - (1)Irene S. Kahemele 37,500 (2)Marina Kahemele 25,000 (3)Willy Howard that is me 37,500 He said that they didn't pay for shares since no shares were called up but they had two different TIN Number for NDIYO United Market. DW1 further testified that they did not sign an employment contract with Irene Kahemele. He said that though NDIYO United Company Limited has no capital but they filed financial statement of NDIYO United Company Ltd. The second witness (DW2) for the defendants was Jacob William Kahemele. In his

testimony, DW2 testified that Ms. Marina and Howard purchased land and constructed building at forest, Mbeya. He s They therefore stated business known as Ndiyo Min Market. He testified that, later in Ndiyo United. He said that he knows Ndiyo Min Market on around 1992 and 1993. He said that the business as sole proprietorship was registered as business (sole proprietorship). DW2 said that his brother in-law Mr. Howard, financed the business where some of the items sold at the market were beverages, cosmetics etc. He testified that that he knows as Ndiyo Min Market since he was the advisor on the business company. He said that he know Irene (the petitioner) as his sister in-law (wife to his brother Simon Kahemele). He testified that the first Directors of the company were Irene Kahemele and Howard. DW2 further testified that there has not been much continuing on calling shares and payment of capital and 19 attachment of shares. He said that there has never been submission to and returns. DW2 stated that Mr. Willie Howard (DW1) was the one who financed the establishment of Ndiyo Min Market and the role of Marina Howard (the third respondent) was to establish Ndiyo Min Market. DW2 informed this court that he knows Irene supervised and assisted in the continuation and development of the business. He stated that he is aware of the Ndiyo United that was an idea to replace Ndiyo Min Market but it has never worked or progressed but Ndiyo United Company has continued to pay taxes through Ndiyo Min Market. The third respondent witness (DW3) was Willa R. Haji who was an accountant by profession. DW3 in his testimony testified that the capital of the Ndiyo United Company was not disclosed and If the shareholders could have paid their shares it could have been indicated under the account report. He testified that the financial report presented at the court does not show how many shares that were paid up but the report only shows the total amount of capital. He said that one of the similarly between the financial report of Ndiyo Min Market and Ndiyo United Company is same on the operations of the company. He said that the two business entities were doing the same operations With the same assets. He stated that in the report there are some motor vehicles without details such as registration numbers. The last and fourth respondents' witness was Marina Kahemele Nyasheni (DW4) who was the wife of DW1 (Second Respondent) and sister in-law to the petitioner. In her testimony, DW4 testified that 20 1990 she used to live at Jakaranda before she met her husband Mr. Howard (second respondent). She said that, later, she with her husband shifted to block T. She said that she is the promotor of Ndiyo United Company by virtue of being the founder and owner of Ndiyo Min Market. DW4 further testified that she started doing this business in 1993 under Ndiyo Min Market as sole proprietor owner. She said that her husband (Willy Howard) is the one who provided the capital. DW4 testified that they first acquired the land and house at block T and block M and placed our business at block M. she testified that when they started their business she was given 145,000 USD by her husband as a capital and the business belongs to her. DW3 testified that she knows the Petitioner (Irene Simon Kahemele) is her sister in-law as she was married to her brother. She stated that Irene (the petitioner) came to Tanzania in December, 1994 and she was the one who received Irene in Tanzania. She stated that her family assisted Irene with all immigration procedures and her husband Howard guaranteed Irene at the immigration office. DW4 stated that Irene (the petitioner) was staying at her home and she

(DW4) was the one who assimilated Irene with the culture of Tanzania. She stated that she paid the air ticket for Irene to come to Tanzania from Ukraine before Simon (Irene's husband and the brother of DW3) came back in 1995. She said that when Simon (Irene's husband) arrived she had her own business and Simon was just assisting in supervision of her business. DW4 further testified that Irene got into the business through the back of her husband (her late brother). She said that Irene and Simon never brought any share from her business 21 and all the time the business was a sole proprietorship under her ownership. DW4 further testified that she shifted the sole proprietorship business to Ndiyo United Company since she had enough capital. DW3 testified that Ndiyo United Company was found in 2015 and she with Irene Kahemele had never conducted any annual general meeting. She stated that the company neither filled the annual return with BRELA nor sold any share. DW4 said that everything from Ndiyo Min Market moved to Ndiyo United Market as an ongoing concern. She stated that they had the conflicts among the Directors. DW4 further testified that the memorandum and articles of association in the Ndiyo United Company was sent to BRELA for registration. She said that all the shares that are in Ndiyo United Company belongs to her. She testified that she is not aware about any board resolution from Ndiyo United Company since there was never any meeting and Ndiyo United Company had never acquired any capital from Ndiyo Min Market. DW3 testified that she signed the Memorandum and Articles of Association to register the Ndiyo United Company. DW4 further testified that she is aware with car (Suzuki) with Registration Number T928 DDV and land cruiser no. T 362 DV as indicated under audited financial report. She said that the cars were owned by the Ndiyo United Company. DW3 told this court that Ndiyo Min Market was transferred to Ndiyo United Company in 2015. 22 To support their evidence every party that is the petitioner and respondents made their written submissions. The submissions are summarized for easy reference during evaluation of the evidence and those submissions. Having called their intended witnesses, all parties made their submissions as follows; Starting with the petitioner, the learned Council for the Petitioner through Mr. Baraka Mbwilo submitted that the petitioner is concerned with unfair prejudice to her as a minority shareholder of a company by the conducts of her follow shareholders of the company (first respondent). The learned Counsels submitted that the legal principle is that the petitioner/ plaintiff is bound to prove his/her case, but this being a civil case the standard of proof is on the balance of probabilities. They argued that the defendants/ respondents must also prove in their defense as well. They argued that the evidence adduced by the respondents in this case is full of contradictory statements from his witnesses and documentary evidence tendered and pleadings. They referred the decisions of the Court in HAMISI FARAJI VS NATIONAL HOUSING CORPORATION, LAND CASE NO. 46 OF 2012 HIGH COURT OF TANZANIA A T DAR ES SALAAM (Unreported) and LAMSHORE LIMITED AND J.S KINYANJUI V. BIZANJE K.U.D.K

[1999] TLR 330, respectively. They argued the evidence by first respondent witness (DW1) Mr. Willie Howard is contradicting the testimonies of DW2, and DW4. The learned counsel averred that while Mr. Willie Howard testified that he is a current Managing Director of the first respondent, Mr. Jacob Kahemele (DW2) and DW4 (Marina Kahemele) testified that the first respondent has not commenced any business hence no any known management. They also referred the evidence of Also DW2 and DW3 who testified that there was no any 23 meetings or resolution ever passed by the first respondent, but they admitted when cross examined that the company operates bank accounts, own properties, hire staffs/ employees and prepare accounts for taxation and government compliances. The petitioner Counsels in their submissions wondered as to how can an artificial organization perform all these duties without having passed resolutions in a recognized meetings. The learned Counsels for the petitioner contended that the evidence of the respondents had other contradictions and inconsistency. They referred the evidence of DW3 who testified in court with the purpose of defeating exhibit P I 1 and P 12 that was the audited financial report of the first respondent tendered by P W 1. They submitted that the Audited Financial report of the 1st respondent as at 31st December 2015 was prepared and certified by an expert who is a Certified Public Accountant from Brain Power Consultant on 18th May 2016. They argued that when the report was being prepared, the Petitioner was already chased away by the respondents since 08th April 2016. They were of the view that the evidence show that the respondents brought in court an expert to discredit their own expert report. She argued that the contradictory statement from the respondents' evidence clearly indicates that their evidence is weaker than the evidence of the petitioner. They averred that the evidence by the petitioner show that the petitioner has discharged her duties properly by proving her case as alleged in the petition on the balance of probabilities. They argued that petitioner successfully proves the above issues in affirmative by adduce sufficient evidences to prove all prayers claimed in the petition justifying she had rights over the 1st respondent. They referred the 24 evidence of the petitioner who testified that that the NDIYO UNITED COMPANY LIMITED is a limited company established and incorporated under the Companies Act Cap 212 of the laws of Tanzania and its address is identified to be Plot No. 594 Block M, Forest Area P.O.BOX 2309 Mbeya Tanzania. They argued that the evidence show that the petitioner is a shareholder of the first respondent. They referred the evidenced by PW1, DW1, DW2 and DW3 during their testimonies in the trial. They argued that as per Section 4(4)(c) of the Companies Act No. 12 of 2002 a person become a shareholder of a company by virtue of subscribing in the memorandum of association and not by virtue of paying for his/her share at the time of calling shares as alleged by respondents during the trial. The learned Counsels for the petitioner further submitted that PW1- Irene Kahemele tendered exhibit P10 which is a memorandum and article of Association of the 1st respondent. They argued that none of the witnesses from both sides denied that the 1st respondent was registered under the Memorandum and Articles of Association tendered in this court. They also referred the evidence of DW1 who testified that he was a Managing Director of the 1st respondent and the Petitioner (Irene) was also the first Director of the first respondent. They argued that

this means that there were changes of the Managing Director of the first respondent. They submitted that all these facts from PW1 and DW1 during trial are clear evidence that the company has its directors and Managing Director. The learned Counsels for the petitioner further submitted a Company cannot be registered without having director and secretary and thus it is undisputed that first respondent is a registered company by Business Registration Licensing 25 Authority (BRELA). They argued that it is impossible for a company to be registered in Tanzania without having sending the name of person who was the first directors and Secretary in prescribed forms to the Register of Companies. The petitioner counsels further submitted that the defense submission that uncalled and unpaid shares has no merit and cannot defeat the rights of petitioner over the 1st respondent. They argued that the first respondent is a private company and not a public Company that could subject its shares for call-up and payment to the public. They submitted that since the first respondent was a private company then it is restricted by Section 27(1) (a) and (c) of Companies Act No. 12 of 2002 to transfer its shares and any invitation to the public to subscribe for any shares. They also referred Section 45 (2) of the Companies Act No 12 of 2002 which bars a private company like 1st respondent to offer to the public any of its shares or allots or agrees to allot any shares to the public. They were of the view that those provision only deal with mandatory requirement for public company to allot shares and call shares. The petitioner counsels further submitted that it is respondents who brought into trial this aspect and alleges this in their pleadings and during testimonies of their witnesses but have failed to tender in court if this discretionary matter of a private company was resolved in a duly constituted meeting and the petitioner defaulted to comply. They were of the view that, it was the duty of the respondents to tender any minutes of the meetings and resolution evidencing that the discretion power was exercised and the petitioner defaulted to comply. 26 The learned Counsel also submitted that the petitioner has contributed to the capital of the first respondent. They argued that it is undisputed that the first respondent is having running capital. They referred Audited financial Report of 31st December 2015 which is exhibit P 11 at page 3 where it is indicated that the Company capital was Tshs. 260.8 million out of which come from share capital and remaining was contributed from accumulated profits from sales of liquor from sales of liquor and groceries. They averred that from the testimony of Petitioner herself backed with several documentary evidence tendered in court and evidence of PW2, PW3 and PW4 it is clear that the petitioner has demonstrated how she contributed in the current running capital of the first respondent. In their submission the learned Counsels submitted that the Petitioner contributed to the capital and asserts currently owned and operated by the first respondent as follows

- (i) Room at Mwanjelwa. Start with Exhibit P9 which is a lease agreement of a room at Mwanjelwa Market from Municipality. It is evidencing that the room is still used by the 1st respondent despite of the facts that the contract was entered by the petitioner and the petitioner has paid rent over 8 (ii) Vehicles. From exhibits P 11 and p 12 which appears to be an Audited financial report conducted by expert hired by the first respondent indicates that

the first respondent is the owner of different vehicles. P 11 indicates clear at page 12 two motor vehicles which the petitioner evidenced in this court that it was here contribution. This vehicles are (iii) Chunya Renovation of the business premises for the first respondent's branch 27 (iv) Contribution to Ndiyo Min Market which was transferred to Nidiyo United Market as ongoing concern. They further submitted that PW1 (the petitioner) testified that she has a lot of assets including real and personal properties. They referred exhibit P 11 that is the Audited Financial reports at the financial statement as at 31st December 2015 at page 11. They argued that this report indicates clearly that there are both noncurrent assets and current asserts. They argued that non-current Assets includes Tangible fixed assets worth Tshs. 279,767,665/= while current asserts included inventory o f Tshs. 195,000,000/= and operational and other receivables Tshs. 4,080,027/= where the total of asserts of Tshs 478,847,691/=. They argued that Exhibits P 11 at page 12 being an expert report of the first respondent herself is supported by list of those asserts includes vehicles, furniture and fittings, cookers, refrigerators, tricycles and computers. With regard to the reliefs parties entitled, the petitioner counsels submitted that as the shareholder and one of the directors of the company, the petitioner has the right to access, examine (inspect) the Book of Cash sales Journal, information of all creditors and debtors account statements, monthly commission from Tanzania Breweries Ltd, Tanzania Distillers Ltd and other suppliers as from January 2016 to date. They argued that the petitioner also has the right to access Bank statements from CRDB Bank Pic, UWAMU Saccos and other Banks as from January 2016 to date. They argued that all these information are supposed to be availed to petitioner as a director, shareholder and member of the first respondent. They also argued that 28 the petitioner has the right to attend Meetings and resolutions of the first respondent as per Section 113 and 114 of the Companies Act No. 12 of 2002. The referred the decisions of the courts in Neill & Another vs Phillips & Others [1999] UK 24 [1999] 1 W L R 1092, Munyinyi and another vs Githunguri and other [2012]! E A 199(CAK) and KULABAKO VS MORINGA LTD AND OTHER (2010) 1 EA 215 (Uganda). On the other hand, the respondents through their learned Counsels Mr. Mwabukusi and Alex Mgongolwa in their submission submitted that they don't agree with the petition filed by the petitioner since she has no any right. They argued that the management and supervision of the business which is NDIYO Mini Market became difficult after the death of the supervisor thus for purposes of proper supervision of the business, the owner of the business who is the 3rd Respondent in this Petition was advised to change the status of the business to be a Company in order for it to be independent particularly in an aspect of Management consequently the existence of the 1st Respondent. They argued that the said business was wholly supervised by the late brother of the 3rd Respondent called Simon Kahemele who is the husband to the Petitioner in this petition. The learned Counsel submitted that it appears that in performing his day to day activities as a Supervisor one Simon Kahemele was assisted by his wife who is the Petitioner herein. Addressing the issue as to whether or not the 1st Respondent legally exists, the learned counsels submitted that the testimony from the Petitioner, the 2nd and 3rd Respondents have unequivocally stated that 29 there was no any Annual General Meeting and particularly first annual general Meeting. They referred section 133 (1) &(2) of the

Companies Act, No. 12 of 2002 which provides for appointments of the Directors of the Company, Auditors and calling for share and among others. They averred that the directors have never called up any share since the incorporation of the 1st respondent pursuant to the above clause. They were of the view that, failure to call up shares and/or calling annual general meeting for purposes among others to raise capital for investment has resulted to the company not to operate for lack of fund. They argued that, that being the case, the 1st Respondent to date has not conducted any business whatsoever since there is no Investment injected so far except for the intended contribution from the 3rd respondent through Ndiyo Min market. They referred the testimony given by DW3 who is an Auditor that it is clear that the Capital of the Company comes from the shareholders by paying up their respective shares and/or borrowing from outside sources. The respondents' learned Counsels submitted that the legal repercussion against the company which has never called any meeting, never invested and operated since its incorporation, it becomes defunct company which deserves to be struck out off the register by the registrar under section 400(1) of the companies act, No. 12 of 2002. They thus argued that the 1st respondent is defunct company which in any case, the orders sought by the petitioner cannot be performed by it since it is not operating and there are no records whatsoever filed to the Business Registration and Licensing Authority such as Annual returns. They were of the view that the petitioner verbosity prayers are untenable because a person derives rights as a member of the Company immediately after paying his shares called up to be paid by 30 the Company. The learned Counsels further submitted that the ownership of interest is always evidenced by a document called share certificate pursuant to section 83(1) of the Companies Act, No. 12 of 2002 and a share certificate states the amount of shares which are paid up. To support their evidence, the respondents' Counsels further submitted that it is not by accident that the Petitioner has not brought her share Certificate but due to the fact that she is aware that she has no interest to the 1st Respondent since she has not paid up her shares thus no capital injected. They referred the testimonies of the petitioner (PW 1), second respondent (DW1), third respondent (DW3) that they believe was corroborated with DW3 & DW3 which revealed that no shares were called up and being paid that's why both 2nd and 3rd Respondents also have no share Certificates in respect of the shares that Petitioner purport to own. In alternative, the learned Counsels submitted that the petitioner contention that she bought cars and donated to the 1st respondent is not backed up with any evidence to convince this court to believe that she contributed a sum of money in terms of cars. They argued that the records and evidence adduced is clear without a shred of doubt that there was no partnership between petitioner and the 3rd respondent nor any agreement in respect of the said cars which petitioner alleges to have bought. They referred section 15 of the Road Traffic Act, cap 168. They prayed that the prayers sought by the petitioner before this Court to be dismissed with an order for costs in favour of the respondents. 31 Having summarized the evidence and submissions by both parties let me now at this juncture analyze their arguments, evidence and determine the key issues. The Court has perused and considered both submissions and evidence from the parties including other records admitted to this court during hearing. I have also considered the evidence by both parties. From what I have

observed, in my considered view one of the key issue that need to be determined in this suit is whether the petitioner deserves the rights she has claimed against the first respondent. I wish to briefly reiterate that the petitioner among others has claimed to the respondents that: 1.to access, examine(inspect) the Book o f Cash sales Journal, information o f all creditors and debtors account statements, monthly commission from Tanzania Breweries Ltd, Tanzania Distillers Ltd and other suppliers as from January 2016 to date.

2. to access Bank statements from CRDB Bank Pic, Uwamu Saccos and other Banks as from January 2016 are entitled to be availed to petitioner as director , shareholder and member o f the first respondent
3. to a c c e s s the rep ort o f m onthly com m is s i o n received by the fir s t R e s p o n d e n t fr o m Tanzania B r e w e r i e s L i m i t e d , Tanzania D i s t i l l e r i e s L i m i t e d and o t h e r s u p p l i e r s as fr o m Ja n u a r y 2 0 1 6 t h r o u g h 2 0 1 7 to date
4. to access the cu r r e n t status o f the fir s t R e s p o n d e n t's S c h e m e A c c o u n t a t o r w i t h T a n z a n i a B r e w e r i e s L i m i t e d.
5. to access op e r a t i o n s exp e n d i t u r e s occu r r e d by the 1 s t R e s p o n d e n t fr o m Ja n u a r y 2 0 1 6 to 2 0 1 7 3 2
6. to access all the docu m e n t s r e l a t i n g to the business o f the fir s t R e s p o n d e n t w i t h o u t any hind r a n c e;
7. to d i s c l o s e to the P e t i t i o n e r all p a y m e n t s p a i d to the second and third R e s p o n d e n t s as d i r e c t o r s f e e s fr o m Ja n u a r y 2 0 1 6 to date
8. to attend Meetings and resolutions o f the first respondent The other key issues to be determined are whether those claimed rights exist on the purported business entities namely Ndiyo United Min Market and Ndiyo United Company respectively. Before I determine those rights if any, I wish to briefly address and determine whether the petitioner had any right and shareholder on the business entity (the first respondent) in dispute or not. The last issue is that what are the remedies available to the parties if any. This will bring me back to analyze the evidence and submissions by both parties on these

issues.

My perusal from the evidence show that the petitioner was part of all businesses that were under NDIYO Min Market and later NDIYO United Company Ltd (The first respondent). This is due to her contribution in terms of hard work she did from joining the business, the money she injected and properties such as cars and buildings that contributed on the rapid growth of the NDIYO Min Market and later the commencement of the first respondent (Ndiyo United Company Ltd) as indicated from her testimony and other documents she tendered to this court. The evidence testified by the petitioner also reveals that she dedicate her time for a long time in the growth of the business in dispute from when the business was very small to become 33 a large entity. Briefly, the evidence of the petitioner as summarized above show that the petitioner in her

evidence testified that she joined the business under Ndiyo United Market very early when the business was still small under the Grocery with the capital of around three (3) to four (4) million Tanzania shillings only. She testified that she was the one who was running the business all the time for a long time since the second and third respondents were staying at the USA. The evidence show that the petitioner did a lot to run various business entities under the umbrella of Ndiyo United Market the fact which was not much disputed by the respondents apart from just saying that there was no agreement evidencing if the petitioner was part of the business owners. Even DW1 in his evidence testified that they paid tickets for Irene (the petitioner) to come to Tanzania and work with them in their business. Indeed DW1 in his testimony testified that they allowed Irene (petitioner) and her husband Simon to join and make sales out of their business. This indicate that the petitioner and DW1 started business a long time. DW1 in his evidence seemed to admit that the petitioner was part of their business though she joined later. This is indicated by DW1 in his evidence when he testified that they authorized his brother in-law and his wife (Petitioner) to form subsidiary companies such as SIM SAM SALAMBY (Exhibit.P7), SIRA (Exhibit.P8) Companies as part of Ndiyo Min market Company. He testified that these business entities were formed using money from NDIYO Min Market and they never called up shares for NDIYO United Company. There is also an evidence on the records and the testimony of the petitioner (PW1) that the petitioner and her husband contributed in terms of properties such as cars that were transferred to be part of the Ndiyo Min Market business entity. For instance the 34 evidence from PW1 and documents show that in in December, 2009 she used the money from her own communication business and ordered a distribution vehicle from Japan with Reg. No. T540 BFF (Mitsubisi Canter) under the name of Ndiyo Mini Market. There evidence is clear that in August, 2010, the petitioner ordered the distribution Canter from Japan registered with number T850 BKY where it was registered under the family business (Ndiyo Min Market) but she used money from her communication business. There is also a clear evidence that The Petitioner In 2012 July, she purchased a distribution Canter with Registration No. T802 CAQ using money from her communication business registered under Ndiyo Min Market. The evidence that was not much disputed further reveals that these cars were later transferred to Ndiyo United Company Ltd as indicated under Exhibit No. 12. For instance PW1 further testified that in July, 2015, she transferred ownership of the vehicle Mitsubishi Canter No. T591 A W from her name to NDIYO United Company Ltd. The evidence of PW1 is corroborated by the evidence of PW3 who was responsible for posting financial matters on expenditure and purchase of company items. For instance PW3 in her testimony testified that in 2009 (December) she posted the purchase car, canter type worth 30.000.000/= and in 2010 there was another posting for purchase of car (canter) worth 30 million. PW3 further testified that in 2012 she posted the purchase of another vehicle (canter) worth 35,000,000/=. On top of that, PW4 (who used to keep data for the company business) testified similar testimony with PW1 and PW3 where she testified that in 2014 there was payment for the car, canter type; worth 15.000.000/= in 2014 June there was also payment for the room that 35 was 20 million. She stated that in 2015 there was also the purchase of the car for around 34 million Tanzania shillings. PW4 further testified she remember the purchase of Toyota land cruiser worth of 65.000.000/ = . Indeed, PW4 further testified that the petitioner used 100.000.000/= (hundred million Tanzania shillings) for purchase of building materials for the

building of NDIYO United Company. It is also clear from the evidence that PW1 in her evidence testified that her contribution in NDIYO United Company Ltd contains two parts namely; NDIYO Min Market and NDIYO United Company after it was incorporated. She stated that in NDIYO Min Market, she contributed four vehicles, (three Mitsubishi canter and one saloon car) in the following registration numbers

- (1) Mitsubishi Canter T540BFF
- (2) Mitsubishi Canter T850BKY
- (3) Mitsubishi Canter T802 CAQ
- (4) Saloon Car (Nissan) T415 CPJ. The evidence further reveals the petitioner was part of other business such as YATENGA (as indicated under Exhibit P which is certificate of incorporation and Exhibit P. 2 MEMAT) with the second respondent where the petitioner had 2,000, Simon Kahemele (Petitioner's husband) with 1,000 while the second respondent (Willie Howard) had 1,5000/= shares. The evidence also show that the petitioner used 20 million from her voucher business, and signed the Contract with the Municipality for renting the premises that were being used by NDIYO Min MARKET under her name. The evidence from the petitioner further reveals that the owners including the petitioner of Ndiyo United Min Market transformed the business into Ndiyo United Company 36 Limited. To show new Company started its operation the Memorandum and Articles of Association (Exhibit P10) were registered with BRELA and taxes were being paid under the name of this new company that is Ndiyo United Company Limited. Indeed the records (Exhibit P10) show that the MEMAT for Ndiyo United Company was signed by the subscribers that is the petitioner who had 37,500 shares, the second Respondent who had 37, 500 shares and the husband of the petitioner who had 37,500 shares. This document was legally witnessed and signed by Joyce Kasebwa on 19/01/2015 who was the Commissioner for oath. The evidence and records indicated that the shares were later divided among the owners and directors in terms of percentage as follows:- (1)Irene S. Kahemele (Petitioner) 25%
- (2) Simon Kahemele (Petitioner's husband) 25%
- (3) Marina Kahemele (third respondent) 25% (4)Willie A. Howard (fourth respondent) 25% The evidence further reveal that after the death of petitioner's husband, the dispute on the shares arose and remaining shareholders agreed to register the company NDIYO UNITED COMPANY LTD and each shale have shares as follows (1)Irene S. Kahemele 37 V2 %
- (2) Willy A. Howard 37 y2 % (3)Marina Kahemele 25% She said that they also had other business with her late husband. She stated that her husband had a contract with a Germany Company 37 namely Alcatel between 1996 and 1997. PW1 testified that her husband had a Toyota Double Cabin pickup from Germany Development services through an action and written under his name. Se stated that her husband was renting the pick-up with registration Number TZD 7755 to different construction companies. From the above evidence it is clear without any doubt that the petitioner was part of the Ndiyo Min Market and Ndiyo United

COMPANY Limited and other related business entities that were part of Ndiyo Min market that was later transformed to Ndiyo United Company Ltd. This is also evidenced by the respondents' evidence through their witnesses. For instance DW1 in his testimony testified that the petitioner was part and among the owners and directors on the Ndiyo Min Market and Ndiyo United Company Limited. DW1 testified that he was a Managing Director of the 1st respondent and the Petitioner (Irene) was also the first Director of the first respondent. DW1 testified that NDIYO Min Market had also voucher business and YATENGA was a supermarket founded using the money from NDIYO Min Market. He testified that YATENGA had 2,000 shares for Irene (Petitioner) and 1,000 shares for Simon Kahemele and 5,000 shares to him (DW1) where Irene was among the Director of YATENGA Company. DW1 stated that he took 1.5 billion from the bank and gave the late Simon and Irene. Now if the petitioner was not part of the business why DW1 decided to give her 1.5 billion as he testified?. The other evidence that show the Petitioner was part of the businesses was 38 that they formed NDIYO UNITED Company and according to MEMAT there were three shareholders who had the following shares (1)Irene S. Kahemele 37,500 (2)Marina Kahemele 25,000 (3)Willy Howard that is me 37,500 On top p f that DW2 also indicated that the petitioner was part of the business when he testified that first Directors of the company were Irene Kahemele (Petitioner) and Howard (second respondent). Indeed DW2 further testified that he knows the petitioner who supervised and assisted in the continuation and development of the business. There is no doubt that when the petitioner arrived in Tanzania with \$ 5,000 as she testified while the second and third respondent had already started the business that became Ndiyo Min Market but the petitioner and her late husband joined the business when the business was still growing. The evidence is clear that the petitioner through her creative work and contribution of money and properties such as land and cars contributed a lot in the growth of Ndiyo Min Market that later formed Ndiyo United Company LTD. Looking at the evidence of other witnesses from the respondent it appears the witnesses were aware that the petitioner was part of the business. For instance DW4 (Marina Kahemele) who is the sister in law of the petitioner in her testimony testified that Irene (the petitioner) got into the business through the back of her husband (her late brother). DW4 further testified that testified that Ndiyo United Company was found in 2015 and she with Irene Kahemele (Petitioner) had never conducted any annual general meeting. If the petitioner was not part of the 39 business why DW4 is mentioning her by saying she with Irene has never conducted any meeting. Assuming that such meeting was not conducted as claimed by DW4 does that exclude the rights of the petitioner on the business?. In my view failure to conduct annual general meeting as claimed by DW4 does not exclude the rights of the Petitioner in the business. DW4 in her evidence also testified that she signed the MEMAT to register the Ndiyo United Company. If DW4 admits that Memorandum and Articles of Association (MEMAT) for Ndiyo United Company were signed and there was a conflict of directs and among the directors were the petitioner how comes the petitioner has no right while the evidence show that Ndiyo United Company originated from Ndiyo Min Market?. Indeed the evidence DW4 further reveals that the petitioner was part of the business when she testified that she is aware with car (Suzuki) with Registration Number

T928 DDV and land cruiser no. T 362 DV as indicated under audited financial report. DW4 in her evidence testified that that the cars were owned by the Ndiyo United Company. Indeed these are among the cars mentioned by PW1, PW3 and PW4 that were part of the contribution by the petitioner. In my considered view the Petitioner and her witnesses were not only reliable witnesses but also witnesses of truth and their evidence clearly showed that the petitioner was part of the business in Ndiyo Min market and later Ndiyo United Company LTD? Indeed as indicated above at some point the respondent's witnesses did corroborate the evidence of the petitioner. With due respect basing on the evidence by PW1, PW3, PW4 and some of the respondent witnesses I am of the clear settled mind that, the Petitioner was part of the businesses in 40 dispute and deserve all rights she claimed in her petition. The argument by the respondents that the first respondent (Ndiyo United Company Limited) never operated has no merit since there are documents that were admitted in this court indicating the registration and incorporation of the company (MEMAT, Exhibit 10). There are also document (Audited Financial Report for Ndiyo United Company Limited as at 31 December 2015) indicating the financials status and audit of the company. There is also a document that is the Motor Vehicle Registration Card (P I2) indicating transfer of one vehicle worth 34,132,500/= with registration Number T928DDQ to NDIYO UNITED COMPANY Limited which indicates that the company was even known by Tanzania Revenue Authority (TRA). There is also Lease of Business Premises Contract (Exhibit P I 2) between Mr. Brown Kalebe and NDIYO UNITED COMPANY Limited. Indeed all these documents were admitted in this Court. With all this evidence in mind, no reasonable persons would have doubted the existence and operation of the NDIYO UNITED COMPANY Limited. The above evidence reveal that the petitioner as a member, contributor and Shareholder for the First Respondent and the business before the first respondent was formed had all rights as she claimed in her petition. It is trite law that shareholders of any business or company usually have the same basic rights regardless of whether the company is private or public. Generally, Shareholders can agree with the company and/or between themselves that their rights are restricted. Indeed the rights of shareholders depend on the rights attaching to their shares under the company's articles and other agreements. Since shareholders are a company's owners, they reap the benefits of the company's successes in the form of increased stock valuation. As part of the business and company owners, the petitioner as one of the shareholders have 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] (persuasive decision) found in the famous business law book by "Anderson's Business Law and Legal Environment Comprehensive Volume, International Edition 21st Edition" at pages 1066-1067. As shareholders are the main stakeholders in a company, they have the right to access, inspect the accounts register and also the books of the firm and can ask questions about the same if

they feel so. As part of the shareholders and owners of the businesses in dispute, the petitioner has the right to enjoy the right to inspect the books of accounts and other financial information of the business entity. See a persuasive decisions of the USA Court in Missouri v. Ill Investments, Inc.⁸⁰ SW3d 855 (Mo App 202) and Ihirg v. Frontier Equity Exchange, 128 P3d 999 (Kan App 20060) found in the famous business law book by “Anderson’s Business Law and Legal Environment Comprehensive Volume, International Edition 21st Edition” at pages 1066-1067. The right to inspect books of account is an important method of obtaining useful information about a business or company by the shareholders so that they may take necessary action against the management for mismanaging the affairs of the company. See a persuasive decisions of the Court in Kelley Manufacturing Co.v Martin, 674 SE2d92 (GA 2009), found in the famous business law book by “Anderson’s Business Law and Legal Environment Comprehensive Volume, International Edition 21st Edition” at page 1067 in this regard, in our case, the petitioner as the shareholders have the right to get copies of financial statements and rights to inspect the records to determine the financial status of the company. It is the duty of the company to send the financial statements of the company to all its shareholders either in a quarterly or annual statement. See a persuasive decisions of the Court Maharani Lalita Rajya Lak shami Indian Motor Company Limbed, (1962) 32Compo Cas.207. The legal position is clear that any shareholder or the owner of business entities like the petitioner, the second and third respondent all have rights to receive and access documents and data from both the Ndiyo Min market and Ndiyo United Company Limited. One of the main documents of interest to shareholders will be the company’s annual report and accounts. In this regard, each shareholder including the petitioner has the right to access and receive these documents or information when they’re issued generally and on request as per the provisions of the Companies Act, Cap 212. For instance Section 165 of the Companies Act provides that:- “(1) Any member of a company, whether he is or is not entitled to have sent to him copies of the company's accounts and any holder of debentures of the company, whether he is or is not so entitled, shall be entitled to be furnished on demand without charge with a copy of, the last annual accounts of the company together with a copy of the Directors' Report and the Auditors' Report 43 All shareholders including the petitioner also have the right to receive a copy of any written resolution proposed by either the directors or shareholders. Indeed all shareholders have a right to access the books and company’s constitutional documents. However, it’s worth noting that shareholders may no right to receive other documents so, for example, they cannot usually demand to see copies of the management accounts prepared for the directors. Worth also noting that, the petitioner also has the right to access financial information. It should however be noted that Shareholders' rights to financial information are not limited by common law or inspection statute limits. Indeed Fair and equal treatment of all holders of shares in any company or business entity is one of the key principles of effective corporate governance under our laws. I also wish at this juncture to re-emphasize that among the specific rights that should be guaranteed equally to all shareholders are: the right to obtain adequate information on a company’s activities; the right to receive dividends; preemptive rights to purchase additionally placed shares; the right to participate

in the general shareholders meeting, including adequate disclosure in advance of all materials necessary to make informed decisions and the right to receive a proportionate share of a company's property, after payment of creditors, in the event of its liquidation. I am of the considered view that among other rights, the petitioner as part of the business has all rights to obtain and access information or data concerning business and company affairs and she has the right to make inspection (the right to review the documents) of the business 44 and company's books and documents subject to the provisions of the laws. In this regard section 89 of the Companies Act, Cap.212 which provides for the rights of shareholders or debentures to inspect books and other documents of the company or business entity may also be relevant. This section provides that:- “ (1) Every register o f holders o f debentures o f a company shall, except when duly closed, be open during business hours to the inspection o f the registered holder o f any such debentures or any holder o f shareholders in the company without fee, and o f any other person on paym ent o f a fe e not exceeding the amount prescribed by the Minister in regulations.

- (2) Every registered holder o f debentures and every holder o f shares in a company may require a copy o f the register o f the holders o f debentures o f the company or any part thereof on payment o f a fe e not exceeding the amount prescribed by the Minister in regulations (3) ...
- (4) I f inspection is refused, or a copy is refused or not forwarded, the company and every officer o f the company who is in default shall be liable to a fine, and further shall be liable to a default fin e ”.
- (5) Where a company is in default, the court may by order compel an immediate inspection o f the register or direct that the copies required shall be sent to the person requiring them ”. The claim by the respondents that the petitioner has no any rights on the ground that she was not part of the owners of the business has no merit, since the evidence is clear that the petition, the second and third respondents were all part of the owners of both Ndiyo Min Market business and Ndiyo United Company Ltd as I observed in my findings above. The respondents' counsel argued that the petitioner has no right since directors have never called up any share since the incorporation of the 1st respondent pursuant to the above clause. They 45 thus argued that failure to call up shares and/or calling annual general meeting for purposes among others to raise capital for investment has resulted to the company not to operate for lack of fund. As I observed these claims by the respondents has whatsoever no merit since the evidence is clear the petitioner has all rights over the first respondent. It appears the respondents counsel assumed that there was a public company that is why they are addressing calling up of shares. I have gone through the evidence and perused the documents, I didn't find if the parties intended to have a public company. In my considered view the parties had in mind of the formation o f private company that is Ndiyo United Company Limited. However, all in all the respondents argument cannot deny the petitioner's right under the entities in dispute. I entirely agree with the counsels for the petitioner that since it was the private company then section 45 (2) of the Companies Act No

12 of 2002 becomes relevant and there was no requirement for calling up and allotment of shares. Indeed this section bars a private company like 1st respondent to offer to the public its shares or allotment any shares to the public. Similarly, Section 27(1) (a) and (c) of Companies Act No. 12 of 2002 restricts transfer its shares and any invitation to the public to subscribe for any shares. Indeed section 45(2) provides that:- “ (2) A private company (other than a company limited by guarantee and not having a share capital) commits an offence if it - (a) offers to the public (whether for cash or otherwise) any shares in or debentures of the company; or

(b) allots or agrees to allot (whether for cash or otherwise) any shares in or debentures of the company with a view to all or any of those shares or debentures being offered for sale to the public. 46

(3) A company guilty of an offence under subsection (2), and any officer of it who is in default, is liable to a fine " On the other hand, section 27 of the same Act provides that; “27.-(I) A "private company" means a company which by its articles- Meaning of "private company"

(a) restricts the right to transfer its shares; and (b)...

(c) prohibits any invitation to the public to subscribe for any shares or debentures of the company Reading between the lines on the above provisions it is clear that all private companies are not allowed to issue or make allotment of shares to the public. Now since Ndiyo United Company limited that was formed from the Ndiyo Min Market was a private company, the issue of transfer or allotment of share has no any room. In this regard, I am of the considered view that while the petitioner has proved to be part of the businesses in dispute under both Ndiyo Min market and Ndiyo United Company Limited, the respondents have not clearly proved if the petitioner was not part of or among the owners of the businesses in dispute. The Court in NATIONAL BANK OF COMMERCE LTD Vs DESIREE & YVONNE TANZAIA & 4 OTHERS, Comm. CASE NO 59 OF 2003() HC DSM, had once observed that:- “The burden of proof in a suit proceeding lies on their person who would fail if no evidence at all were given on either side.” Reference can also be made to section 111 of the Evidence Act Cap 6, [R.E. 2002] which provides that: “A burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on their side ” 47 See also the persuasive decision of the Court of Uganda (Commercial Division) O HCT -00-CC-CS-034-210 in MOREX CONTRACTORS Vs NAKAWA DIVISION LOCAL COUNCIL & KAMPALA CITY COUNCIL. I am of the settled view that, the petitioner has all rights she has claimed in her petition subject to the provisions of the Companies Act, Regulations and Rules and I hold so. Looking at the evidence of the respondents, it is clear that the evidence by both DW1 (the second respondent) and DW4 (the third respondent) all denied the petitioner to have any right in Ndiyo Mini Market. However, their evidence at some point indicated that the petitioner was part of the business at the later stage when they established the business. Both DW1 and DW4 testified similar evidence that the petitioner was the wife of the brother of DW4 and they admitted that they welcomed her to Tanzania and joined the business. The evidence of both DW1 and DW4 show that the petitioner was also part of other

business such as YATENGA and Communication business apart from Ndiyo Mini Market and Ndiyo United Company Limited. Indeed both the two respondents (the second and third)” witnesses testified that the petitioner had shares in Ndiyo United Company Limited the company that was formed from Ndiyo Min Market. Indeed the evidence of DW1 and DW4 was corroborated by the evidence of DW3 (accountant) who testified that one of the similarity between the financial report of Ndiyo Min Market and Ndiyo United Company is both intended similar operations of the company as the two business entities were doing the same operations with the same assets. DW3 also testified that under the financial report presented to the court there are some motor vehicles without details such as registration numbers. Indeed some of these motor 48 vehicles were the ones contributed to the business and company by the Petitioner. Under such circumstances and with that evidence that was testified in this Court no one would have ruled out the contribution and rights of the petitioner on the business in dispute. In this regard my analysis and evaluation of evidence have revealed that the petitioner was part of the business under both the Ndiyo Min Market and Ndiyo United Company Limited and I hold so. From the foregoing reasons, I allow the petition and the petitioner shall be entitled to all rights as claimed. Given the circumstance of this case and taking into consideration the parties are elated, I order each party to bear its own costs. Judgment delivered in Chambers this 26th day of June, 2020 in presence of both parties. DR. A. J. MAMBI JUDGE . . 26 06 2020 Right of appeal explained. DR. A. J. MAMBI JUDGE . . 26 06 2020 49

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