

TANZANIA / JUDGMENT

Final THE REGISTERED TRUSTEES OF ALLI MBERESERO FOUNDATION vs

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI SUB-REGISTRY AT
MOSHI CIVIL CASE NO. 01 OF 2022 THE REGISTERED TRUSTEES OF ALLI MBERESERO
FOUNDATION PLAINTIFF VERSUS WILFRED BENEDICT
MBERESERO.....1ST DEFENDANT GEORGE BENEDICT MBERESERO.....2ND
DEFENDANT

JUDGMENT

16/10/2024 & 25/11/2024 SIMFUKWE, J. The Registered Trustees of Alli Mberesero Foundation (the Plaintiff herein) filed the instant suit against the defendants, claiming a total sum of Tanzanian Shillings four billion, thirty-nine million, four hundred fifty-eight 1 thousand, one hundred sixty (TZS 4,039,458,160/=) as compensation for lost annual profits. The claim is in respect of Plot No. 2 Block H in Moshi Municipality and Plots Nos. 7 and 8 Block E in Same Town, alleged to be under the management and supervision of the 1st and 2nd defendants, respectively. In a nutshell, the plaint reveals that following the death of Benedict Mberesero @ Alli Mberesero, his children agreed to establish a trust named the Registered Trustees of Alli Mberesero Foundation, the plaintiff herein, with the objective of managing and owning the deceased's estate. It is further claimed that the 1st defendant was entrusted with managing the hotel business known as Kindoroko Hotel, located at Plot No. 2 Block H, Moshi Municipal. It was agreed that the 1st Defendant should manage the Hotel in trust and account annually his operation costs and mesne profit should be remitted to the Plaintiff. In compliance, the 1st Defendant reported to the Plaintiff board for the period of January to December 1999. The 1st Defendant is also accused to have misused TZS 3,458,160/= which was approved for maintenance of parking yard for Ngorika Bus Transport Company Limited. It was stated further that the 1st Defendant has not accounted for his annual profit or remit mesne profit to the Plaintiff for the period of twenty-one years from 2000 to 2021. 2 As for the 2nd defendant, it was alleged that he has been misusing the hotel building on Plot No. 7 Block E in Same Township and he has erected permanent commercial structures on Plot No. 8 Block E, Same Town. That, the 2nd Defendant is generating income from it without accounting to the plaintiff. Also, the 2nd Defendant has not accounted for his annual profits for nine years. The acts of the 2nd Defendant are said to have occasioned loss to the Plaintiff at the tune of TZS 36,000,000. Based on these claims, the plaintiff

prays for judgment and decree against the defendants as follows:

1. A Declaration that the Defendants are in breach of management trust and or contract by failing to render true account of profit and remittance of mesne profit from the property held in trust by the Defendants to the Plaintiff.
2. An order compelling the 1st Defendant to make true account of profit for the period of twenty-one years and 2nd Defendant to account for the period of nine years this being respective period of time for the Defendants management of the Plaintiff's trust properties.
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3. An order to compel the 1st Defendant to pay Tshs. 4,000,000,000/- to the Plaintiff being unremitted mesne profit for the period of twenty-one year's counting from 2000 to January 2022.
4. An order that the 1st Defendant to refund Tshs 3,458,160/- plus 30% commercial interest from the date of breach to the date of judgment being property of the Plaintiff having been used against the objects of the Plaintiff.
5. An order to compel the 2nd Defendant to pay Tshs. 36,000,000/- to the Plaintiff being unremitted mesne profit for the period of nine years.
6. An eviction order, evicting 1st Defendant from Plot No. 2 Block H, in Moshi Municipality and 2nd Defendant from Plot No. 7 Block E, Same Mjini.
7. An order for jointly and severally for payment of general damages to be assessed by the Honourable Court of at least Tshs. 1,000,000,000/-
8. Interest on the decretal sum at Court's rate of 7% per annum from the date of judgment to the date of full satisfaction of the decree. 4
9. Costs of the suit be borne by the Defendants.
10. Any other or further relief(s) this Honourable Court may deem just and fit to grant
Contesting the claims, the defendants filed their joint Written Statement of Defence. Briefly they stated that they operate their own businesses prior to the death of their father and prior to the formation of the Foundation. That, the business licences, business names certificates, receipts of payments of statutory bills such as land rent, electricity bills and water bills are in the names of the defendants. They contested all the claims of the Plaintiffs. At the hearing of the case, the plaintiff was represented by Mr. Dickson Johnson Ngowi and Ms Sikitu Mtikile learned counsels; the 1st defendant was represented by Mr. Emmanuel Kinabo, learned counsel; and the 2nd defendant was represented by Mr. Daniel Dannland Lyimo, learned counsel. Prior to the hearing, the following issues were framed:
 1. Whether there was an agreement being contractual business or lease between the Plaintiff and the Defendants. 5

2. Whether the Defendants have breached management trust to administer Plaintiff's properties and failure to render true account of profit leading to Plaintiff to suffer loss.
3. Whether the Plaintiff own and operate business of the 1st and 2nd Defendants.
4. Whether the Plaintiff is entitled to the remedies or costs as pleaded in the pleadings.
5. To what reliefs are the parties entitled to. In proving the claim, the plaintiff called two witnesses and tendered 12 exhibits. PW1 Mr. Charles Benedict Mberesero, informed the court that he has served as the Chairperson of the Registered Trustees of the Alli Mberesero Foundation since June 2023. His responsibilities included safeguarding the Foundation's constitution. He testified that his father, Alli Benedict Temba, also known as Alli Mberesero, passed away in 1997. To substantiate his testimony, he presented a certified copy of the death certificate, which was admitted into evidence as Exhibit P1. PW1 explained that the Registered Trustees of Alli Mberesero Foundation was a result of their agreement in a third meeting which they conducted after the death of their father. The said meeting was conducted in 1997. The trustee is lawful as it was registered at RITA, it was blessed by the family meeting and it was ordered in the Probate Cause before the High Court in 2001. He tendered the minutes of third family meeting which they conducted in 1997. It was admitted as Exhibit P2. In addition to Exhibit P1, PW1 also tendered the Trust Deed and the Certificate of Incorporation of the Registered Trustees of Alli Mberesero Foundation, which were admitted into evidence as Exhibits P3 and P4, respectively. To prove that there was a Probate Cause, PW1 tendered letters of Administration of the property of the late Benedict Alli Mberesero, and it was admitted as exhibit P5. PW1 explained further that they both agreed to administer and develop the property of their late father. According to PW1, the properties of their late father are: petrol station at Kisangara Village (Meanwhile Mangara Village) in Mwanga District, Ngorika Bus Services, a three-storey building located at Plot 2 Block H Mawenzi Road within Moshi Municipality, 7 Kindoroko Hotel which is at the mentioned Plot, one house located at Plot No. 7 at Same town, farms located at Kyomo Village famous as Kileo Village. Other properties are one farm located at Chekereni @ Public, measured 10 acres, one farm at Kisangara Village (Mangara) about 85 acres, one house located at Mwanga, one shop at Spir Way at Nyumba ya Mungu which they later gave to the late Mama Luciano, a workshop of Ngorika Bus Service located at Mangara Village formerly known as Kisangara Village, near the petrol station. The farm at Mangara had cows and goats. He tendered certified copy of a certificate of Occupancy of Plot No. 2, Block H, Section III, Moshi Township, it was admitted as exhibit P6. PW1 tendered certified copies of Letters of Offer in respect of Plot No. 7 and 8 located at Same Township which were admitted as exhibit P7 collectively. The certified copy of a sale Agreement between Pamphil Joseph and Ali Mberesero Foundation was admitted as exhibit P8. PW1 elaborated that Plot No. 2 Block H, at Moshi Municipal is the property of Ali Mberesero Foundation under supervision of 1st the defendant. That, there is a hotel business which started at the end of 1988, rooms for guests and a bar. The procedure was that proceeds of that business was 8 being collected and handed over to the family. He stated that the business was commenced by their late father

and his young wife Rabina. The managers were Msemo and Msaki. PW1 testified further that after the death of their father, the 1st defendant continued to supervise the business pursuant to the third family meeting which they held, the Will of their father and powers bestowed on them by the law enforcement agencies. In respect of the house at Same, PW1 stated that the same was used for renting and they once rented it to R.T.C. Thereafter, they rented it to various tenants including their uncle who was trading as “Abuye” meaning the uncle of someone. After Abuye, they handed over the house to the 2nd defendant through a lease agreement which was drawn by Prof. Msanga. To strengthen his testimony, PW1 tendered Business agreement between the Registered Trustees of Alli Mberesero Foundation and the 2nd defendant dated 01/04/2002 which was admitted as exhibit P9. Explaining his grievances against the 1st defendant, PW1 stated that the 1st defendant honoured the agreement for three years; 1997, 1998 and

1999. Thereafter, he changed his mind. PW1 explained further that their 9 responsibilities were to supervise the business, pay taxes, pay salaries of workers and bills and give the plaintiff the profit. Regarding the 2nd defendant, PW1 testified that the 2nd defendant honoured the agreement for approximately eleven years, from 2002 until 2013 or 2014. Thereafter, he stopped to comply to the terms of the agreement. To back up his assertion, PW1 tendered the report in respect of the stated three years which he purported to have been prepared by the 1st defendant in 1999. The court admitted the same as exhibit P10. PW1 clarified that exhibit P10 was from Kindoroko Hotel addressed to the Director Steven Benedict Mberesero and forwarded to the Board of Registered Trustees of Alli Mberesero Foundation. He said the Directors were supposed to supervise the business, pay taxes, bills and hand over the profit. The income was TZS. 125,770,344.90. That, in 1998 Wilfred Mberesero suggested that there should be payment of salary of USD 1000/= and that he should be given a residential house. Concerning the 2nd defendant, PW1 tendered a business report from 2013, which was admitted into evidence as Exhibit P11. He elaborated that the said report was prepared by the 2nd defendant, who was operating 10 Kindoroko Hotel in Same, it was addressed to the Director, Mr. Steven Mberesero. PW1 reiterated that the defendant complied with the agreement for a short period. That, having breached the family agreement, they convened family meetings in vain as the 1st defendant refused to attend. PW1 continued to explain that they resorted to mediation to various institutions and persons. They went to RITA and reported. Subsequently, negotiations continued through legal representatives, including Professor Msanga and the late Cecil Maruma. However, their efforts proved futile. Thus, they continued with RITA who advised them what to do. However, what RITA advised them could not be executed. Thus, they had to resort to this court. In respect of the 2nd defendant, PW1 issued a notice via Advocate Winfrida Charles Mmbando on 28/9/2021 while on part of 1st defendant, they issued him a letter demanding him to hand over Kindoroko Hotel via Advocate Mnyele Msengezi. The two demands notices dated 07/2/2018 and 28/9/2021 were admitted as exhibit P12 collectively. PW1 insisted that the said businesses were not the properties of the defendants. That, pursuant to the third family meeting they had agreed 11 and distributed

responsibilities. PW1 argued that if the said properties belonged to them, they could have said at the meeting. He averred that at the meeting, the 1st defendant said that the cows belonged to him and it was agreed. PW1 clarified that the procedure which they used was correct and it was conceded by all people. Further to that, it was PW1's testimony that the defendants are responsible because as evidenced by the documents of the defendants which he tendered, for instance the prayer of Wilfred to be paid USD 1000/= and a residential house. Also, the defendants did not reply their notices which they issued to them because they knew that it was true. He insisted that the property which is under supervision of Wilfred, were formerly supervised by their father and mother. Concerning the 2nd defendant, PW1 maintained that the house and the business were the properties of their father. That, after maintenance, they handed over it to the 2nd defendant under agreement; thus, the same is not his property. PW1 explained that writing their names does not mean that the properties belonged to them as that was the practice even when their father was alive. 12 In his conclusion, PW1 prayed the court to grant them all the reliefs prayed in the plaint as the properties were owned by their father and their family is big. That, only few family members are benefiting from the properties. Elaborating on the claim of 4 billion, PW1 explained that, after calculating from the 1999 report over twenty-one years up to when they were instituting this case, they arrived at that amount. Furthermore, the mesne profit cannot remain static for the entire period, as the 1st defendant is still present. PW1 stated further that the 2nd defendant had requested the money based on the 2013 report, in which he asked the family to enable him to increase the family income. The family had complained for a long time about the income he was handing over. He requested the court's assistance to help the family receive that income. Moreover, PW1 prayed that the defendants should vacate the disputed premises, as all efforts to reconcile with them had proved futile due to their refusal to attend meetings. PW1 claimed further that the family continues to suffer. However, the defendants' vacating the business does not mean they are excluded from being beneficiaries of the property. 13 During cross examination, PW1 stated inter alia that the Foundation does not run a business. He enlightened that it was agreed that those who run the business shall hand over the proceeds to the Foundation. Also, when cross examined by Mr. Lyimo, PW1 explained that the agreement of handing over is not included in the constitution but the same is included in the minutes of the 3rd family meeting. PW2 Mr. Said Msemo, among other things explained that he was a manager of Kindoroko Hotel at Moshi Municipal from 1993 to 1996. His responsibilities as Manager included supervising the quality of food cooked in the hotel, availability of all drinks in the Hotel throughout, waiters serving customers timely, waiters presenting bills to customers before they leave, security of customers while at the hotel, he used to communicate with police officers in case of anything concerning security. PW2 testified that his employer was the late Mzee Ally Mberesero. PW2 went further alluding that the business licenses were in the name of Christopher Benedict Mberesero, the son of Mzee Ally Mberesero. PW2 narrated that he knew the 1st defendant as the son of Mzee Ally Mberesero who was his employer. He said when Mzee Ally Mberesero took him, he informed him that he had a son called Wilfred

Mberesero who was 14 studying so that he could assist him running the hotel. During vacation, the 1st defendant used to come at the hotel and they were friends. That, he was informed by Mzee Ally Mberesero that he wanted to change the name from Christopher to Wilfred Mberesero as his business techniques. During cross examination, PW2 clarified that when the 1st defendant supervised the hotel, he was not there. That marked the end of the Plaintiffs' case. On part of the Defendants, two witnesses were summoned, and their evidence is summarized as follows. DW1 Mr. Wilfred Benedict Mberesero testified among other things that he has a business in hospitality industry (hotel, food and beverage) and his businesses are at Arusha, Karatu and Moshi. At Moshi there is Kindoroko Hotel which is located at double road/Mawenzi, Plot No. 2 Block H Section III, Mawenzi Road. DW1 testified that he knew the plaintiff as the foundation of which he was the first trustee. That, Alli Mberesero is his father and he is his son from the second wife, the 10th born from the second wife as they were born thirteen (13). 15 DW1 explained further that he officially started the business at Kindoroko hotel in 1995 after completing his studies. Prior to that, he used to do it during vacations. That, their deceased father passed away in 1997. By then, he was the one who was running the business at Kindoroko Hotel. DW1 admitted that he is not the owner of the plot where Kindoroko hotel is constructed as it was owned by his father Alli Mberesero. Currently, it is owned by Alli Mberesero Foundation, the plaintiff. DW1 continued to testify that between 1995 to 1997 he was running Kindoroko Hotel. That, his father had many businesses. He had transport business, petrol station, shops and farms. He entrusted one of his children each business for supervision and as part of his training. Thus, he was entrusted to supervise Kindoroko hotel. His father informed him about his plans when he was in standard four and started preparing him. That, Kindoroko hotel was a challenge and failure to him as it required education to supervise it properly. DW1 was engaged fully when he was in form five and six. It was in 1990, 1991 and 1992 as he was told that the hotel would be his employment. Therefore, after DW1 had completed his college education, his father handed over the business to him. DW1 informed the court that he had his own business licence, bank accounts and everything. That arrangement never changed after the demise of his father. 16 Furthermore, DW1 testified that there is a dispute between him and the plaintiff in respect of Kindoroko Hotel. The dispute arose after the death of his father. By then DW1 was 27 years old. During the funeral, they started inquiring about the Will. After the meeting, it was revealed that most of the instructions of their father were not written. They had to agree how to conduct businesses. Thus, they conducted a third meeting and there are minutes of the said meeting. DW1 identified exhibit P2 to that effect. Testifying on what transpired in the family meeting, DW1 described that the main agenda in the said meeting was administration of the estates of their deceased father and other related agenda. On the administration of estate agenda, they agreed to form a Foundation for the purpose of supervision and development of the estates of the deceased. Concerning the properties of the deceased, DW1 elaborated that they agreed the same to be listed, names of the owners, location of the business and names of those who were running the businesses. Kindoroko Hotel was one of the businesses which were discussed. It was revealed that Kindoroko hotel was constructed at the land

owned by Alli Mberesero, located at Moshi Township and it was run by the 1st defendant. 17 According to DW1, another listed property was a house at Kisangara which was shown to be used by Ngorika Bus and it was run by Ngorika bus. In respect of Kindoroko hotel, they discussed how to run that business only. However, ownership of Kindoroko hotel building is vested to Alli Mberesero Foundation since 2017. That, there is a dispute between him and the plaintiff because the plaintiff required him to submit his profit and accounts to the Foundation. Explaining the reason of transferring ownership to Alli Mberesero Foundation, DW1 stated that their father did not want his properties to be distributed. He used to give them examples of how Indian families handle their estates by referring them to two Indian families at Moshi. Also, their father was of the view that in case one failed to operate the business, he should leave it to another family member to continue running the business. Another source of the dispute according to DW1 was the allegation that the business did not belong to him and that DW1 was required to distribute the profit of the business to the foundation. In addition, DW1 stated that one of the intentions of their father was that those who were left at the business should proceed and those who had 18 vacated in case they wanted to return. Thus, the challenge was that those who had vacated wanted to do the opposite while the directives were that they were required to report to those who had left. DW1 informed the court that people like Dr. Mberesero had never operated the business. The arrangement was done by their father. Thus, the foundation was to promote the ideas and opinions of their father. DW1 identified Exhibit P3 which was the constitution of Alli Mberesero Foundation. He explained that the same was for providing guidance in respect of the estates of their deceased father. DW1 clarified that the said constitution does not require him to hand over profit and accounts of the business. There is agreement to that effect to date. He said he has never handed over profit and accounts of the business. In respect of settlement of the dispute, DW1 testified that prior to filling the instant suit, they had tried to resolve the dispute amicably in vain. That, they were unsuccessfully reconciled by advocate Maruma, Prof Msanga, their uncle Ibrahimu Mberesero and RITA where the foundation was registered. It was alleged before RITA that Dr. Mberesero had complained that DW1 has taken the property of the foundation (Kindoroko hotel). 19 DW1 proceeded to elaborate that, after referring the dispute to RITA, they were summoned and heard at Mwanga office for interrogation. He was interrogated about Kindoroko hotel business, the owner of the business; he told them that he was the owner of the business. They asked him whether he had evidence of ownership of the business, he told them that he had about nineteen exhibits. Thereafter, Rita advised them to discuss with Alli Mberesero Foundation in respect of rent of the suit premises. The report of RITA was issued in 2020. DW1 informed this court that he was the one who was paying land rent, government levy of the building since the time when their father was alive to date. DW1 identified exhibit P6, a certificate of occupancy of Plot No 2. Block H section 111 Moshi Township and argued that the same is owned by the Registered Trustee of Ali Mberesero Foundation. Also, he identified Exhibit P5, Probate and Administration of the estates of Ali Benedict Mberesero which was issued to the first trustees of Ali Mberesero Foundation. DWI told this court that he is one of the trustees. Others were Dr.

Mberesero, Stephen Mberesero, Francis Mberesero Luciana Mberesero Lubiana Mberesero. That, the current administrators of the estate of Ali 20 Mberesero are the registered trustees but they are not the first trustees. He stated that the objectives of the foundation are not complied with as there is breach of management trust. Testifying in respect of Exhibit P10, DW1 narrated that the same was a result of a request of Stephen to learn from him how to prepare a business report. Thus, he prepared the report and gave it to Stephen and not the Foundation. In respect of the claim of 4 billion, DW1 stated that he was not aware of the same. He said, all the claims of the plaintiff are not true. He gave an example of the claim of TZS 3000,000/= in respect of the plot where Ngorika buses are parking; he said that the place is the property of National Housing and he paid that amount to National Housing. That, he took the money from his business although the place is being used by Ngorika bus. During cross examination, DW1 illustrated that the said business was handed to him by his father after his studies. When examined by Mr. Dickson, DW1 elaborated that the business was not listed as part of the estate of the deceased. That, it was only the building which was listed. 21 He explained further that, in the said meeting, they only listed the properties of the deceased since by then there was no Foundation. DW2, Mr. George Benedict Mberesero, testified, among other things, that he operates a transportation business in East and Southern Africa. Also, he transports passengers within Tanzania mainland. Moreover, he said, he has a business of bar and guest house within Same district in Kilimanjaro Region where he sells drinks and provide accommodation to guests. He is the operation manager. DW2 explained that, he got the capital of his business from financial institutions like banks. The buildings in which he operates his business is the property of Alli Mberesero, his biological father who is deceased. DW1 stated that he is not related to the plaintiff Alli Mberesero Foundation. To date, the owner of the building he uses is the deceased Ali Mberesero, and no rent has ever been claimed from him, as they are not the owners of the suit premises. He stated that this arrangement was not based on any formal agreement. It was DW2's further testimony that his deceased brother Stephen who was in good terms with him, informed him that Tanzania Breweries Ltd had no agent in Same district. Thus, DW2 asked him to lend him some 22 money so that he could be an agent of Tanzania Breweries Ltd. DW2's brother did not reply. DW2 finalised his testimony by stating that the claims against him are not true. That was the end of evidence of both parties. The learned counsels of both parties filed their final written submissions. Mr. Dickson Ngowi, for the plaintiff on the outset started his final submissions by reproducing issues which were agreed and framed in this matter. Submitting on the first issue on whether there was an agreement being contractual, business or lease between the plaintiff and the defendants; Mr. Dickson relied on Exhibit P2, arguing that it laid the foundation for the establishment of the plaintiff. Through this exhibit, family members were selected to manage and supervise the businesses left by the deceased. The 1st defendant was appointed as the supervisor of Plot No. 2, Block H, Section III, Moshi Township, while the 2nd defendant was handed over the house at Plot No. 7, Block E, Same Township, vide business agreement dated 1st April 2002 (Exhibit P9). Among the terms of the agreement was a requirement to provide an annual declaration of profit and expenditure, which the

defendants never 23 fulfilled. Mr. Dickson emphasized that there was a contractual agreement between the plaintiff and the defendants for the management of the properties and businesses of the late Ali Mberesero, which was later transferred to the plaintiff. On the second issue whether the defendants have breached management trust and failed to render true account of profit; Mr. Dickson submitted that one of the terms of supervision was that the supervisors will be accountable to the Board of the Plaintiff to make declaration of profit, loss, pay salaries, pay taxes and submit the business plan for the future. While relying on evidence of PW1, Mr. Dickson believed that the defendants failed to render true account. He made reference to exhibit P11 and argued that evidence of PW1 was confirmed by the defendants. He added that the plaintiff managed to prove that she owns both the buildings and the business therein. On the third issue on whether the plaintiff own and operate businesses of the 1st and 2nd defendants; Mr. Dickson submitted that the plaintiff came to take over the business which used to be operated by the late Benedict Alli Mberesero. However, the modality of conducting the business was left to individual family members for the benefit of all beneficiaries. He argued 24 that in their Written Statement of Defence, the defendants claimed to be the owners of the businesses without any evidence. While referring to the plaintiff's evidence, the learned counsel contended that it was undisputed fact that the business is the property of the plaintiff save for its operations which were left under the supervision and management of the defendants. Lastly, on the fourth and fifth issues concerning the remedies, Mr. Dickson argued that since the issues were answered in the affirmative, the plaintiff is entitled to the reliefs as sought in the plaint. On their part, the learned counsels for the defendants in their joint final submissions started by stating the background of the case which I do not see any reason to reproduce as the same has been covered herein above. The learned counsels faulted the plaintiff for failure to adduce any evidence to establish the contractual relationship between them. It was argued that all the exhibits tendered shows the existence of probate and administration of the estates of the late Alli Benedict Mberesero. They drew an attention of the court on what is mesne profit by making reference to section 3 of the Civil Procedure Code [Cap 33 R.E 2019] and the case of Eligius Kazimbaya vs Pilli Prisca Mutani and Peter 25 Paul Kazimbaya, Civil Appeal No. 163 of 2019 (CAT), which elaborated what amount to mesne profit. On how to prove mesne profit, the learned counsel cited the case of Tanzania Sewing Machine Co. Ltd vs Njake Enterprises Ltd, Civil Appeal No. 15 of 2016 which emphasised that mesne profit should be proved by evidence. In the instant matter, the learned counsels believed that no trust or lease agreement was presented that was entered between the plaintiff and the defendants. That, neither exhibit P2, P9, P10 nor P11 did state anything about the existence of any trust between the plaintiff and the defendants or even the arrangement that requires the defendants to render an account of their respective businesses to the plaintiff. It was further submitted that the properties had already been placed under the management of the Defendants by the deceased Alli Benedict Mberesero. The same was not a trust but a grant which did not attract any payment of rent or any form of profit-sharing arrangement. The learned counsels were of the view that since there is no single piece of evidence that shows the existence of such

contract, then the first issue is answered in the negative. 26 It was further contended that the plaintiff's evidence both documentary and oral established that the defendants were operating the businesses since when the deceased was alive. They were paying the taxes and never operated in the name of the deceased Alli Mberesero nor that of the plaintiff. The learned counsels believed that the issue whether the defendants own the businesses that they operate must be answered in the affirmative. Challenging the tendered reports, the learned advocates explained that the same were not prepared by accountants nor auditors. That, the reports did not qualify to form evidence on computation of mesne profit. They added that, there is no tangible evidence to show that the defendants were tenants to the plaintiff, paid rent to the plaintiff and or collected rent on behalf of the plaintiff. Based on adduced evidence, position of the law on mesne profit and nature of this suit, the learned counsels were of the opinion that the matter at hand was on probate and administration of the estate of the late Alli Mberesero. He blamed the appointed administrator who is the plaintiff herein for failure to discharge her duties of administering the estate of the late Alli Mberesero. Instead, they are instituting multiple suits 27 to make sure that the family is not in harmony so as to continue benefiting from the estates. In their conclusion, the defendants' counsels urged that in case the court finds that there is any claim against the defendants, then such claim should be from the year 2022 when the account and inventory was filed. After going through evidence of both parties thoroughly, I will start with the first issue whether there was an agreement being contractual business or lease between the Plaintiff and the Defendants. According to the testimony of PW1, the plaintiff's claim against the defendants involves payment of mesne profits for breach of management trust or contract due to failure to render a true account of profits for properties under the supervision of the 1st and 2nd defendants, specifically Plot No. 2, Block H, Section III, and Plot No. 7, Block E, respectively. In his final submission, the learned counsel for the plaintiff relied on Exhibit P2, which contains the minutes of the 3rd family meeting of the Mberesero family. Alongside this evidence, PW1 submitted Exhibit P9, which is the lease agreement between the plaintiff and the 2nd defendant, to prove that the 2nd defendant was entrusted with the said property. 28 On the other hand, DW1 testified that he was involved in the business before the passing of his late father. In their final submission, the learned counsels for the defendants emphasized that there was no evidence to prove the existence of any contractual or lease agreement between the plaintiff and the defendants. After examining the exhibits and oral evidence presented, it is important to note that, according to the law, the burden of proof lies to the one who alleges and the standard of proof is on balance of probabilities. This is as provided under section 110(1) of the Evidence Act, Cap 6 R.E 2022. There are numerous authorities to that effect. For instance, in the case of African Banking Corporation T. Ltd vs T-Better Holdings Co. Ltd (Civil Appeal No. 207 of 2017) [2024] TZCA 165 (6 March 2024) Tanzlii, the Court of Appeal observed that: "...on the law regarding burden of proof which characterises the discussion in this ground. The law under section 110(1) of the Evidence Act is that he who alleges must prove his allegation to succeed in a suit. It is equally the law that, unlike in criminal trials, the burden of proof in civil cases is not static.... It is also trite that, a party who 29 has the

burden of proof must discharge his burden on balance of probabilities regardless of the weakness in the case of his opponent...” In the present matter, particularly on the first issue, since the contention is whether there was any agreement between the plaintiff and the defendants; it was therefore the duty of the plaintiff to prove this fact on balance of probabilities. The duty does not shift to the defendants until the plaintiff has discharged his duty. The same was emphasized in the case of *Jasson Samson Rweikiza v. Novatus Rwechungura Nkwama* (Civil Appeal No. 305 of 2020) [2021] TZCA 699 (29 November 2021), *Tanzlii*, in which the Court of Appeal stated at page 14 that: “It is again elementary law that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case.” Upon examining the plaintiff's evidence, it is clear that there was no lease or contractual relationship between the plaintiff and the defendants that would require the defendants to account for the properties under their 30 supervision. Furthermore, there is no arrangement or evidence indicating that the alleged properties were placed under the 1st defendant's supervision, let alone requiring him to render a true account of the profits. With due respect to Mr. Dickson, Exhibit P2, which he referred to support this issue, consists of the minutes of the 3rd family meeting. After carefully examining the exhibit, I find no statement categorically indicating that the properties were entrusted to the defendants with a requirement to render a true account thereof. Consequently, it is the court's observation that there was no contractual, business, or lease agreement between the plaintiff and the 1st defendant. The 1st defendant elaborated this clearly when cross examined by Mr. Dickson. He stated that the agenda in the said meeting was to list the deceased's property and the members were required to brain storm. It was suggested that a Foundation be formed. The court has noted that, Exhibit P9, the lease agreement between the plaintiff and the 2nd defendant was entered into in 2002. In the said agreement, the plaintiff leased Plot No. 7 to the 2nd defendant to conduct business. Thus, in this regard, the plaintiff has demonstrated that a lease agreement existed between the plaintiff and the 2nd defendant, which was established in 2002 and not in the 1990s as testified. 31 Having established the existence of a lease agreement, the issue that follows, and which will be addressed under the second issue, is whether there was a breach of any management trust to administer the plaintiff's property and failure to render accurate accounts. Starting with the second defendant: despite the existence of a lease agreement between him and the plaintiff, the agreement did not establish any management trust for administering the property, nor did it impose an obligation on the second defendant to render an account of profit. Upon a careful examination of the lease agreement, it is noted that paragraph 2(e), (g) and (h) state that: “(e) MFANYA-BIASHARA atajilipa mshahara wake Pamoja na wafanyakazi wengine wote.

- (g) MFANYA-BIASHARA atawajibika kumwonyesha MMILIKI hesabu za Mapato na matumizi ya Mwaka

- (h) MFANYA-BIASHARA atawajibika kufuata maagizo ya MMILIKI kuhusu kuajiri ndugu na kumkabidhi (MMILIKI) faida iliyopatikana.” 32 The above quoted paragraphs may seem to establish a lease agreement between the plaintiff and the second defendant. However, I am of settled opinion that sub paragraph (e) is uncertain and contravenes section 29 of the Law of Contract, Cap 345 R.E 2019 which provides that: “29. An agreement, the meaning of which is not certain, or capable of being made certain, is void.” The salary of the second defendant is not indicated in the agreement. Also, it is not certain whether the business is owned by the plaintiff or second defendant. Consequently, I find that the plaintiff has failed to substantiate the claim of any loss regarding this issue. Regarding the first defendant on the second issue, adduced evidence shows that there is no any management trust, nor is there any indication that the first defendant was entrusted with Plot No. 2, Block H, at Moshi Municipal. Therefore, it stands that the plaintiff has failed to prove the second issue, specifically that the first defendant breached any management trust to administer the plaintiff’s property. There is no evidence showing that he was ever entrusted with such property. 33 Furthermore, exhibit P2, the minutes of the third family meeting, does not indicate that the alleged property was entrusted to the first defendant. With due respect to Mr. Dickson, upon reviewing Exhibit P11, it is observed that this document does not constitute a business report from the 1st defendant accounting for profit. Rather, the first defendant requested an advance of seventy-two million (TZS 72,000,000/=) from the plaintiff to initiate the business of being an agent for Tanzania Breweries. This cannot be construed as an admission of failure to account for the property as interpreted by Mr. Dickson. Accordingly, it is the firm conclusion of this court that the second issue is answered in the negative. Regarding the third issue on whether the plaintiff owns and operates the defendants’ businesses; it was the testimony of PW1 that the properties of the deceased included Plot No. 2, Block H, Section III, Moshi Township. He tendered the Certificate of Occupancy, which was admitted as Exhibit P6. Moreover, PW1 tendered certified copy of Letter of Offer in respect of Plot No. 7 and 8 located at Same Township, which was admitted as Exhibit P7, to prove that the said properties belong to the plaintiff. The fact that the plaintiff owned the mentioned properties was not disputed by the defendants. 34 However, the defendants disputed the plaintiff’s ownership of the businesses established on the properties. The defendants contended that the businesses are registered in their names and that they pay all taxes. In his final submission, Mr. Dickson observed that, although the properties are owned by the plaintiff, the management and operation of the businesses were assigned to individual family members. To the contrary, the learned counsels for the defendants were of strong opinion that there is no single business which was operated by the plaintiff. According to Exhibit P9, the agreement between the plaintiff and the second defendant, it is evident that the business conducted at Plot No. 7, Block E, Same Urban, is operated not by the plaintiff but by the second defendant. The evidence on record suggests that it is the defendants who are operating the businesses in the properties of the plaintiff. This fact was not disputed by the plaintiff since PW1 during cross examination admitted that the Foundation does not run the businesses. Based on this finding, the conclusion regarding the third issue is that the plaintiff does not own or operate the defendants’ businesses. 35

Turning to the fourth and fifth issues on whether the plaintiff is entitled to the reliefs sought in her plaint; based on the findings on the three issues above and considering the fact that the plaintiff failed to establish that the defendants breached any management trust in administering the plaintiff's properties, the plaintiff is therefore not entitled to any relief sought. Furthermore, even if the answers to the three issues had been in favour of the plaintiff, still the plaintiff's claim of Tshs 4,000,000,000/= remains unsupported by evidence. Surprisingly, the plaintiff did not produce any proof either oral or documentary, to prove the claims. This also applies to other claims, which are likewise unsupported. It is established principle of law that specific damages must be expressly pleaded and strictly proven. In the case of Dongxing International Real Estate Ltd vs Heri Investment Limited (Civil Appeal No. 373 of

2021) [2024] TZCA 955 (2 October 2024), Tanzlii, at page 21, it was emphasized that special damages must be specifically pleaded and strictly proven. The Court of Appeal defined Special damages in the case of Sultanali Javer t/a Mwaloni Filling Station v. NSK Oil & Gas 36 Limited (Civil Appeal No. 330 of 2021) [2024] TZCA 738 (15 August 2024), Tanzlii, at page 9, by stating that: "Beginning with pleadings and in line with the settled principle reproduced above, it can be said that special damages are those claims that can be ascertained and must be specifically pleaded." In the present case, since the plaintiff did not submit any documentary or oral evidence to explain how the alleged profit accrued, the specific damages were not strictly proven. Before concluding, the court finds it prudent to offer a word of advice to the parties. It appears that there are underlying family issues concerning the properties left by the late Alli Benedict Mberesero. Given the fact that the parties are siblings and that the properties were acquired through the efforts of their late father, I urge the parties to come together and resort to amicable settlement before the misunderstandings are succeeded to their next generation. 37 Otherwise, as already stated, evidence adduced by the plaintiff does not substantiate the plaintiff's claims on balance of probabilities. In the upshot, I hereby dismiss the suit with costs. It is so ordered. Dated and delivered at Moshi this 25th day of November 2024. X S. H. SIMFUKWE JUDGE Signed by: S. H. SIMFUKWE 25/11/2024 38 39

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