

TANZANIA / JUDGMENT

registered trustees of alli mberesero foundation foundation vs kapesa benedict mberesero 2019 tzhccomd 131 4 april 2019

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4 April 2019

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IN THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION AT PAR ES SALAAM
COMMERCIAL CASE NO. 176 OF 2017 BETWEEN THE REGISTERED TRUSTEES OF ALLI
MBERESERO FOUNDATION..... PLAINTIFF VERSUS KAPESA BENEDICT
MBERESERO..... DEFENDANT

JUDGMENT

MRUMA. J This is a "family" dispute in which the beneficiaries of the estate of the late Benedict Mberesero @ Ali Mberesero are mired in the miasma of familial rancour. During his sojourn on this earth, the late Benedict Mberesero @ Alii Mberesero, himself and through a limited liability company which he established and which known by its acronym of Ngorika Bus Transport Company Limited acquired and accumulated massive wealth, particularly Motor Vehicles in terms of buses and trucks plying all over the country, landed properties particularly in Kilimanjaro Region and other assets the value of which is not an issue in this proceeding. Unfortunately, upon his demise that wealth has turned out to be the apple of discord in his family, as vividly demonstrated in this case and in Miscellaneous Commercial Application No. 362 of 2017 which arose from it. The record shows that since his death intestate on 22nd June 1997 his family has known no real harmony. Fighting acrimoniously not vividly over who his dependants are, but apparently over their respective shares of the property in the estate has been order of the day. The litigation over his estate has spawned countless family members' contentious meetings, resolutions and disputes which have ultimately led to this suit. It would appear from the pleadings and annexes thereto that even the deceased's grandchildren and third parties have joined the fray, staking all manner of claims to portions of the estate. Existence of family disputes over the estate was signalled by the petition for incorporation of a trust (the present Plaintiff), by the trustees followed by an application for grant of letters of administration of the estate of the late Benedict Mberesero, the founder director of Ngorika Bus Transport Company Limited by the trustees, coupled with allegations of filing of doubted annual returns of the company and concealment of part of the estate, forgeries of minutes and company resolutions among others. In all those struggles, some children and grandchildren of the deceased have, without any sense of irony, easily disowned persons whom at one time or

another they represented to the neighbours and friends to be their brothers or siblings. The Plaintiff is by virtue of letters of administration granted to it vide Exhibit P9, the Administrators of the Estate of the late Benedict Mberesero @ Ali Mberesero and the Defendant is one of the sons of the late Benedict Mberesero @Ali Mberesero and one of the ten (10) first trustees members of the plaintiff's trust. The plaintiff's prayers against the Defendant are as follows:

1. A declaration that is not the share holder or director of the Company called Ngorika Bus Transport Company Limited; 2
2. An order that the Defendant is holding the assets of the company (i.e. the busses) wrongfully and unlawfully;
3. And order directing the Defendant to release and hand over buses and other assets of the company to the Plaintiff;
4. An order to direct the Defendant to remit to the Plaintiff unremitted profits for the year 2015/2016 and upon taking proper account;
5. General Damages, costs and any other remedy as the court may deem it fit to grant. The Defendant in his defence joined hands with the Plaintiff that he is not a share holder and/or the director of the said company, therefore share holdings and directorship became non contentious issue in these proceedings. The record in the pleadings also shows that some of the beneficiaries and their dependants have passed away, not to mention allegations that a substantial part of the estate has been dissipated during the dispute, which has been on-going for over 3 years. For instance in an attempt to salvage the property of the estate on 22nd November, 2017 this court granted an application for temporary injunction and her Ladyship Sehel J, (as she then was), ordered ten buses of Ngorika company to be grounded for a period of three months. At the final pre-trial conference and upon perusing parties' pleadings seven issues were framed for determination. The issues are:
 1. Whether or not the Defendant was aware of the company's meeting convened on 15th April 1994; 3
 2. Whether or not the Defendant fraudulently and maliciously forged the signatures of the late Stanley Benedict and Benedict Mberesero;
 3. Whether or not the Defendant is wrongfully holding and using the properties of Ngorika Bus Transport Company Limited;
 4. Whether or not the of continuous use of the buses by the Defendant has caused them wear and tear;
 5. Whether or not the Defendant caused loss of earning to the tune of T.shs 1,900,000/=;
 6. Whether or not the Plaintiff's suffered loss of earnings at the tune of T.shs 50,000,000/= per month. At the hearing the Plaintiff was represented by Mr. Simon Mnyele, learned counsel and the Defendant was represented by Peter Mshikilwa. The Defendant didn't file witness

statement which is equivalent to failure to call his witness or prosecuting his case. Basing on the decision of this court in Commercial Case No 147 of 2012 between Barclays Bank Tanzania Limited Versus Tanzania Pharmaceuticals Industries Limited & 3 Others where it was held that failure to file witness statement is tantamount to failure to procure attendance of a party's witness, I ordered case to proceed without the Defendant's witness statement but I allowed his counsel to cross-examine the Plaintiff's witnesses, bearing in mind that failure by the Defendant to call his witness does not deny him his right to cross-examine the plaintiff's witnesses and particularly so because it comes after the closure of the Plaintiff's case. The Plaintiff called one witness, Dr. Sabas Benedict Mberesero (PW1), the chairman of the Plaintiff's trust. According to this witness sometimes 4 in 1990 his father, the late Benedict Mberesero established a company called Ngorika Bus Transport Company Limited, a limited liability company. It is further evidence of PW1, in compliance with the law the late Benedict Mberesero invited his two sons namely Stanley Benedict and Stephen Benedict to hold some shares in the company and accordingly he held 50% of the shares and the other shares were held by the two sons. The evidence (Exhibit PI) shows that the initial total share capital of that company was 1000. The witness said that on 15th April 1994, the company held a meeting in which it decided to increase its share capital by 20% that is 1200 shares out of which Benedict was allotted 15% so as to hold 65% of all shares in the company. According to the witness the said meeting was attended by Benedict Mberesero, Stanley Mberesero and Stephen Mberesero (Exhibit P3). This contradicted his earlier statement that Stanley Benedict demised in 1993, because it is inconceivable for a person who dead in 1993 to attend a meeting and pass resolution in 1994. It is further evidence of PW1 that Benedict Mberesero @Ali Mbersero passed away in 1997. In 1999 the Plaintiff's trust was incorporated and thereafter it successfully applied for letters of administration of the estate of the late Benedict Mberesero @ Ali Mberesero. It is that letter of administration which gave the trust locus standi to sue in these proceedings. Furthermore PW1 testified that on 4th March 2013, the Defendant fraudulently forged minutes (Exhibit P II) of a meeting and signatures of Benedict Mberesero and Stanley Mberesero to show that Benedict Mberesero had surrendered his shares to him and that Stanley Benedict had surrendered his shares to one Festo B. Mberesero. According to 5 PW1 both Stanley Benedict and Benedict Mberesero could not sign the minutes because on the mentioned date they were already dead. It is these allegations where the present dispute finds its root. The witness testified further that following the Defendant's fraud he seized and forcefully acquired assets of the company to wit the busses of the company and since then he has been using them for his own benefit and to the detriment of the other members of Benedict Mberesero's family. As stated hereinbefore, as the Defendant didn't file witness statement no evidence was offered on his behalf. I have carefully considered the pleadings of the parties, the testimony of PWI together with the submissions of the learned counsel and I am afraid to say that the Plaintiff's case is far from being proved on the standard required which. In law he who alleges must prove. Section 110

- (1) of the Evidence Act provides that: "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist" The kernel of the Plaintiff's complaint in this case is an allegation of forgery and fraud which have been levelled against the Defendant. Fraud, according to Black's Law Dictionary means an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him/her or to surrender a legal right. It entails acting wilfully and with specific intent to deceive or cheat, ordinarily for purposes of either causing some financial loss to another or bringing about some financial gain to oneself. Fraud is therefore, anything calculated to deceive, whether by a single act culminated, or by suppression of truth, or suggestion of what is false, whether it is by a single, direct falsehood or the innuendo by speech or silence, word of mouth, or look or gesture. [See Black's Law Dictionary 7th Edition Bryan E. Garner pg 671]. On the other hand forgery is defined in same dictionary at page 661 as the act of making a false document or altering a real one to be used as if genuine. The above definitions are what this Court will accord to the question before me, did the Defendant maliciously and fraudulently forged the signatures of the late Benedict Mberesero @ Ali Mberesero and that of Stanley Benedict?. As it would seem from the evidence reproduced above, PW1 simply stated that the Defendant forged the signatures of Benedict Mberesero and Stanley Benedict. Since is repetition of the allegations in the plaint and not evidence of forgery. The Plaintiff didn't lead tangible evidence to prove that actually the Minutes (Exhibit P 11) were authored and signatures therein were of the Defendant. In view of the Defendant statement under paragraph 3 of his written statement of defence in which he disputed the allegations that he was holding shares in Ngorika Bus Transport Company Limited and stated thus; That the contents of paragraphs 3, 4 and 5 of the plaint are disputed as the Defendant is neither the shareholder of Ngorika Bus Transport Company Limited nor holding the assets of the company and the properties and assets of the are legally owned by all Beneficiaries of the Registered Trustees of Ali Mberesero Foundation[Emphasize mine], 7 The Plaintiff's burden to prove that the Defendant forged the minutes and the signatures thereon and is actually holding shares in the said company became heavier. Forgery of signatures which is alleged in this case could be proved by eye witness who witnessed the Defendant signing in Exhibit P 11, or by handwriting expert. No such evidence was forthcoming. On the other hand fraudulently acquisition of shares in a company could have been proved by conducting search in the office of the registrar of company (BRELA) to establish who are share holders' of a particular company, that has not been done either. As stated hereinbefore, it is trite law that the burden of proof in all cases including cases of fraud and forgeries lies on the party alleging. In the case of R.G. Patel vs Lai Makanji [1957] E.A 314, it was held that allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities. To say the least in the case at hand no scintilla of evidence has been led to establish whose handwriting is in Exhibit P 11 and who were actually holding shares in Ngorika Bus Transport Company Limited. Because that burden has not been discharged by the Plaintiff the second issue is answered in the

negative. That is to say there is no evidence that Defendant did fraudulently forge the signatures of the late Benedict Mberesero and Stanley Benedict. The answer to the second issue has the bearing to the answers of issues No. 3, 4, 5, and 6. This is because the answers to those issues were dependent on the answer to the second issue. For instance having found that there is no evidence that the Defendant did forge minutes and signatures in Exhibit P 11 it goes without saying that Defendant couldn't benefit from the result of forgeries and fraudulent acts which have not been established. On allegations of acquiring and holding shares fraudulently the Plaintiff didn't lead any evidence to prove that the Defendant is holding any share in Ngorika Bus Transport Company Limited let alone unlawfully acquired shares in that company. Regarding holding the properties of the company, PW1 simply tendered original copies of Motor Vehicle Registration Cards of the company buses (Exhibit P 13). Motor Vehicle Registration Cards are document of titles. Essentially this means that the Motor vehicles are owned by the company which evidence tallies with the Defendant statement of defence that the assets and properties of the company are legally owned by the company for of the Plaintiff's trust beneficiaries. Regarding the first issue which is whether the Defendant was aware of the meeting allegedly convened on 15th April 1994, like other issues no evidence was led to prove this. Exhibit P3, shows that the said meeting was attended by:

1. Ally Mberesero;
2. Benedict Mberesero
3. Stanley Mberesero
4. Stephen Mberesero. 9 The minutes were signed by all who attended. The Defendant did not attend and didn't sign the minutes and there is nothing in the evidence of PW1 to show how the Defendant came to know about the meeting. Moreover, in view of the testimony of PW1 at paragraph 8 of his witness statement which is to the effect that Stanley Benedict passed away in 1993 and that Benedict Mberesero is the same person as Ali Mberesero, the purported meeting and resolutions passed were void ab initio as it was attended and signed by a dead person and also by Benedict Mberesero and Ali Mberesero as two distinct persons while it was not true. This meeting and resolution passed were tainted with illegality and this court cannot condone illegalities. Thus, the first issue is answered in the negative. That is to say there is no evidence that the Defendant was aware of the meeting held on 15th April 1994. Regarding issues No. 5 and 6 in an attempt to prove loss of earnings of the company the Plaintiff tendered in evidence Profit and loss statement of Ngorika Bus Transport Company Limited (Exhibit P10). This report seems to have been prepared by one Patrick B. Mberesero Transport Manager of the company and was presented to the Chairman of the foundation. It has two components. The first component is preamble and briefing presented to the Chairman. The covering letter shows that it is a "TAARIFA YA BIASHARA 2013-2014" and it reads: "Tafadhali husika na kichwa cha barua hapo juu na taarifa ya mapato na matumizi kwa kipindi cha miaka Miwili 2013 na 2014" And, the second component constitutes of statistics which show that it is a PROFIT AND LOSS STATEMENT FOR

JANUARY, 2014 TO DECEMBER 2014. In both components it is stated that the company 10 had earned a profit of T.shs 44,724, 712.77. No explanations were offered on the contradictions of the report period. PW1 did not lead the court to understand how the Defendant did cause loss of earnings of T.shs. 50,000, 000/= per annum and about T.shs 1,900,000 to the deceased and his members of the family. Thus issues No. 5 and 6 are answered in the negative. Regarding issue No. 4 which is about wear and tear of the buses owned by the company no evidence was produced whatsoever to establish the wear and tear of the buses. I therefore answer issue No. 4 in the negative, that is to say there is no evidence that the Defendant did cause wear and tear to any bus owned by the company. Before I summarise my findings and record my verdict on the matter, let me explain albeit briefly the involvement of Ngorika Bus Company Limited in this matter, which according to the pleadings is a limited liability company duly incorporated under the Companies Ordinance Act, Cap 212 R.E. 2002 of the Laws, therefore a legal entity capable of suing and being sued. Ngorika Bus Service Company was incorporated under the repealed Companies Ordinance Cap 212 of laws of Tanzania. Under the repealed Company Ordinance and Section 24(1) and (2) of the new Companies Act, subscribers to the memorandum of the company and every other person who agree to become member of the company are deemed to have agreed to become members of the company. Accordingly Benedict Mberesero @ Ali Mberesero (deceased), Stanley Benedict and Stephen Benedict were all members and share holders of that company. ii It is the Plaintiff statement that in 1994, the company convened a meeting and resolved to increase the share capital by 20% that is to say 1200 shares and Benedict Mberesero was allotted further 15% shares that is to say 180 shares and held them through his other name as Ali Mberesero and thereafter he became the owner of 65% of the shares in the company and other shares were held in trust of him by other share holders. I have already found that the purported 1994 meeting and the alleged resolutions passed were tainted with illegalities therefore of no effect. In summary, the purported meeting was illegal because first it was attended by Stanley Benedict who on the evidence of PW1 he was already dead and secondly because it purported to have allotted shares to Benedict Mberesero in his real name and allotted other shares to him in his alias name of Ali Mberesero and thirdly because it purported to have allotted shares to other members of the company in trust of Benedict Mberesero which in essence means that all shares of the company were held by him. In law one share holder cannot hold shares in trust of another share holder in the same company. Similarly a share holder cannot hold shares in a company by using his other name. Therefore the purported meeting of 1994 was illegal and the minutes and resolutions passed there from are of no effect. Now what could be the status of Ngorika Bus Transport Company Limited at the time of instituting these proceedings? Apparently all the first directors and share holders of the company who were also subscribers to the company's Article and Memorandum of Association are no longer. The records show that Stanley Mberesero passed away in 1993 and Benedict Mberesero @ Ali Mberesero died in 1997 while Stephen Benedict demised in February, 2016. 12 As correctly observed by the learned counsel for the Plaintiff, the legal status of Ngorika Bus Transport Company which has no surviving share holder and/or director makes one to think

twice and like him, it has considerably and intensively taxed my mind. Going by the pleadings one may be right in saying that from 1997 when Benedict Mberesero @Ali Mberesero died up till 2016 when Stephen Benedict, the sole surviving director and share holder perished, the company had one director only. This is particularly so because the Plaintiff is strenuously challenging the company's meeting purportedly held on 4th March 2013 which transferred some shares to the Defendant. That meeting and the resolutions passed like the 1994 meeting was illegal and of no effect. It is illegal as it was tainted with illegalities. On the evidence of PW1, the minutes of the alleged meeting were fraudulently forged because on the mentioned date both Benedict Mberesero and Stanley Benedict had already passed away therefore they could not sign the minutes. The fact that both Benedict Mberesero @Ali Mberesero and Stanley Benedict were already dead on 4th March 2013 was not challenged in anyway. It follows therefore that they could not attend and/or sign any minutes of the company's meeting. I accordingly find and hold that the purported Extract of Minutes of the Board of Director's of Ngorika Bus Transport Company dated 4th March 2013 (Exhibit P II) couldn't be signed by Benedict Mberesero@ Ali Mberesero and Stanley Benedict because they were already dead. In the said minutes it is stated that the meeting was attended by Stephen B. Mberesero (Chairman), Benedict Mberesero (Member), Stanley B. Mberesero (Member) Kapesa Mberesero-the Defendant (Invitee) and Mohamed S. Mganyo-appointed Secretary. I have already held that there is no evidence being it direct and/or circumstantial that it is the Defendant who unlawfully and fraudulently forged that minutes (Exhibit P II) , and that by failing to explain to the court who forged the signature of Stanley in the Minutes of the Meeting allegedly held on 15th April 1994, a year after Stanley's death and by failing to prove that it was the Defendant who signed and forged the Minutes of the company's meeting held in March 2013, the plaintiff cannot be said to have proved fraud. Counsel for the Plaintiff also did not address court on this question but the law is that courts of law cannot sanction what is illegal and an illegality once brought to the attention of the Court, overrides all questions of pleadings including admissions made thereon. The totality of the evidence tendered indicates that the company Ngorika Bus Transport Company Limited is a sham company. Since the demise of Stanley Benedict there is no evidence that his shares were transferred to any other person or they being held in trust of his estate by any person. It appears that since then and after the demise of Benedict Mberesero in 1997 and Stephen Benedict in 2016 the company is being run illegally and not in accordance with the requirement of the relevant laws. Several illegalities in running the affairs of the company have been demonstrated in this case. The first illegality is in respect of the alleged increase of share capital of the company through its Board Meeting purportedly held on 15th April 1994 (Exhibit P3) in which the company increased its Share Capital by 20% and Benedict Mberesero was allegedly allotted 15% of increased shares in his other name of Ali Mberesero. The alleged meeting is said to have been attended by Stanley Mberesero who was already dead by that time. Secondly even if he was alive and the meeting was actually held, it was contrary to the law to allot to the late Benedict Mberesero 15% of shares in his other name of "Ali Mberesero". The Second illegality is that it would appear that from 1997 when Benedict Mberesero @ Ali Mberesero demised,

Ngorika Bus Transport Company remained with one Director Mr. Stephen Benedict Mberesero. Under Section 3(1) of the Companies Act, the minimum number of directors for a private company is two. No evidence has been to establish that after the death of Benedict Mberesero there was change of directors and who was appointed to replace the late Benedict Mberesero @Ali Mberesero. As stated earlier, the purported meeting was held in March 2013 over ten years after the demise of Stanley Benedict in 1993 and over Six years after the death of Benedict Mberesero in 1997, therefore they couldn't attend the meeting and pass resolutions. The third illegality is that from 2016 and after the demise of Stephen Benedict the company has no director or at least there is no evidence that new directors were appointed to replace him and who are the new directors. There can be no argument that the shares of a deceased in a limited liability company are assets which the family through their personal representative has power to distribute in an administration cause. In the case, the evidence has indicated that 50% of 1000 shares in Ngorika Bus Transport Company Limited were being held by the late Benedict Mberesero @ Ali Mberesero. In view of letters of administration of the estate of the late Benedict Mberesero @Ali Mberesero which was granted to the first trustees Benedict Ali Mberesero Foundation (Exhibit 15 P9), the trustees are personal representative of the beneficiaries of the estate of Benedict Mberesero @ Ali Mberesero. Thus, the Plaintiff has the right over 50% shares of Ngorika Bus Transport Company Limited on behalf of the beneficiaries of the estate of the late Benedict Mberesero @Ali Mberesero. According to the Memorandum of Association of the company (Exhibit PI), the remaining 500 shares are held by Stanley Benedict and Stephen Benedict who held 250 shares each. There is an assertion that those shares were being held by Stephen Benedict and Stanley Benedict in trust of Benedict Mberesero, I have already found that in law these shares cannot be held by them in trust of the late Benedict Mberesero as the Plaintiff would like this court to believe. I have also held that a share holder cannot hold different shares in the company by using different names. Therefore the assertion that some shares were held by the late Benedict Mberesero in that name and others in his name of Ali Mberesero cannot hold water. Thus, taking the status of the company as it was in its inception, its share holders are Benedict Mberesero @ Ali Mberesero, Stanley Benedict and Stephen Benedict (all deceased). There is no doubt that the estate of Benedict Mberesero @ Ali Mberesero which amongst others it comprises of 50% shares in Ngorika Bus Transport Company is being administered by the Plaintiffs first trustees in view of letters of administration (Exhibit P9) granted to it. The court has not been informed who are the administrators of the estates of the other two deceased share holders, but in any event their shares vest in their respective administrators of their estates. As it would appear that this is a family company, the administrators of the estate of Stanley Benedict 16 and Stephen Benedict may engage with the company and the Plaintiff under the relevant Company laws and Probate and Administration rules to wrest them back to the trustees for the benefit of the entire family members as it was the intention of their deceased father. This may be possible under among other laws Section 78 of the Companies Act, which provides that:- "A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member

ber o f the com pany, be a s valid a s i f he h ad been such a m em ber a t the tim e o f the execution o f the instrum ent o f transfer". In this case the personal representative o f the late Benedict Mberesero @ Ali Mberesero is known and is the Registered Trustees o f Ali Mberesero Foundation. The personal representatives o f the remaining shareholders are not known and they are not parties to the present proceedings. The personal representative o f the deceased has power to transfer the shares o f the deceased as if it were the deceased himself. I take the view, that in absence o f personal representatives o f the other share holders and the company itself court cannot conclusively determine this family feud. In summary, this suit fails as the Plaintiff has failed to prove fraud and forgeries against the Defendant or that he hold any share in the company. The Plaintiff has also failed to prove that the Defendant is holding and/or misappropriating the assets o f the company or that he has caused any tear and wear o f buses the property o f Ngorika Bus Transport Company Limited. The suit is therefore Dismissed. 17 As this judgment would implicate, all claims raised against the Defendant in this case could conveniently be canvassed in a case where the company and personal representative o f all deceased share holders are joined as parties to the proceedings. Otherwise this being a family dispute it would bring more harmony and peace in the family if they can agree to sit down and review the memorandum and Articles o f their company and see how they operate it in a modern way and for the benefit of all beneficiaries as intended by their father Benedict Mberesero @Ali Mberesero who according to Exhibit P6 he was heard saying that he wanted his legacy to be administered as if it were a mission or the properties o f Karimjee. As this is a family matter, each party shall bear own costs o f the suit. 18

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