

TANZANIA / JUDGMENT

mohamed said kiluwa vs kiluwa steel group company limited wang sengju and wang wengqian 2020 tzhccomd 2088 16 october 2020

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM MISC. COMMERCIAL CAUSE NO. 30 OF 2020 IN THE MATTER OF SECTION 233 OF THE COMPANIES ACT, CAP 212 (R.E. 2002) AND IN THE MATTER OF AN APPLICATION FOR THE HONOURABLE COURT TO ORDER PURCHASE OF THE APPLICANTS SHARES BY OTHER MEMBERS OR THE COMPANY AND BE GIVEN A FAIR SHARE OF COMPANY'S ASSETS PROPORTIONAL TO THE SHARES HELD BY HIM. BETWEEN MOHAMED SAID KILUWA.....PETITIONER VERSUS KILUWA STEEL GROUP COMPANY LIMITED..... 1st RESPONDENT WANG SHENGJU..... 2ndRESPONDE WANG WENQIAN..... 3rdRESPONDEN

RULING

B.K. PHILLIP, J The petitioner herein lodged this petition under the provisions of section 233 of the companies Act, Cap 212 R.E.2002, praying for the following

orders.

- i. A declaratory Order that, the affairs of the 1st Respondent are being conducted in a manner which is unfairly prejudicial to the interest to its members generally and to the Petitioner, particularly. ii. An order declaring illegal and void all acts and transactions conducted by the 2nd and the 3rd respondents in contravention of the law. iii. An order appointing an Independent Auditor/Audit Firm to investigate financial affairs of the 1st respondent and conduct Valuation of the assets of the 1st respondent for the fair and equitable compensation of the Petitioner's financial interests in the 1st respondent. iv. An order that, the Petitioner be paid off the proportion of shares held by him on the basis of the value of all assets of the 1st respondent.
- v. An order for payment of the Petitioner's director's remuneration at the monthly rate of Tzs. 10,000,000.00 from January, 2016 to the date of exit as the shareholder of the 1st respondent.
- vi. An order for payment of the Petitioner capital investment in goodwill, to be assessed by the court from the date of Commencement of business by the 1st respondent to the date of

change of name by the 1st respondent. vii. An order for the 1st respondent to change its name and stop using the family name of the Petitioner 'Kiluwa'. viii. An order that, the unjustified bank withdrawals are unlawful and be returned to the accounts of the 1st respondent. ix. Costs of this Petition be paid by the respondents.

- x. Any other reliefs that the honourable court may deem fit and just to grant. 2 A brief background to this petition is that in the year 2014, the petitioner together with Mr. Liu Dellis and Wang Shengju formed a company known as Kiluwa Steel Group Company Ltd. (The 1st respondent herein and hereinafter to be referred to as "the Company") and became the first directors of the company. The share holding structure was as follows: Lui Delli held 5000 shares whereas the Petitioner and Wang Shengju held 2,500 shares each. Later on the shares allotted to Mr Liu Delli were forfeited and re-allotted to Du-funze who was allotted 4,500 shares and the remaining 500 shares were allotted to the petitioner. However, later on Liu Delli sold his shares to Wang Menguian (the 3rd respondent herein). Thus, from 29th June 2015 to date the share holders of the Company are as follows; Wang Wenqian, Mohamed Said Kiluwa and Wang Shengju. The petitioner further alleged that as business prospered, the capital of the company increased from time to time. By December 2015, the capital of the company had increased up to 42,000,000,000/=. In 2016 the Company obtained a loan facility from National Microfinance Bank (NMB) to a tune of USD 6,500,000/= as a working capital. Moreover, the petition alleged that, after establishment the Company's operations/business, the petitioner and, the 2nd and 3rd respondents agreed that it was wise for the petitioner to take a health vacation, after a well done job for securing all necessary licences and permits for building the premises for the Company and that he would be involved in the operational activities of the Company whenever necessary or during decision making only. Thus, the petitioner stopped engaging himself in the day to day activities of the Company, but he was consulted in case of need and during decision 3 making. The 2nd and 3rd respondents took charge of the management of the company. Furthermore, the petitioner contended that, after the alleged consensus he took a healthy leave as agreed. That the 2nd and 3rd respondents have been managing the Company's business, making profits out of it and re- investing the same in the business by buying machinery, landed and movable properties etc, but whenever the petitioner inquires about his remuneration and profits made out of Company's business, the 2nd and 3rd respondents always claim that the company is not generating any profit. The petitioner has pointed out a number of complaints against the 2nd and 3rd respondents and contended that their acts are in contravention of the laws governing the operation of companies in Tanzania. Among the petitioner's complaints is that the 2nd and 3rd respondents are not servicing the loan that the company secured from NMB. Thus, putting the petitioner in imminent danger as he issued personal director's guarantee for repayment of the loan. In their reply the respondents alleged that, the petitioner is neither a share holder nor director of the company because he never paid for the shares allotted to him. That the amount of money alleged to be paid by the petitioner are just the value of the shares he holds in the company. The respondents contended that in the years 2016 and 2017, the company had a total liability

of Tshs. 2,125,305,282/= and Tshs. 5,348,658,899/= respectively which was caused by the petitioner, who was the managing director of the company by then and later decided to quit from the 4 management of the day to day activities of the company. Consequently, in the year 2018, the company had to seek for an overdraft facility from the bank to rescue the company's business. However, by that time, the companies liabilities had increased to Tshs. 5,389,818,527/=. Moreover, the respondents alleged that since its incorporation the Company has been operating under loss, thus no profit has been generated out of the company's business. In short the respondents disputed all the allegations leveled against them. Furthermore, the respondents alleged as follows; That they are servicing the loan obtained by the Company from NMB. That the petitioner abandoned his responsibilities in the company and withdrew himself from the day to day management of the company. That they have never sold any property belonging to the company. As regards the complaint on cash withdrawals from the Bank, the respondents alleged that same is unfounded and baseless. On the allegations that the respondent filed false information at the Registrar of Companies, the respondents response is that the documents relied upon by the petitioner to substantiate his claims were approved and submitted to the registrar of Companies by the petitioner himself by virtue of his position as the managing director of the company, before he abandoned his responsibility in the management of the company early in the year 2018, when the company's liabilities reached a tune of Tshs. 5,389,818,527/= and incurred loss to a tune of Tshs. 960,767,995/=. 5 This petition has been disposed of by way of written submissions. The learned advocates Alex Mashamba Balomi and Bernard Stephen filed the submissions for the petitioner and the respondents respectively. Submitting for the petition Mr. Balomi stated by narrating the background to the petition which I have summarized herein above, thus I will not reproduce it here again. He proceeded to submitted that, the 2nd and 3rd respondents breached Article 64 of the Articles and Memorandum of Association of the company for failure to pay the petitioner his remuneration as the director of the company. Mr. Balomi, further submitted that the company has been generating profits as a result it has acquired various assets including machineries for steel production. He contended that the 2nd and 3rd respondents sold the land belonging to the company to foreigners contrary to the laws and the petitioner does not know how the proceeds of the said illegal sale of the Company's land were used. To cement his arguments he referred this court to documents annexed to the petition as MISK 9A {Sa/e agreement between the Company and Sunda Chemicals Fiber Limited), MSK 9B (Sate agreement Between the Company and Power construction Corporation of China Limited) and MSK9C {sale agreement between the Company and Fu Xing Paper Manufacturing (T) Company Limited). The alleged illegal sale of the company's land to Chemicals Fiber Limited is in respect of Plot No. 1 Block " N" Pwani. The landed property that was sold to Fuxing Paper Manufacturing (T) Company Limited was undervalued and sold at a low price in the sum of Tshs. 50,000,000/=, contended Mr. Balomi. He insisted that the aforesaid sale of Company's land was illegal because a foreign 6 entity, save for investment project approved by the Tanzania Investment Center cannot acquire land in Tanzania as stipulated in section 20(1) of the Land Act No. 4 of 1999. Other concerns raised by Mr. Balomi are; That the 2nd and 3rd respondents have

sidelined the petitioner in all matters involving the Company's Bank transactions despite the fact that the petitioner is one of the signatories to all Company's Bank accounts, under special instructions that, either of the two directors including himself may sign cheques or any Bank transactions. Mr. Balomi also submitted that the 2nd and 3rd respondents have been doing cash withdrawals of the company's money for unjustifiable payments. He referred this court to annexures MSK-10, MSK 10A and MSK 10B {Company's statements of account and a letter from a consultant), to the petition. He contended that the alleged cash withdrawals of money and illegal disposition of land, might amount to money laundering contrary to section 3(x) 12(a) and 3(1) (a) of the Anti- Money Laundering Act No. 12 of 2006 as amended. He was of the opinion that in the absence of court intervention on the alleged irregularities, the petitioner being shareholder and managing director of the Company is likely to be subjected to the investigations by the Financial Intelligence Unit (FIU) which has got powers to collect and analyze Suspicious Transaction Reports (STRs) for the purpose of determining matters pertaining to money laundering and financing of terrorism. 7 Mr. Balomi went on to submit that the company has never conducted board meetings, no transparency in the company affairs, no audited accounts has been presented to the shareholders, the 2nd and 3rd respondents have authorized high director's remunerations for themselves while denying the petitioner the payments of his remunerations, no dividends have been paid to the petitioner since 2016, the 2nd and 3rd respondents have been forwarding irregular and misleading information to the registrar of companies regarding the affairs of the company contrary to the provisions of section 182(1) of the companies Act, 2002 which requires the directors of a company when performing their duties to act honestly and in good faith. Furthermore, Mr. Balomi submitted that what the 2nd and 3rd respondents did is contrary to section 472 of the Companies Act, 2002 and amounts to committing an offence. He contended that under the circumstances, the petitioner feels unsafe to continue being a member and shareholder of the company. He believes that it is high time to terminate his relationship with the respondents. It was the contention of Mr. Balomi that since the petitioner alleged that 2nd and 3rd respondents have sidelined him from the management/operations of the company, it implies that, they are no longer in need of the petitioner despite the fact that he played a very big role in establishing the company. He contended that this is a fit case for this court to invoke its powers under the provisions of section 233(3) (d) 8 of Companies Act, 2002 to grant the reliefs sought by the petitioner in this petition. In rebuttal, the respondents' advocate Mr. Bernard Stephen submitted that the prayers made by the petitioner in this petition are declaratory orders which some of them are not within the jurisdiction of this court, but they fall within the ambit of labour and civil proceedings which need separate hearing to prove them. Mr. Bernard went on submit that, the following prayers that have been made by petitioner in this petition need separate proceedings;

- (i) An order for payment of the Petitioner's remuneration. (ii) An order for payment of the petitioner's capital investment. (iii) An order that the bank withdrawals are unlawful. (iv) An order for the respondents to stop using name "Kiluwa".

- (v) An order for appointment an independent Auditor/audit Firm to investigate financial affairs and conduct valuation of assets of the respondents. (vi) An order declaring illegal and void all acts and transactions conducted by the respondents. He contended that, this court cannot grant the petitioner's claim for remuneration as a director and shareholder of the company under the provisions of section 233 of Companies Act, 2002, since the law governing the remunerations in Tanzania is the Employment and Labour Relations Act No. 6 of 2019 (Henceforth "Act No. 6/2019"). In the absence of employment contract, Act No. 6 of 2019 is not applicable and sections 12 9 and 50 of the same establish a proper forum for handling labour matters in Tanzania. The law stipulates that, labour matter are handled by the Commissions for Mediation and Arbitration and a Labour Division of the High Court of Tanzania, thus this court lacks jurisdiction to entertain matters/complaints on remuneration, contended Mr. Bernard. He further argued that as per Rule 10(2) of the Labour Institutions (Mediation and Arbitration) rules GN No. 64 of 2007, the petitioner's claims for remuneration is time barred since he was supposed to lodge the same within 30 days from the date the cause of action arose, that, is in the year 2016, in which he alleges that he had to be paid remuneration therefrom. As regards the claim for payment of dividend, Mr. Bernard argued that clause 90 of the Articles and Memorandum of Association of the Company stipulates that, no dividend shall be paid otherwise than out of profit. Referring this court to annexures 'KK2' (the Audited Financial Statement of the Company for the year 2018) to the reply to the petition, Mr. Bernard contended that the company has been operating on loss, thus, no dividend could be paid to the members. He contended that the petitioner has not demonstrated how the respondent generated profit. It was the contention of Mr. Bernard that the petitioner did not pay for his shares. He has not brought any proof for the payment of the same and never injected any capital in the company. As regards the company's landed properties, Mr. Bernard submitted that the acquisition of Plot No. 7 Block N. Disunyara Area Mkudizi Coastal Region was initiated and financed by the respondents. To cement his arguments he referred this court to annexure KK1 {Statement of Financial Position as at 31st December 2017) which is attached to the reply to the petition. In addition to the above Mr. Bernard submitted as follows; That in the years 2016 and 2017 the company had a total liability of Tshs. 2,125,305,282/= and Tshs. 5,348,658,899/=. In 2018 the liability increased to Tshs. 5,389,818,527. The company had to seek for an overdraft facility to rescue its business. At that time the petitioner had abandoned his responsibilities in the management of the company. There is no any board resolution or official document showing the company's resolution that the petitioner should take a health leave. The respondents have never sidelined the petitioner. There is no any property belonging to the company that has been sold by the respondents. There are no any irregularities in operations of the company and no false information has been filed at the registrar of companies as alleged by the petitioner. The respondent has never breached any law, regulation or any Article of the Memorandum and Articles of Association of the Company. As regards the alleged cash withdrawals, Mr. Bernard submitted that all cash withdrawals are justified since the respondents are duty bound to pay the company's employees who are more than 50 permanent employees and about 30 casual employees. The

company also requires money for buying materials for production of steel bars, paying for various matters in respect of Companies corporate social responsibilities to the societies as well as paying for the day to day activities of the company. Mr. Bernard ii insisted that all withdrawals of the company's money have been incorporated in the Company's Audited Financial Report filed at the TRA in 2016, 2017 and 2018. The allegations on inflated costs and expenses against the company are without any justification, contended Mr. Bernard. He submitted that the petitioner has never complained before the respondents on all of the alleged irregularities on the management of the company. He referred this court to the case of Ms. Devota Kiwory and Mr. Nyemo Malundo Vs Cetawisco Limited, Misc. Civil Commercial cause No. 20 of 2019. Moreover Mr. Bernard argued that petitioner sued a wrong party because the name of the 1st respondent is not Kiluwa Steel Group Companies Limited, it is Kiluwa Steel Group Company Limited as evidenced by all the attached documents to the petition. He also raised a concern that the submission filed by the petitioner's advocate indicates that the same is in respect of commercial Application No. 30/2020 instead of Commercial Cause No. 30/2020. In rejoinder Mr. Balomi submitted that Mr. Bernard avoided to address the key issues in this petition instead he concentrated in extraneous matters related to employment disputes. He contended that the petition remains uncontested. He further contended that, Mr. Bernard's arguments that the petitioner has filed submission in respect of commercial Application No. 30/2020 instead of Commercial Cause No. 30/2020 is a very weak argument and trivial since the error pointed out of by Bernard is just a typing error which can be corrected at any stage in the hearing by adopting the correct title in the petition which already forms part of the court's records, contended Mr. Balomi. As regards the argument raised by Mr. Bernard that the petitioner has sued a wrong party, Mr. Balomi submitted that the omission or misspelling of the company's name is a typing error which is a minor anomaly and can be cured by writing the company's name correctly, since all documents attached to the petition reflect the correct name of the company, that is Kiluwa Steel Group Company Limited and the correction of the name of the Company cannot cause any prejudice to the respondents. To cement his arguments he referred this court to order 1 rule 9, 10 (1) (a) (2) (1) and section 3A of the Civil Procedure Code, Cap 33, R.E 2019 as amended by the Written Laws Misc. Amendment Act No. 3 of 2018 which provides for the principle of overriding objective. He went on to submit that the principle of overriding objective among others, is aimed at facilitating the just, expeditious, proportionate and affordable resolutions of civil disputes. As regards the jurisdiction of this court and the reliefs prayed by the petitioner, Mr. Balomi submitted that, Mr. Bernard did not cite any provision of the law to show that the jurisdiction of this court in respect of the matters in dispute herein has been ousted. He contended that directors' remuneration as opposed to employment remunerations are within the ambit of commercial disputes and are set out in Article of Association of the company which is adopted from Table 'A' vide section 11 of the companies Act, 2002. Mr. Balomi insisted that Articles of Association 13 of the company in general is a key instrument in regulating the relationship between share holders and the company, and the balance of powers amongst shareholders and directors. The internal matters, such as directors' remunerations under

dispute in this petition do not fall under Act No. 6/2019 and does not fall under the jurisdiction of the Commission for Mediation and Arbitration. ("CMA") since there is no employment relationship between the Directors of a Company and the Company. The provisions of section 12 and 50 of Act No. 6 of 2019 relied upon by Mr. Bernard in his submissions are not relevant in this matter, argued Mr. Balomi. Expounding more on this point, Mr. Balomi submitted that labour dispute as defined in section 4 of Act No. 6 of 2019, means any dispute concerning a labour matters between employer as registered employer's association on one hand and any employee or registered trade union on the other hand. Mr. Balomi was of the strong opinion that the petitioner's claim for remuneration does not fall within the ambit of the application of Act No. 6 of 2019. As regards the claim for dividends. Mr. Balomi insisted that the company has been in operation for more than four (4) years, thus, the audited reports for the year 2016, 2017 and 2018 referred to by Mr. Bernard in his submissions are not sufficient to prove that the company has been operating under loss. He invited this court to order investigations on the company's financial status by an independent Audit Firm to ascertain the financial status of the company. 14 As regards the shares of the company subscribed thereto by the petitioner, Mr. Balomi contended as follows; That the petitioner paid for all his shares. The respondent's allegations that the petitioner has not paid for his shares are unfounded and that the 2nd and 3rd respondents have not told this court how much they paid for their shares. The 2nd and 3rd respondents have never cleared the burden on the allegations raised against them by the petitioner. In addition to the above, Mr. Balomi maintained that the name "Kiluwa" belongs to the petitioner and the petitioner is the one who acquired Plot No. 1 Block "N" Disunyara Mlandizi, Costal Region for the company, since he is the only citizen of Tanzania in the company who could process ownership and acquire that land in accordance with the land laws. That the cash withdrawals done by the respondents are inappropriate and attract criminal actions. He contended that the payments of employees, contractors/suppliers are effected by cheques and direct Bank transfers, thus the cash withdrawals remain unjustified. As regards the case of Devota Kiwory (supra) cited by Mr. Bernard, Mr. Balomi submitted that the same is unreported but was not supplied to him contrary to the acceptable practice. However, he insisted that the principle stated in that case does not fit in the circumstances of this petition. He reiterated the prayers made in this petition. Having read the pleadings between the lines and analyzed the submissions made by the learned advocates appearing herein, it is my settled legal view that the reliefs sought by the petitioner can be classified into two major 15 groups. First, the petitioner wants to quit from the company on the ground that the 2nd and 3rd respondents are running the company improperly and in contravention of the laws. Thus, he prayed to be adequately paid for his shares on the basis of the company's financial status and be compensated for his capital investment in the company in terms of the goodwill, be paid all arrears of his remunerations as the director of the Company, but since he does not know the Company's financial status he prayed an order for Audit of the current Company's financial status. Secondly, the petitioner wants the name of the company to be changed, so that the company stops using the name "Kiluwa" which he alleges that it is his family name. Let me start with the issues pertaining to the name of the

company and the citation of this petition as indicated in the pleadings which have been raised by Mr. Bernard in his reply to Mr. Balomi's submission. The above mentioned issues are in a form of points of preliminary objection. However, the pleadings in this petition does not reflect the same. The joint reply to the petition filed by Mr. Bernard does not mention any of the above issues. This means that Mr. Bernard decided to raise these points of preliminary objection as an afterthought. This is not correct since submissions are supposed to be based on what is pleaded. A party is bound by his/her pleadings and is not supposed to submit on issues/allegations which are not pleaded. (Yara Tanzania Limited Vs Charles Aloyce Msemwa t/a Msemwa Junior Agrovot and two others, Commercial Case No. 5 of 2013). Thus, I am constrained to ignore them. 16 However, without prejudice to what I have said herein above, I wish to point out here by passing that, as correctly submitted by Mr. Balomi, what happened is that there has been typing errors in respect of the name of the company as well the citation of the application, that is, instead of writing "Kiiuwa Steel Group Company Limited", the petitioner wrote "Kiiuwa Steel Group Companies Limited". This error has not caused any prejudice to the respondents. A typing error in the name of a party to a case like the one in hand cannot vitiate the proceedings. Justice demands this court to order necessary corrections of the name of the parties and proceed with the determination of the matter on merits (see the case of Christina Mrimi Vs Coca Cola Kwanza Bottles Ltd. Civil Application No. 113 of 2011). In addition to the above, the principle of overriding objectives as provided in provisions of sections 3A (1) (2) of the CPC requires this court to strive to achieve substantive justice. I have noted that all annexures in this matter indicate that the 1st respondent's name is "KHuwa Steel Group of Company Limited", therefore, that is the name which is going to be reflected in this ruling. Similarly, the petitioner's submissions were filed in respect of Misc. Commercial Cause No. 30 of 2020 not in respect of commercial Application No. 30/2020. Having said the above, let me proceed to determine the merits of the petition and I wish to start by mentioning hereunder matters which are not in dispute; 17

- i. That the petitioner is a director and founder member of the company. ii. That the company was incorporated in 2014. iii. That no any document has been supplied to this court to show that there has been any annual general meeting held by the company as stipulated in article 40 of the Articles and Memorandum of the company. It has to be noted that, in principle, all issues pertaining to the assets of the company, the company's financial status as reflected in the Company's books of account, appointment of Auditors for the Company's financial status and books of accounts, remunerations of directors, dividends, changes in the Company name if any and the management of the day to day activities of the company are deliberated at the company's general meeting. The company (the 1st respondent) is not an exception to this general rule. Holding of a general meeting is a mandatory requirement of the law, thus, the Company's failure to hold the annual general meeting contravenes the provisions of companies Act, 2002 and the Articles Association of the company, in particular article 40 of the Articles of Association which provides for the procedures for holding a general meeting. This is a serious irregularity on part of the company regarding the manner it is running its

affairs. As I have pointed out earlier, the petitioner wants to quit from the Company and claims for payment of what he believes that he deserves as 18 he quits from the Company. The same have been reproduced at the beginning of this ruling, thus, I do not need to reproduce them here. Upon reading the pleadings between the lines and analyzing the rival arguments made by the learned advocates, let me say outright here that, I am in agreement with Mr. Balomi that the Company's name, that is, "Kiluwa", is the petitioner's family name, since it is not in dispute that the petitioner is the founder member of the Company and the name "Kiluwa" appears in the pleadings as his family/last name. A simple reasoning reveals the truth behind the company's name. It does not need any more evidence apart from what is pleaded in this petition to know that first respondent was named after the petitioner's family name, that is "Kiluwa". The petitioner's decision that his family name should not be used by the company anymore as he has stated in this petition is justified and meritorious. As regards the issue on the shares allotted to the petitioner, looking at the facts of this matter and the documents attached to the pleadings by both sides, I am not convinced with the arguments raised by Mr. Bernard that the petitioner did not pay for the shares allotted to him. I find the same to be unfounded since there are no any documents tendered in court to substantiate it. No documents have been tendered in court to show that either there has been any demand/notice served to the petitioner for the payment of his shares as stipulated in Article 16 of the Company's Articles of Association or the petitioner's shares were forfeited as stipulated in Article 27,28 and 29 of the Company's Articles of Association. Thus, under 19 the circumstances it is the finding of this court that the petitioner is the rightful owner of all the shares allotted unto him and he paid for the same. Interestingly, as argued by Mr. Balomi, the 2nd and 3rd respondents neither attached any document to their answer to the petition to prove that they paid for their shares nor attached any share certificate to that effect. Justice demands equal treatment to all parties. Thus, the 2nd and 3rd respondents are not justified to demand for proof of payment of the petitioner's shares since the criteria for allotment of shares and payment for the same has not been disclosed by either side. At this juncture it is worth pointing out that, all of the petitioner's prayers are hinged on the information on the company's financial status/ affairs, thus, in the absence of any information on the company's financial status/affairs, no appropriate and executable order can be issued in respect of the prayers made by the petition as I will briefly demonstrate soon. For instance, the compensation for the petitioner's investment in the Company in terms of goodwill if any, cannot be assessed without first establishing the financial status of the Company, how successful the Company has been, etc. Likewise, the value of each share of the Company cannot be established without having the financial status of the Company in place. Even the change of the Company name which I have said herein above that it is meritorious, requires to await for the Company's financial status to be established for the smooth conduct of the investigations/audit on the Company's financial status. It is prudent that the original name of the company be left intact until the report on the Company's financial status is produced. 20 From the foregoing, the petitioner's prayer for appointment of an Independent Auditor /Audit Firm so as to establish the Company's financial status, in terms of its assets and cash flow in its business takes precedence over the

rest of the prayers. From the foregoing, this court makes the following findings; That the affairs of the Company (1st respondent) are being conducted in a manner which is unfair, prejudicial to the interests of its members, in particular the petitioner and tainted with irregularities. Pleadings in this petition reveal that the Company has not been holding the general meeting as required by the Companies Act, 2002 and Articles and Association of the company. Looking at the facts pleaded by both sides in this petition, it is evident that only the 2nd and 3rd respondents are involved in the management and decision making in the company's business. I have taken into consideration the petitioner's allegation and the submissions made by Mr. Balomi that it was agreed by the members of the company that the petitioner should take a sick leave. With due respect to Mr. Balomi, I have failed to buy that argument because it has not been substantiated. Likewise, Mr. Bernand's argument that the petitioner withdrew from the management of the Company after causing losses to the company is also not substantiated. What I have gathered here is that there is a serious conflict regarding the management of the Company between the 2nd and 3rd respondents on one hand and the petitioner on the other hand. This explains the reasons behind the petitioner's intention to quit from the Company and dispose of his shares. It is the finding of this court that the petitioner's decision to quit from the company is justifiable and he has a right to do so if he wishes. After all being a shareholder/member in a company is not a must. The same has been done under a free will. Likewise, the petitioner's prayer for change of the Company name from his family name, that is, "KILUWA" to another name is justifiable and is hereby granted. In the upshot, I hereby order that the 2nd and 3rd respondents should convene a general meeting of all members of the company, within fourteen

- (14) days from the date of this order. The agendas of that meeting shall include all matters that are supposed to be dealt with at the general meeting as per the company's Articles of Association, including the agenda for appointment of an Audit Firm for investigation and preparations of a report on the Company's financial status. The appointed Audit Firm should be directed to complete its work within two months from the date of its appointment. Seven days from the date of receipt of the report on the Company's financial status, the 2nd and 3rd respondents shall convene an extraordinary general meeting of all members of the Company to deliberate on the disposal of the petitioner's shares, the process on the implementation of this court order on the change of the Company's name from "Kiluwa" to another name, the issues pertaining to the payment of the petitioner's remunerations and compensation for the investment in the company in terms of the Goodwill and all of the petitioner's concerns on the sale of the company's properties and withdrawals of the company money as alleged in this petition, if at all will still need to be resolved after the presentation of the Company's financial status. Let me make it clear here that in my considered opinion, it is imperative that the Audit Firm has to be appointed by the members of the Company to give flexibility to the Company to appoint a suitable Audit Firm whose costs are affordable since, all costs shall be paid by the company. All parties herein are ordered to provide all information and support required by the Audit Firm to accomplish its task. Further order, pursuant to the provisions of section 233 (3) (c) of the Companies Act,

2002, at the end of the extraordinary general meeting ordered herein, parties herein are granted leave to institute civil proceedings in the name of the Company if need be. I give no order as to costs. Dated at Dar es Salaam this 16th day of October 2020. 23

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