**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**CORAM: MKUYE, J.A. GALEBA, J.A. And RUMANYIKA, J.A.)**

**CIVIL APPEAL NO. 30 OF 2019**

**GEITA GOLD MINING LIMITED ..... APPELLANT**

**VERSUS**

**JUMANNE MTAFUNI..... RESPONDENT**

**(Appeal from Judgment of the High Court of Tanzania at Mwanza)**

**(Gwae, J.)**

**dated the 23rd day of January, 2017**

**in**

**Land Appeal No. 124 of 2015**

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# JUDGMENT OF THE COURT

27th April & 12th May, 2022

## RUMANYIKA, J.A.:

This second appeal has its genesis in a dispute on a parcel of land estimated to be ten acres at Katoma Village, Kalangalala Ward, Geita District Council (henceforth "the suit land"). Jumanne Mtafuni, the respondent sued Geita Gold Mining Ltd, the appellant, in the District Land and Housing Tribunal for Geita at Geita (the DLHT) and won the battle on 03/10/2015. He was declared the lawful "occupier" of the suit land and awarded compensation. As the present appellant was aggrieved, it appealed to challenge that decision to the High Court

(Gwae, J.) unsuccessfully. Still aggrieved, the appellant is before us with two grounds of appeal hereunder reproduced as follows:

*"1. That, the appellate judge erred in law in deciding that the respondent is entitled to compensation with regard to the evidence adduced by the appellant's witnesses during the trial which proved that compensation in respect of the area in dispute had already been paid.*

1. *That, the appellate judge erred in law when he ordered payment of Tshs. 40,000,000/= to the respondent as general compensation or Tshs. 20,000,000/= as general damages without there being proof by the respondent on the claimed compensation".*

The material facts giving rise to this appeal are fairly clear and straight forward. According to the respondent, PW1, the latter purchased the suit land in two phases from Feleji Yakwila. Five acres in 1993 and another five acres in 2000 as shown at page 65 of the record of appeal, also as evidenced by exhibits PE1 and PE2. Then he occupied and utilized it undisturbed until in February, 2014 when, in exercise of its exclusive right for mining activities vide a Special Mining Licence No. 45/99 issued on 27/08/1999 (the SML), the appellant invaded the suit

land, assumed title by acquisition and alleged to have accordingly compensated the respondent and some other outgoing occupiers in neighborhood in the years 2006 and 2009. The respondent denied the appellant's allegations. The appellant, through DW2 at page 83 of the record of appeal, testified that for the respondent, the latter's wife Christina Charles Msuka received the compensation for the suit land indicated in exhibit DE2 but the respondent gave no vacant possession of the suit land. However, in the same breath at page 88 of the record of appeal, DW3 testified that the suit land belonged to the Government therefore no individual was entitled to compensation. Nevertheless as stated earlier on, the DLHT was impressed and decided in favour of the respondent. The appellant was unhappy and appealed to the High Court against the DLHT's decision. After hearing the parties, the High Court reversed the order of compensation to TZS 40,000,000/= as general compensation and TZS 20,000,000/= as general damages in favour of the respondent. That decision is subject of this appeal.

At the hearing, Messrs Silwani Galati Mwantembe and Ephraim Koisenge, learned counsel appeared for the appellant and the respondent respectively.

Elaborating on the appellant's written submission filed on 11/12/2018, in respect of the first ground of appeal Mr. Mwantembe contended that by way of purchase as alleged, the respondent may have good title, but upon the appellant procuring the SML on 27/8/1999, as against the rest of the world, it had exclusive right on the suit land and compensated all the respective outgoing occupiers, the respondent inclusive as shown in exhibit DE2 at page 83 of the record of appeal. Then, he submitted that as far as the area covered by the said SML is concerned, the appellant was home and dry. On a reflection however, Mr. Mwantembe no longer had an issue with the order of general damages of TZS 20,000,000/= with a moderate zeal and vigor, he queried TZS 40,000,000/= which the High Court Judge referred as "general compensation". He further submitted that even when the impugned TZS 40,000,000/= compensation was to read; special damages, still the order falls short of legal basis upon which the sum was arrived at. Since, he said, the amount of money had not been specifically pleaded and strictly proved by the respondent as required by law. To support his contention, Mr. Mwantembe cited the case of **Cooper Motors Corporation (T) Ltd v. Arusha International Conference Centre** [1991] T.L.R. 165. He urged us to allow the ground of appeal and set aside the impugned judgment.

In reply, Mr. Koisenge informed the Court that the respondent had his cross appeal dropped. Then he adopted the respondent's written submission filed on 12/03/2019 and amplified it that though not expressly stated, it is undisputed that the appellant, before acquiring the exclusive right in the SML, the respondent lawfully owned the suit land customarily and was entitled to fair compensation as shown in exhibit D3. Additionally, he submitted that if any money was paid by the appellant to the alleged Christina Charles Msuka, there was no evidence sufficiently led to prove that fact as required by section 110 (1) and (2) of the Tanzania Evidence Act [Cap. 6 R.E. 2002; Now R.E. 2019]. He concluded that there was no evidence either to prove that the payment allegedly made by the appellant to Christina Charles Msuka was sanctioned by the respondent.

As regards the impugned TZS 40,000,000/= general compensation, Mr. Koisenge charged that there is nothing upon which to fault the High Court Judge, because, in monetary terms the loss caused by the appellant's illegal actions to the respondent's unexhaustive improvements was worthy the amount. To support his argument, Mr. Koisenge cited the case of **Asha Mohamed v. Zainab Mohamed** [1983] T.L.R. 59. Moreover, Mr. Koisenge submitted that the appellant

trespassed onto the suit land and destroyed all the existing crops, whose valuation was practically impossible. However, he argued, justice of the case demanded that the High Court Judge award TZS. 40,000,000/=, as this Court held in **Cooper Motors Corporation (T) Ltd** (supra). He argued further that if there was any compensation paid, the same was paid to a stranger, Christina Charles Msuka. Mr. Koisenge submitted further that there was no evidence to show that the respondent was compensated for his land. Rounding up his point, Mr. Koisenge concluded that the material contradiction in the evidence adduced by DW2 and DW3 supported the position that the respondent was not paid anything in compensation. He stated that whereas DW2 stated that the land belongs to the respondent, DW3 stated that it belonged to the government.

It is clear to us at page 65 of the record of appeal that the issues set forth for determination by the DLHT were; (1) whether the applicant (now the respondent) is the lawful owner of the suit land (2) whether the suit land falls within the respondent's SML (3) if the first issue is answered in the affirmative whether the applicant (the present respondent) was compensated.

Central for our determination, the issue is no longer whether or not before the appellant acquired the said SML the suit land belonged to the respondent, but whether as an outgoing occupier the latter was paid compensation by the appellant.

We are settled in our mind that there was no evidence that the appellant paid the respondent any compensation as required by law. In holding so, we have five main reasons: **One,** Christina Charles Msuka who is alleged to have received the respondent's compensation as per exhibit DE2, did not appear at the trial to support the appellant's case. **Two**, even if there were proof that the said Christina Charles Msuka had received the money as alleged at page 83 of the record of appeal, there was no evidence that she received it on behalf of the respondent. **Three,** there was no witness called from Geita District Council, who would testify that he paid any money to the respondent or his agent. **Four**, With regard to the above stated reasons number two and three, the onus of proof lied on the appellant. The latter's unexplained failure to bring in court any such key witnesses entitles us to draw adverse inference, as we hereby do. We held so in the cases of **Boniface Kundakira Tarimo v. Republic**, Criminal Appeal No. 351 of 2008, **Raphael Mhando v. Republic,** Criminal Appeal No. 54 of 2017, **Allan**

**Duller v. Republic,** Criminal Appeal No. 367 of 2019 (all unreported) **and Aziz Abdallah v. Republic** (1991) T.L.R 71. For instance in **Aziz Abdallah** (supra) we stated as under:

> *"...the general and well known rule is that the prosecutor is under a primafacie duty to call* ***those witnesses who from their connection with the transaction in question are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."***

In this case we hasten to subscribe to the above cited rule.

**Five,** exhibit DE2 is doubtful. As regards the alleged payment, it does not attain standard of the required proof. It is a mere list of names with signatures of the alleged payees appended. With respect to Mr. Mwantembe, we are settled in our mind that there was no proof that the respondent was paid any compensation for his land as was alleged for the appellant. In the circumstances, the first ground of appeal is dismissed.

As regards the second ground of appeal, TZS 40,000,000/= termed as "general compensation" awarded by the High Court Judge, with respect, we take it to be a novel relief ever. The guiding principle in

awarding general damages was stated in the old case of **Admiralty Commission v. S. S. Susqehanna** [1950] 1 All ER 392 where it was held as follows:

> *"If the damage be general, then it must be averred that such damage has been suffered,* ***but the quantification of such damage is a jury's question.***
>
> (Emphasis added).

But again, having borrowed a leaf from **Amiralty Commission case** (supra), in **Reliance Insurance Company (T) and two Others v. Festo Mgomapayo,** Civil Appeal No. 23 of 2019 (unreported), we stated as follows:

> *"...The position of the law in regard to an award of general damages is settled. There is a number of authorities stating that the* ***generai damages are normally awarded at the courts' discretion and need not to be specifically proved...".*** (Emphasis added).

For a court to consider and grant a remedy of specific damages, we are guided by the rule, that we stated in unbroken chain of

authorities including the case of **Reliance Insurance Company (T) Ltd** (supra) where we said as follows:

> *The law in **specific damages** is settled, the said damages **must be specifically pleaded and strictly proved, but this is not the case in the current appeal...**The standard required in proving special damages is higher than on balance of probabilities..."*

In this case, Mr. Mwantembe argued it, and, on that one we agree with him that the said amount of TZS. 40,000,000/= of which we take the High Court Judge considered to cater for specific damages was not even pleaded or proved by the respondent. The order was unfounded and we set it aside. TZS 20,000,000/= general damages remains undisturbed because in his submission Mr. Mwantembe dropped it down the road. As observed before, save for the award of TZS. 40,000,000/= set aside, the second ground of appeal is partly allowed and partly dismissed.

Finally, is about the DLHT having declared the respondent "the lawful occupier", instead of declaring him the lawful owner of the suit land as was intended and pleaded by him, which order we take to have escaped the mind of the High Court Judge. Exercising our revisionary

powers conferred upon us under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 R.E. 2019, we hereby revise that order. For avoidance of doubt, the order of general compensation which is, in our considered view quite an unknown remedy in civil litigation, shall now read that, until such time that the respondent will be fairly compensated for his land, the respondent remains the lawful owner of the suit land.

In the upshot, the appeal is dismissed to the extent herein above stated. The respondent shall have the costs.

Order accordingly.

**DATED** at **MWANZA** this 12th day of May, 2022.

R. K. MKUYE
**JUSTICE OF APPEAL**

Z. N. GALEBA
**JUSTICE OF APPEAL**

S. M. RUMANYIKA
**JUSTICE OF APPEAL**

The Judgment delivered this 12th day of May, 2022 in the presence of Dr. George Mwaisondola, learned counsel for the Appellant and Ms. Mary Merchory holding brief for Mr. Ephraim A. Koisenge, learned counsel for the Respondent, is hereby certified as a true copy of the original.

A. L. KALEGEYA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**