IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And GALEBA, J.A.)

CIVIL APPEALS NO. 238 AND 239 OF 2018

MAGAMBAZI MINES COMPANY LTD ..... 1ST APPELLANT

JUMA SITTA BUNDARA ..... 2ND APPELLANT

IVULI W. JEREMIA ..... 3RD APPELLANT

MARWA W. IKWARE ..... 4TH APPELLANT

HAMIS MSANGI ..... 5TH APPELLANT

VERSUS

KIDEE MINING (T) LIMITED ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Arusha)

(Mwaimu, J.)

dated the 24th day of February, 2015

in

Civil Case No. 14 of 2011

.....

JUDGMENT OF THE COURT

28th November & 7th December 2022

GALEBA, J.A.:

These appeals arise from Civil Case No. 14 of 2011 which was heard and concluded at the High Court in Arusha. The civil action was based on a contract dated 19th December 2006 (the Mining Contract) and its subject matter was four Primary Mining Licences No. 0007811, 0007812, 0007813 and 0007814, all for prospecting and mining Gold (the PMLs), at Magambazi area in Handeni District within Tanga Region.

Parties to it were the second to the fifth appellants on one hand, and the respondent, on the other. Under clause 3 of the Mining Contract, it is indicated that all the PMLs are legally owned by the second, third, fourth and the fifth appellants. The material terms of the Mining Contract and relevant to this judgment are particularly clauses 3 and 4. Under clause 4 (a) of the Mining Contract, the contribution of the respondent was to provide an equipment called Monorope Winch for lifting crushed rock from the mining pits to the outside. Both parties to the contract would also contribute financial resources to cater for mining operations in terms of clause 4 (c). Most importantly, once the respondent would have fulfilled her part of the bargain, in terms of clause 4 (b) of the said contract, she would be entitled to enjoy the status as an equal shareholder with the existing PML owners. Those were the major terms of the agreement, that we deemed to be material to this judgment.

The cause of action, according to clause 7 of the plaint, was breach of the said contract and because of that, in terms of the relief's clause of the same plaint, the respondent prayed for the following remedies; **one**, payment of special damages of TZS. 360,000,000.00; **two**, payment of general damages for breach of contract; **three**, or

alternatively, an order for specific performance. **Four**, the respondent also prayed for a declaration that formation of the first appellant was hatched out of a fraudulent scheme to defraud her of her covenanted rights in the contract; **five**, interests; **six**, costs and; **seven** any other reliefs that the court could deem just to grant.

At this juncture, and before getting any further, we think it is significant to point out two things; **one**, although the contract was entered between the second to the fifth appellants, the owners of the PMLs were thirty-four individuals whose names appear on the licenses. **Two**, Juma Sitta Bundara and Hamis Msangi, the second and fifth appellants, respectively were not part of the thirty-four co-owners to whom the PMLs were granted by the Commissioner for Minerals, although they participated in entering into the Mining Contract with the respondent. For now, we will pause for the moment on these two points, with a promise that, we will be referring to them throughout this judgment.

At the High Court, the appellants denied allegations of breach of contract, but after a full trial of the case, two decision-points were made. The first related to the validity of the Mining Contract and another, in respect of its breach. By a judgment dated 24th February

2015 at pages 460 to 461 of the record of appeal, the High Court made a finding of fact that the Mining Contract was valid and the same was enforceable under the law. The reasons offered for that finding by the trial court were; **first,** that the appellants did not dispute entering into the contract, and; **second,** that the appellants did not tender any evidence to show that the contract was invalid or unenforceable. As for the breach, at pages 462 to 463 of the record of appeal, the court held that indeed the appellants breached the contract. The reasons advanced were that, in May 2008, PW1 saw a convoy of CANACO motor vehicles moving into the mine site but the third appellant informed him that CANACO Resources Mining were just carrying on research. Later on however, the respondent realized that the licences had been transferred to the first appellant and later on to CANACO. The trial court ruled out that, on account of those facts, the second to the fifth appellants breached the Mining Contract.

Flowing from the above breach, in terms of the decree at page 486 of the record of appeal, the respondent was awarded TZS. 360,000,000.00 and TZS. 800,000,000.00 as special and general damages, respectively. In addition, the appellants were ordered to pay the respondent interest at a rate of 12% per annum from the date of

judgment to the date when they would settle the judgment debt in full, with costs.

The above decree of the High Court did not, at all, please the appellants. Whereas the first appellant lodged Civil Appeal No. 238 of 2018, the second to fifth appellants filed Civil Appeal No. 239 of 2018 at this Court's sub-registry in Arusha. These appeals were later consolidated into the present Civil Appeals No. 238 and 239 of 2018, where nine grounds of appeal were formulated for consideration of the Court. Nonetheless, for reasons that will become obvious in due course, we will not discuss those grounds or determine them in this judgment.

At the hearing of this appeal, Messrs. Boniface Joseph and Ipanga Kimaay, learned advocates, teamed up for the first appellant, whereas the other four appellants had the services of Mr. Moses Mahuna, also learned advocate. Mr. Mpaya Kamara and Ms. Neema Mtayangulwa, both learned advocates, together represented the respondent.

As when preparing for hearing we had noted that the PMLs' beneficiaries were thirty-four but that the Mining Contract had only four signatories, two of whom being not even part of thirty-four grantees of the PMLs, we took it up with parties' advocates to address us on that aspect. Specifically, we required learned counsel to submit on two

points; **one**, whether in the circumstances, the contract underlying the law suit at the High Court was valid and; **two** whether it was the High Court or the Commissioner for Minerals who had jurisdiction to entertain the complaints of the respondent in respect of the alleged breach of the Mining Contract. Responding to parties' advocates request, we adjourned the matter for several hours to afford them adequate time to prepare. Upon reconvening the session, learned counsel argued in support and against both points we had earlier raised. We will start by capturing counsels' submissions in respect of the validity of the Mining Contract, and dispose of that point first.

In that respect, Mr. Joseph informed us that since his position and arguments were the same as those of the second to fifth appellants, then he adopted the position as it would be presented by Mr. Mahuna for the four appellants. It was therefore, Mr. Mahuna's turn. According to him, the Mining Contract was obviously void because, **first**, the second and the fifth appellants had no mandate to sign anything in relation to the PMLs since they were not co-owners of the said PMLs. **Second,** he argued that, the beneficiaries of the PMLs being thirty-four, the Mining Contract which was executed by only four individuals without any clear consent or authorization of the remaining owners, was without

doubt, invalid. He concluded therefore, that the Mining Contract was illegal such that, no suit could have proceeded from its alleged breach, because legally, such a contract was incapable of being breached. He implored us to hold that the respondent did not, and could not have a cause of action in Civil Case No. 14 of 2011 for the contract underlying it, was a sheer nullity.

In reply, Mr. Kamara was emphatic in opposing the position taken by counsel for the appellants. In respect of the fact that the second and the fifth appellants had no interest in the PMLs, his argument was that, their signing the Mining Contract was because they came with the third and the fourth appellants who introduced them to the respondent's principal officer as co-owners of the PMLs, so their signing of the contract did not, at all, vitiate it. He submitted that it would be different if, the two strangers to the PMLs were the sole parties to the contract, but otherwise, he argued, all was well and the contract was valid.

As for the other argument, on how could have the two owners Ivuli Jeremia and Marwa Ikware, the third and the fourth appellants respectively, bound the other thirty-two, Mr. Kamara submitted that the thirty-two who did not sign the contract consented to entering into it by the two appellants, on their behalf. He submitted that the co-owners of

the PMLs who did not sign the contract consented to the transaction by implication or as he styled it, they gave their deemed consent, by benefiting from the joint venture and by their names being included in the quarterly reports that were being made to the Zonal Mines Office in Handeni. Thus, according to him, there was nothing alarming with the Mining Contract as it is, because the same was a valid contract under the law.

We are thankful to learned counsel for all parties for the submissions made because they bear sufficient material for purposes of resolving the points raised.

We have carefully and thoroughly scrutinized the documents forming the basis of this judgment, namely the PMLs and the Mining Contract. Those two documents were attached to the pleadings. We have already highlighted the relevant points in respect of the Mining Contract in the introductory background above, but not so much with the PMLs. It is therefore, in our view, appropriate at this juncture, to capture the content of the PMLs, which is as follows:

> *"The exclusive right, subject to the provisions of the Mining Act, 1998 and the regulations thereunder now in force or which may come into force during the continuance of this primary mining licence for a period*

of five (5) years from the date of grant or any renewal thereof, is hereby granted to ***Fredy Nkwabi Gule*** *of P. o. Box 110 Handeni in partnership with* ***Boaz B. Mwangoka; Ivuii S. Jeremia; Marwa W. Ikware; Mwamvua Ali; Kulwa S. Majiyabululu; Bakari Ngade; Amini Rajabu; Hatibu Amiri; Mwinjuma Msekeni; Hossein Mbwana; Athuman Mbwana; Ibrahim Luwi; Simon N. Masika; Juma Mbasa; Muhina Kaoneka; Sophia Ambari; Fabia John; Mbezi Hatibu; Saidi Rajabu; Dominick Prased; Omari S. Nyangasa, Alfani Mbelwa; Mussa Hatibu; Jafari Mbwana; Mahiza Aliy; Ramia Juma; Hamis Nguzo; Mussa Mbelwa; Hassan Rajabu; Edga Chapa; Beda Liwenga; Faraji Mwichande and Emma Mange*** *to prospect for and mine* ***Gold*** *within the area described overleaf.*

Granted this 8th day of June 2005.

Sgd

Commissioner for Minerals."

The names in the bold text are of the thirty-four co-owners in the four PMLs. The four licenses are also identical in every other aspect except for the licence numbers and the area to which each licence relates, which are different. With the above content of each of the PMLs, we think we can now proceed to the issues for determination because our only interest are the names on the PMLs.

In the course of resolving the points we raised, we will address two issues; the first is whether the second and the fifth appellants not being part of the thirty-four owners of the PML, had mandate to enter into the Mining Contract with the respondent, and the effect thereof. The second will be whether, Ivuli W. Jeremia and Marwa W. Ikware who were co-owners to the PMLs, could legally enter into an agreement to bind thirty-two other owners of the PMLs.

We will dispose of the first issue mainly based on the competence to enter into a binding contract as provided under section 10 of the Law of Contract Act [Cap. 345 R.E. 2019] (the LCA) which provides that:

> *"All agreements are contracts if they are made by the free consent of* ***parties competent to contract****, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void: Provided ... (N/A)."*
> [Emphasis added]

It is basic that because the second and the fifth appellants, not being co-owners with interest or stake in any of the PMLs, none of them, either by himself or jointly with some other co-owners, had powers to sign any document disposing or binding the licences in any way with the respondent. The basis for this finding is, the *nemo dat quod non habet*

rule, that one cannot give that which he does not have, as was observed in **Mathias Erasto Manga v. Simon Group (T) Ltd** [2014] T.L.R. 518 and **Abdulatif Mohamed Hamis v. Mehboob Yusuf Othman & Another**, Civil Revision No. 6 of 2017 (unreported). In this case the two appellants, the second and the fifth, were complete strangers to the PMLs, the object or the subject matter of the Mining Contract, such that in law they lacked competence, envisaged under section 10 of the LCA, to execute any agreement, leave alone, a binding Mining Contract. The two had nothing to suffer or give as consideration, and under our laws unless a contract meets the criteria detailed at section 25 (1) of the LCA, the same is void.

In our considered view, the argument by Mr. Kamara that the said two strangers to the Mining Contract came with two of the thirty-four authentic owners and presented themselves as co-owners to the licenses, would not, with respect, in itself vest or confer competence to the said strangers to conclude a binding Mining Contract with the respondent.

To bless the act of the second and fifth appellants of concluding a contract binding the property which is not theirs, as a lawful transaction, would be a dangerous precedent from this Court sanctioning as lawful,

the otherwise illegal acts of unscrupulous people who could singlehandedly assume powers of disposing or dealing in properties or assets that do not belong to them. Under Article 24 (1) of the Constitution of the United Republic of Tanzania, 1977 [Cap 2 R.E. 2002], every person is entitled to own property, and has a right to the protection, from the courts, of such property if legally owned. That is the virtue, that is, protection of common peoples' property, which this Court, would be eroding if we were to agree that, it is perfectly lawful for strangers to the PMLs, to sign the Mining Contract potentially ceding a proportion of the value in those assets to the respondent. Certainly, that, under any circumstances, we cannot do.

At this point, we will pause our discussion in respect of the issue of involving third parties in the Mining Contract, who were not PML co-owners. We will however, revert to it with a deserving conclusion, of course, consistent to the above deliberations.

As for the second issue, Mr. Kamara equally eloquent maintained his position that the Mining Contract was valid and enforceable against the appellants. This time round, his contention was that, the third and fourth appellants entered into the contract with implied or deemed consent of the thirty-two other PML holders. We captured two major

reasons backing his position; **one**, at clause three of the Mining Contract, the four appellants presented themselves as owners of the mines. **Two,** all the thirty-four PML holders were beneficiaries of the Mining Contract, because, the respondent was sharing proceeds of the mining business with them during the currency of the Mining Contract.

Before delving at some depth into the above points, it is, we think, useful to just hint at this juncture, that although the PMLs, were granted to the thirty-four individuals as partners of each other, it is our considered position that the term "partnership" in the PMLs, is loosely used and not strictly the same "partnership" with the same import and meaning attached to that word by the LCA. That is so because, under section 191 (1) of the LCA, it is provided that the relationship of partnership arises from contract and not from status. In this case, it is beyond clarity that the thirty-four holders of the PMLs, did not come together by contract or agreement, rather, they are joined together by their status as to ownership of the PMLs. Further, under section 191 (2) (a) of the LCA, the joint property or common property does not of itself create a partnership whether the owners are sharing profits or not. Thus, the thirty-four individuals were owners of the PMLs, not as partners as known under the LCA.

With that clarification, we will then move to the law relating to transfers and assignments of Mineral Rights as it stood at the time the Mining Contract was concluded on 19th December 2006. At that time, the relevant law applicable, was the Mining Act No. 15 of 1998 (the 1998 Act). Section 9 (1) of that Act provided as follows:

> *"9-(1) The holder of a Mineral Right, or where the holder is more than one person,* ***every person who constitutes the holder of that Mineral Right, shall,*** *subject to subsection (2),* ***be entitled to assign the Mineral Right or,*** *as the case may be, an undivided proportionate part thereof to another person."*
>
> [Emphasis added]

This section had side notes "Mineral Rights transferable," and the section dealt with both transfers and assignments. This section has been maintained throughout, as section 9 (1) with the same side notes in not only the Mining Act, No. 14 of 2010, which repealed the 1998 Act, but also the identical content has been maintained by the Mining Act, [Cap 123 R.E. 2019], the present legislation that repealed the 2010 Mining Act.

The reason we have made reference to section 9 (1) of the 1998 Act, is because of what would be the effect of clause 4 (b) of the Mining

Contract at page 367 lines 1 to 3. That clause of the contract expressed a clear potential acquisition by the respondent of part of the thirty-four owners' stake in all the four PMLs. That clause states:

> *"Baada ya kufanya hivyo Kampuni ya Kidee Mining (T) Ltd itakuwa imejumuishwa kwenye hisa zote zinazohusika yaani hisa zinazolingana."*

The substance of the above clause in the Mining Contract is to the effect that, upon the respondent performing her obligations fully, she would acquire a stake in the ownership of the PMLs in equal measure as the thirty-four PML owners. Thus, in terms of section 9 (1) of the 1998 Mining Act, in the absence of clear consent or mandate, to do so, the second to the fifth appellants had no mandate to execute the Mining Contract.

Mr. Kamara submitted that the second to the fifth appellants indicated in the agreement that they were owners of the PMLs. We agree with him, but the point is defeasible by the fact that the licences had thirty-four names of co-owners, not two or four. Therefore, no valid contract in the circumstances would have been entered by people other than those named in the licences.

Having found that the Mining Contract was invalid on account of being entered into by the four respondents without being mandated by the other thirty-two grantees of the PMLs, we do not find any necessity to consider the second point, which was, seemingly argued in the alternative to the first, that as all the thirty-four individuals were beneficiaries of the Mining Contract, so they retrospectively consented to its signing.

Thus, we wish to make two conclusions. One, it is our firm holding that, the second and fifth appellants being strangers to the PMLs, and having no interest in those Mineral Rights, their involvement in executing the Mining Contract, vitiated it to the core, for they were entering into a contract for which they had no consideration to suffer.

In respect of the second issue, we wish to state in no uncertain terms that, as the Mining Contract had a potentiality of ceding a stake in the PMLs to the respondent, section 9 (1) of the 1998 Act required all of the owners to sign the Mining Contract, short of which the Mining Contract was void *ab initio*.

Because of the above finding, we do not think it is of any use to discuss the issue whether the jurisdiction to handle the dispute was with the Commissioner for Minerals or with the High Court, because doing so

would presuppose that there was a potentiality of a valid claim arising from the Mining Contract, which we have already held to have been void from inception. In that case, a discussion on jurisdiction becomes superfluous with no practical meaning.

The final question whose answer we will give in two shakes of the lamb's tail, is what should be the final orders, now that it has turned out that the Mining Contract which formed the basis of the case at the High Court was all along void from the word go. The position of the law is that, a void contract is unenforceable and it cannot create any right enforceable by way of a legal action in a court of law. It therefore naturally follows, that there was no basis for institution of Civil Case No. 14 of 2011; to put it legally, the plaintiff never had a cause of action against the defendants in the case at the High Court. As per this Court's decision in **John Byombalirwa v. Agency Maritime Internationale (Tanzania) Ltd** [1983] T.L.R. 1, the plaint initiating Civil Case No. 14 of 2011 ought to have been rejected under Order VII rule 11 (a) of the Civil Procedure Code [Cap 33 R.E. 2002, now R.E. 2019].

In the circumstances, under the provisions of section 4 (2) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019], it is hereby ordered that, all the proceedings from institution of Civil Case No. 14 of 2011 that was

concluded at the High Court in Arusha, are hereby nullified and the resultant judgement and decree are both quashed and set aside. Further, because no appeal can legally stem and proceed from a nullity, these appeals are in the same vein, incompetent. The same are therefore struck out. In fine, it is hereby declared that the parties are restored to the same position as they were immediately before signing the Mining Contract.

Finally, since the issues that have led to the above orders were raised by the Court, we make no orders as to costs.

Order accordingly.

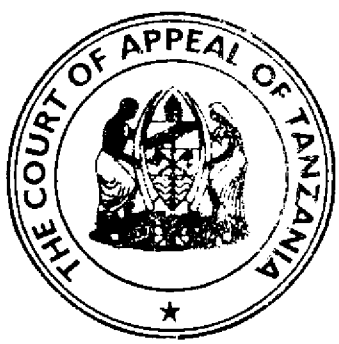
DATED at **ARUSHA**, this 6th day of December, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this day 7th of December, 2022 in the presence of Mr. Moses Mahuna, counsel for 2nd – 5th appellants and holding brief for Mr. Boniface Joseph for 1st appellant and Mr. Henry Simon, counsel for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL