

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KWARIKO, J.A., LEVIRA, J.A., And NGWEMBE, J.A.)

CIVIL APPLICATION NO. 636/8 OF 2022

**MR. JOSEPHAT MUNIKO MWITA (Applying under the
constituted Special Power of Attorney conferred to
him by MR. MWITA MAKINDYA and
MRS. MWITA ANTHONY WAMBURA) APPLICANT**

VERSUS

NORTH MARA GOLD MINE LIMITED RESPONDENT

**(Application from the decision of High Court of Tanzania, Commercial
Division
at Mwanza)**

(Fikirini, J)

dated the 6th day of October, 2020

in

Commercial Case No. 09 of 2019

RULING OF THE COURT

20th February & 1st March, 2024

NGWEMBE, J.A.:

This application has been preferred by Mr. Josephat Muniko Mwita (Applicant) seeking leave of this Court to file additional evidence in respect of Civil Appeal No. 109 of 2021, currently awaiting for the Court's determination.

It is discerned from the record of this application that, Mr. Mwita Makindya and Mrs. Mwita Anthony Wambura owned a registered mining land best known as Claim No. 41493 at Nyamongo in Tarime district, in the cause, an agreement was executed between them and Africa Mashariki Gold Mines Limited, the predecessor of the respondent North Mara Gold Mines Limited on 5th day of June, 1999. In the agreement, Mwita Makindya and Mrs. Mwita Anthony Wambura were referred to as Claim Owners or Donors. However, they assigned Mr. Josephat Muniko Mwita under Special Power of Attorney to perform everything on their behalf.

In the cause and after lapse of many years, the applicant felt that, the terms of the agreement were breached by the respondent, thus, on 7th September, 2019, Mr. Josephat Muniko Mwita (the applicant) instituted a Commercial Case No. 9 of 2019 at the High Court of Tanzania, Commercial Division sitting at Mwanza against the respondent. The applicant was not only complaining about a breach of contract, but also for payment of special and general damages arising from such breach. Issues were framed including payment of 1% royalty which is among the terms of their agreement and whether the applicant was entitled to special damages. However, the evidence did not prove special damages because the

applicant had no sufficient information to prove it. Therefore, during trial, the applicant intended to move the court to visit *locus in quo* so as to prove the respondent had already started production on the Claim area, but his prayer was refused. Also, he intended to tender the report from Tanzania Extractive Industries Transparency Initiatives (TEITI) to prove his special claims, but later he withdrew his prayer.

When the trial court deliberated on that case, the learned Judge observed that the contract was imbalanced, there was no flow of information from the respondent to the applicant and vice versus and the respondent breached their agreement. Hence proceeded to award the applicant general damages and was unable to award special damages because of lack of information to peg the claimed 1% accrued royalty revenues. The applicant was partly dissatisfied with the outcome of his case; thus, preferred an appeal registered as Civil Appeal No. 109 of 2021, which is awaiting for adjudication by the Court.

While the appeal is yet to be adjudicated, the applicant became aware that there was a report in another similar commercial case, which was tendered by the respondent which reveals mining production activities in the area including that of the applicant. The applicant thought the report

is relevant evidence to the pending appeal. Hence, on 11th July, 2022 he lodged this application under certificate of extreme urgency, by way of a notice of motion made under Rules 2; 4 (2) (b); 36 (1) (b); and 48 (1) of the Tanzania Court of Appeal Rules (the Rules) read together with section 3A (1) and 3B (1) (a) and (c) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 praying for leave of the Court to tender additional evidence at the hearing of the appeal.

In the notice of motion, the applicant presented ten grounds as basis of his application. For convenient purpose, those grounds may be summarized into four complaints as follows:

- 1. The additional evidence which the applicant seeks to supply to the Court is gold production data for the year 2013 to 2021 that were tendered by the respondent to the Commercial case No 3 of 2020 under the order of the trial Judge in that case;*
- 2. That the respondent concealed that crucial information to the donors which they could obtain the requisite 1% of royalty they are entitled to, from the applicant's Claim title No. 41493 at Nyabirama pit in Nyamongo Tarime district;*
- 3. The additional evidence when filed in this Court for use in the pending appeal will enable the Court to offer a commensurate order of special damages which could not be made by the High*

Court because such information was not made available by the respondent to the applicant; and

- 4. The referred evidence is crucial for conclusive determination of the pending appeal in this Court. Thus, the applicant seeks leave of the Court to tender the said additional evidence.*

The supporting affidavits sworn by Heri Louis Kayinga and Josephat Muniko Mwita make averment in support to the application. In brief, the applicant avers that on 5th June 1999, the donors of the power of attorney who were the owners of Claim Title No. 41493, entered into an agreement with the respondent for consideration of the royalty revenue of 1% from gold produced on quarterly basis. That the respondent breached that agreement which brought a commercial case referred above. Upon adjudication, the applicant, though partly succeeded, yet he lodged an appeal to the Court for the dismissed part related to special damages. During the pendency of the appeal in this Court, the applicant noticed that, there are new evidence related to making of gold produced in the area including the Claim Title subject of the said agreement. Such evidence was not in the domain of the applicant all along the trial of the Commercial Case No. 9 of 2019.

Further avers that, he noticed the existence of a court order compelling the respondent to produce such report in the Commercial Case No. 3 of 2020. Following that court order, the respondent complied with and issued the said report in court. Since the applicant has it, is now seeking leave of this Court under Rule 36 of the Rules, to allow him to file in Court as additional evidence which will be used during adjudication of his appeal pending in this Court.

However, the respondent resisted the application by filing two affidavits in reply, one being sworn by Mr. Faustin Anton Malongo and another by Joseph Calist. Whereas, the respondent admits to the existence of the agreement with the donors and that they agreed, upon commencement of underground mining operations in the applicant's Claim Title, he will be entitled to 1% royalty. Averred further that, the agreed underground mining operation is yet to be operational, thus the rights of the applicant to 1% royalty will only be realizable after commencement of underground mining. Distinguished the report tendered in Commercial Case No. 3 of 2020 as was covering the whole area of Nyabirama mining operations, which he said, the same is not useful to the appeal pending in this Court because it is a general report.

Despite the detailed affidavits and opposing averments, also both parties have filed detailed written submissions with useful authorities in the subject matter.

Now, when the application was placed before us for hearing on 20th February, 2024, both parties procured legal services of learned advocates. While the applicant was represented by Dr. Rugemeleza Nshala, Messrs. Nyaronyo Mwita Kichere and Heri Louis Kayinga, all learned advocates, the respondent was represented by Mr. Faustin Malongo, also learned advocate. In arguing the application, Dr. Nshala started by adopting the two affidavits in support of the application, together with their written submissions to form part of his arguments.

He argued forcefully, that the agreement signed by the disputants was one sided, while the Claim Owners did not know anything, the respondent knew everything because the language used in the agreement was English with legal terms. Insisted that, as was so observed by the trial Judge in her judgment which is subject of the appeal, the agreement was imbalanced. Proceeded to submit that, similar commercial case was heard by the same court but before another Judge who ordered the respondent to tender in court the report on production of gold in the disputed area,

which order was complied with by the respondent. He also submitted that the applicant believes all necessary documents are with the respondent, but concealed them from the applicant. Supported his argument by referring the Court to the cases of **Phoenix of Tanzania Assurance Company Ltd and Another vs. Panache Ltd**, Civil Appeal No. 111 of 2020 and **Filemon Vanai Saiteru Mollel vs. Wilian Titus Mollel and Another**, Civil application No. 372 of 2022. Insisted that, all along the donors were not aware of what was done in the claim area except the respondent. Proceeded to argue that, the applicant was denied to know that the respondent was mining both surface and underground. Substantiated his argument with the case of **Trade Union Congress of Tanzania (TUCTA) vs. Engineering Systems Consultants Ltd and 2 Others**, Civil Appeal No. 51 of 2016 (unreported).

Lastly, Dr. Nshala submitted that, the intended additional evidence will assist the Court to decide conclusively on the grounds appealed against. Supported his argument with the case of **Mohamed Enterprises Tanzania Ltd vs. Mussa Shabani Chekechea**, Civil Appeal No. 51 of 2018 (unreported). Referred also to the judgment of the trial court that the

learned trial Judge lamented on lack of information which would help the court to decide the matter conclusively.

In reply thereto, Mr. Malongo learned counsel, commenced by adopting the two affidavits in reply and his written submissions to be part of his arguments. Proceeded to oppose the application by referring this Court to paragraph 2.2 of the agreement, which place the respondent to pay 1% of royalty when she begins the underground mining operation, which operations has not yet commenced.

The learned counsel insisted that, during trial the applicant failed to prove the claim on surface mining as well as underground mining. Thus, the applicant has failed to satisfy the conditions set forth to allow him to tender additional evidence. Moreover, Mr. Malongo challenged the applicant's grounds in the notice of motion that at paragraph 5 prays for specific damages contrary to the gist of the application. Proceeded to argue that, the applicant intends to produce new evidence which was not adduced at the trial. Supported his argument by referring this Court to the case of **Idrisa R. Hayeshi vs. Emmanuel Elinami Makundi**, Civil Application N. 113/08 of 2020 (unreported).

Mr. Malongo discredited the intended additional evidence as irrelevant to the appeal pending in this Court, because the report which was produced in Commercial Case No. 3 of 2020 was related to the whole area of Nyabirama, while the contract with the applicant was of specific area with specific mode of mining underground as opposed to open pit.

He contradicted further that, the judgment in Commercial Case No. 3 of 2020 is already appealed against in Civil Appeal No. 478 of 2022. Therefore, the said report is among the documents subject of the pending appeal. Thus, he rested by a prayer that this application is not merited and thus same be dismissed.

In brief rejoinder, Dr. Nshala again came up forcefully that, the applicant is not allowed to visit the mining area and has no means to know any activities carried thereon, save he depends on the report from the respondent whose report is concealed. He contended that, the applicant does not intend to punch up evidence, but he is only claiming for information from the respondent. On the basis of his submission, Dr. Nshala implored us to grant the prayer he made in the submission in chief.

We have dispassionately considered the rival arguments from the learned counsel, their written submissions and the contents of their

affidavits. We have also revisited the contents of Rule 36 of the Rules together with several decisions of similar nature. We are settled in our minds that, for the interest of justice, this application will be appropriate to be made orally to the Court seized with the record of appeal. We are therefore, firmly determined to advise as we hereby do, that the applicant may make an oral application before the Court in the cause of hearing of the appeal to furnish the Court with the intended additional evidence. In the circumstances of this matter, we make no order as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 29th day of February, 2024


M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

Ruling delivered this 1st day of March, 2024 in the presence of Ms. Caroline Kivuyo, learned counsel for the Respondent and also holding brief for Mr. Heri Kayinga, learned counsel for the Applicant, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL