IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: MWARIJA, J.A., MWAMPASHI, J.A. And MURUKE, J.A.)

CIVIL APPEAL NO. 99 OF 2019

GENERAL MANAGER AFRICAN BARRICK GOLD MINE LTD .....APPELLANT

VERSUS

CHACHA KIGUHA.....1ST RESPONDENT
NEEMA CHACHA.....2ND RESPONDENT
BHOKE CHACHA (a minor by his next friend Chacha Kighua) .....3RD RESPONDENT
KIGUHA CHACHA (a minor by his next friend Chacha Kiguha).....4TH RESPONDENT
MOTONGORI CHACHA (a minor by his next friend Neema Chacha.....5TH RESPONDENT
SURATI CHACHA (a minor by his next friend Neema Chacha.....6TH RESPONDENT

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

(Mlacha, J.)

Dated the 3rd day of August, 2016

in

Civil Case No. 09 of 2013

.....

JUDGMENT OF THE COURT

10th & 14th June, 2024

MWARIJA, J.A.:

This appeal is against the decision of the High Court of Tanzania at Mwanza (Mlacha, J. as he then was) in Civil Case No. 9 of 2013 handed down on 03/08/2016. In that case, the respondents, Chacha Kiguha and his wife, Neema Chacha (the 1st and 2nd respondents respectively) and their children, who were minors, Bhoke Chacha, Kiguha Chacha, Montogori Chacha and

Surati Chacha (the 3rd to 6th respondents respectively) sued the appellant, General Manager, African Barrick Gold Mine Ltd, claiming for payment of general damages of TZS. 600,000,000.00. The 3rd and 4th respondents were suing through a next friend, the 1st respondent, who is their father, while the 5th and 6th respondents were also suing through a next friend, the 2nd respondent who is their mother.

The respondents' claim was based on the tort of negligence; that acting in breach of the duty of care, the appellant, a limited liability company which was holding a Special Mining Licence (SML) over five villages in Tarime District including the respondents' village of Nyamwaga, caused them to contract diseases resulting from mining activities conducted at a close proximity from their house situated on a piece of land owned by the 1st respondent (the affected land). They claimed that they could not vacate the land because of the appellant's failure to pay fair compensation for the affected land.

In paragraph 22 of the amended plaint, the respondents state as follows:

> *"22. That, the act of the defendant has caused injury to the plaintiffs in the following [manner]:*
>
> *(a) The plaintiffs [have], for number of years been making follow up of their compensation to*

the defendant's officer [but] ended in vain and causing serious mental distress and agony.

(b) By living [under] a miserable condition of mining fumes and police bombs, the appellants had no happiness in life.

(c) Fumes produced excess carbon dioxide in ...air resulting into cardio respiratory infection.

(d) Loss of earning as the 1st and 2nd plaintiffs cannot do any economic activities for being sick and [as a result of their being] surrounded by the mining area.

(e) Excessive amount of dust from mining activities which got [clogged] in the lungs resulting into silicosis, a disease that has no known cure".

The appellant disputed the respondents' claim that it failed to observe a duty of care thereby causing the respondents to contract various ailments or mental sickness as alleged by them. It contended that, it did not fail to compensate the respondents, rather they refused to receive the amount of TZS. 1,762,682.00 which was a fair and adequate compensation because it was arrived at, after valuation of the land on the permission of the 1st respondent.

During the trial, whereas the respondents called four witnesses to testify including the 1st and 2nd respondents, the appellant relied on the evidence of two witnesses. Testifying as PW1, the 1st respondent stated that, on 18/10/2020, he received the officials of the appellant who visited his land with a view of carrying out valuation thereon. At that time, he had not erected any building on it. After the valuation, he was given some papers on which there was his name. He produced in court, copies of papers bearing numbers: 000106 and 0001017. The same were admitted in evidence as exhibit P1(a) and (b) respectively. He stated further that, the purpose of the valuation was to compensate him for the affected land. In May, 2011, he was called and offered a cheque worth TZS. 1,700,000.00. He declined to accept it because he did not believe that he could use that amount to secure another land.

As that amount frustrated him, he sought the assistance of the Kitongoji and Village Chairmen who promised to convey his dissatisfaction with the amount of compensation to the appellant with a view to being increased. PW1 testified further that, the Village Chairman wrote a letter to the appellant but despite several follow-ups, the efforts proved futile. As a result, he said, he decided to constructed a house and moved to stay on the affected land.

While in occupation of his piece of land, PW1 went on to state, the appellant proceeded with mining operations. In a particular incident, he said, explosive blasting giving a noise of fired bomb was carried out at a very close distance from his house, situated about 100 meters from the mine.

He went on to state that, the blasting which were being done without warning, were carried out from time to time and as a result of the noise and dust, himself and the other respondents started to fall sick and had to attend at hospital for treatment. He tendered his medical chits as well as those of the 3rd to 6th respondents. The same were admitted as exhibits P4 (a), P4 (b), P4 (c), P4 (d) and P4 (e) respectively.

The 2nd respondent, Neema Chacha Kiguha who testified as PW3, told the trial court that, after having moved into the affected land, in 2011, she started getting sick from time to time. She testified that; her sickness was a result of the explosive blastings which were being carried out in the mining area. According to her, in 2013, she had miscarriage because of the blasts which were carried out without warnings. Like PW1, she also testified that, she suffered from ear and chest problems as a result of the mining operations in the area. She tendered her medical chit and the same was admitted in evidence as exhibit P5.

The evidence of PW1 and PW2 was supported by Dr. Nega Marco Nyakeboko (PW3) who was at the material time the District Medical Officer, Tarime. He testified that, between 2012 and 2013 he attended the respondents several times at the to hospital. He testified that, the 1st respondent's complaint was chest and ear problems as well as flu. When PW1's specimen was examined, the result was that, he did not have TB (Tuberculosis). PW3 went on to state that, he also attended the other respondents and their complaints were that; as for the 3rd respondent, he had cough which had lasted for more than one week and had also breathing problems. Upon further examination, he said the 3rd respondent was also found to have no TB. The witness added that, the 3rd respondent had also skin rushes which spread rapidly on his body. On the part of the 2nd respondent, the witness testified that, her complaint was similarly a breathing problem and like the other respondents, was treated but later returned to hospital for the same problem. With respect to the 5th and 6th respondents, PW3's testimony was that, whereas the former had chest problem and was treated with asthma medication, the latter had fever, flu and chest problem.

Testifying further, PW3 told the trial court that, he tried to establish the cause of the respondents' illnesses. He thus called them and after hearing their story; that they were living within the mining compound, he

advised them to move from there. He also wrote a letter to mine's authority advising that the respondent be paid so that they could move out of the mining area. He tendered a copy of the letter which was admitted in evidence as exhibit P6. When he was cross examined by the appellant's counsel, PW3 said that, he suspected that the cause of the respondents' sickness was allergy resulting from dust. He added that bronchitis which is the swelling of the lungs and asthma can be caused by allergy which may arise from dust or any other irritants.

The other witness for the prosecution, James Magiga Wambura (PW4) who was at the material time the Nyamwaga Village Executive Officer supported the evidence of PW1 that, on 3/12/2012 there was a huge explosive blast which sounded like a fired bomb. Being concerned of the respondents' safely, he called a meeting of the villagers. In the meeting, which was held on 12/2/2012, it was resolved that, the appellant be advised to compensate the 1st respondent and other villagers who were still in the mine area so that they could move out of them mine. He also wrote a letter to the District Executive Director, Tarime District Council (the DED) and that about the incident. He tendered a copy of the minutes of the meeting and the letters to the DED same were admitted in evidence as exhibits P7 and P8 respectively.

The witnesses for the appellant were, Sadal a Hamisi (DW1) and Dr. Nicholas Mboya (DW2). DW1, who was at the material time the head of the land section of the mine, testified that, in 2011 he participated in the valuation of the land owned by the people in the area where the appellant had obtained. The owners included the 1st respondent. The purpose was to compensate them so that he could vacate the mining area.

He contended that, the valuation which was conducted by a valuer involved between 90 and 100 occupiers and the report of the valuation was approved by the Chief Government Valuer. He said further that, all the persons whose pieces of land were valued accepted the valued amount of compensation except the 1st respondent who refused, shifted from where he was previously staying and decided to stay on the affected land after he had constructed a house at a distance of about 50 meters form the mine.

When cross-examined, the witness said that, the mining operations at the area stopped in 2012 or 2013. He admitted that, until the time of his testimony, the appellant had not acquired the 1st respondent's surface rights and that the appellant had a duty of care to the occupiers of the affected land.

On his part, DW2 gave explanation on the respondents' medical chits. It was his evidence that, in all the medical chits, what was recorded on them

was the complaints made by the respondents about their health. He explained that, the particular finding of diseases suffered by each of them was not recorded. As for the statement in exhibits that bronchitis was caused by fumes from the mine, DW2 said that, such an allegation was not substantiated. He added that as per the contents of the medical chits, the respondent became infected with diseases. In re-examination, he clarified that what a person complains of to be the cause of the sickness need not be the true cause.

Having considered the evidence for the respondents and the appellant, the learned trial Judge found that the appellant had a duty of ensuring that the respondents are not injured by its mining activities but however, breached that duty. He found that, as a result of that breach, the respondents got infected with diseases, in particularly respiratory and ear diseases due to dust and explosives. That the 3rd respondent was also caused to suffer as well skin disease. On that finding, the court awarded general damages of TZS 50,000.000.00 to each of the respondents. The appellant was thus adjudged to pay TZS 300,000,000.00 in total. It was ordered further that; the decretal amount should be with interest at the rate of 7% per annum from the date of judgment to the date of full satisfaction of the decree.

In its memorandum of appeal, the appellant has raised 9 grounds of complaints; that:

"1. *The trial court erred in law in entertaining and determining the suit which ought to have been entertained by a Resident Magistrate or a District Magistrate.*

2. The Honourable trial Judge erred in fact for failing to hold that the appellant's mining activities did not cause the respondent's illnesses.

3. The Honourable trial Judge erred in law and in fact for holding that the appellant breached the duty of care towards the respondents.

4. The Honourable trial Judge erred in law and in fact in failing to hold that the appellant was not liable to the respondents as the respondents moved in the appellant's Special Mining License area and constructed a house therein without the appellant's consent.

5. The Honourable trial Judge erred in iaw by misconstruing the provisions of the law on relocation, resettlement and payment of compensation to people within a Special Mining License (SML) area.

6. The Honourable trial Judge erred in law and in fact in ignoring the parties' admission on the existence of valuation of the land.

7. The Honourable trial Judge erred in law and in fact in raising an issue of approval by the Chief Government Valuer which was not framed at the commencement of trial.

8. The Honourable trial Judge erred in law and in fact in awarding each respondent Tshs 50,000,000 as general damages which is excessive.

9. The evidence on record does not support the finding of the trial court".

At the hearing of the appeal, the appellant was represented by Mr. Faustin Anthony Malongo assisted by Ms. Caroline Lucas Kivuyo, learned advocates. On their part, the 1st respondent who as stated above, also sued on behalf of the 3rd and 5th respondents and the 2nd respondent who also sued on behalf of the 5th and 6th respondents, appeared in person unrepresented. The appellant had on 29/4/2019, filed written submissions in support of the appeal and according to Mr. Malongo, a copy thereof was served upon the respondents. The 1st respondent denied however, that a copy of the appellant's written submission was served on them. To expedite the hearing of the appeal, we ordered that a copy be supplied to the respondents. That was done and the respondents filed their reply submissions.

Submitting in support of the 1st ground of appeal, the appellant's counsel argued that, since according to the plaint, the respondents claimed for general damages of TZS 600,000,000.00, the case should have been filed in the Resident Magistrate's Court or the District Court because they are the courts which had jurisdiction to entertain the claim. He relied on *inter alia*, article 108 (1) and (2) of the Constitution of United Republic of Tanzania which provides for the jurisdiction of the High Court and section 13 of the Civil Procedure Code, Chapter 33 of the Revised Laws (the CPC) as well as

the case of **Tanzania -China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters [2006]** T.L.R. 70.

He went to argued that, although in the case of **Peter Joseph Kilibika and CRDB Bank Public Company Ltd v. Patrick Aloyce Mlingi,** Civil Appeal No. 37 of 2009, the Court distinguished the **Tanzania China Friendship Textile** case (supra) in that, where the amount of special damages is not specified for the pecuniary Jurisdiction of the Court to be determined, then the High Court has Jurisdiction to entertain the case notwithstanding the fact that, the amount is within the jurisdiction of the Resident or District Magistrate, he urged us to depart from that case because, according to him, the principle in **Peter Joseph Kilibika** defeats the purpose of s.13 of the CPC. It was his submission that, the decision in **Peter Joseph Kilibika** was given per incuriam.

Responding to the submissions of the learned counsel for the appellant on the 1st ground of appeal, the respondents argued in their written submissions that, as matter of principle, an amount claimed as general damages does not determine pecuniary jurisdiction of the court, rather it is the special damages. The case of the **Gurdian Limited and Another v. Justin Nyari**, Civil Appeal No. 187 of 2020 (unreported) was cited to bolster that argument. On the contention that the decisions in the two cases of **Peter Joseph Kilibika** and **Justin Nyara** are in conflict with the decision in

the case of **Friendship Textile** case, the respondents opposed that, argument contending that the latter case was distinguished.

It is a correct position as argued by the learned counsel for the appellant that s.13 of the CPC requires that every suit be instituted in the court of the lowest grade having jurisdiction to try it.

Guarded by that provision, in the case in which the respondent had claimed for special damages of TZS 8,136,720,00, the amount which was at the time within the pecuniary jurisdiction of the Resident Magistrate's Court or District Court, the Court found that the suit was wrongly filed in the High Court. In **Peter Joseph Kilibika**, the respondent claimed for general damages of TZS. 800,000,000.00. It was argued that, since it is a substantial claim which determines the jurisdiction of courts, the High Court lacked jurisdiction to entertain the suit. Reliance was placed on the case of the **Friendship Textile** case. The Court considered the issue and held as follows:

> *"The respondent claimed for damages of TZS. 800,000,000.00. There was no claim made which could lead to conclusion that the pecuniary value of the claim is not within the jurisdiction of the High Court.* ***The circumstances of this case are different from the circumstances prevailing in the Friendship Textile (supra). In the***

Friendship Textile case the principal claim was below 10,000. It was a specific claim for TZS. 8,136,720.00 *being the cost incurred for the production of the vitenge fabrics and tax paid.*

[Emphasis added]".

The principle was later applied in other cases, including the case of **Justin Nyari** (supra) cited by the respondents.

The learned counsel for the appellant urged us to depart from the decision in **Peter Kilibika** for the reason that, it was made per incuriam and in conflict with the decision in the case of **Friendship Textile** case. With respect to the learned counsel, in the first place, being a bench of three Justices, we do not have the power of departing from our previous decisions because those powers are vested in the bench of five Justices- See for instance, the case **of Abualy Alibhai Aziz v. Bhatia Brothers Ltd** [2000] T.L.R. 288. In that case, it was held that:

"The full bench of Court of Appeal has no greater powers than a division of the court, but if it is to be contended that there are grounds, upon which the court could act, for departing form a previous decision of the court, it is obviously desirable that the matter should, if practicable, be considered by a bench of five judges".

[Emphasis added].

Secondly, we do not find to be a correct position that the decision is in conflict with **Friendship Textile case**. As clearly shown above by the emphasized words in the above cited passage, in the case of **Peter Joseph Kilibika,** the case was distinguished.

We wish to state also that, following the amendment of s.13 of the CPC by Act No. 4 of 2016, even where a suit which would ordinarily be instituted in a Resident Magistrate's Court or District Court is erroneously entertained by the High Court, the error would not vitiate the proceedings. After amendment, Section 13 of the CPC reads as follows:

> *"13. Every suit shall be instituted in the court of the lowest grade competent to try it and, for the purpose of this section a court of the Resident Magistrate and District Court shall be deemed to be courts of the same grade.*
>
> ***Provided that the provisions of this section shall not be construed to oust a general jurisdiction of the High Court".***
>
> *[Emphasis added]*

In the case of **Benitho Thadei Chengula v. Abdulahi Mohamed Ismail**, Civil Appeal No. 183 of 2020 (unreported) in which the issue of jurisdiction of the High Court based on a similar point was raised, we observed that:

> *"...it is our considered view that the error of instituting it in the High Court instead of the District Court did not occasion a miscarriage of justice as it did not prejudice any of the parties. Besides, since section 13 of the CPC was amended two years later by Act No. 4 of 2016 by adding a proviso whose effect is to render the present objection regarding jurisdiction to be redundant, we shall not uphold the [objection]".*

On the basis of the above stated reasons, we find that the 1st ground of appeal is devoid of merit and thus dismiss it.

With regard to the 3rd, 4th and 5th grounds of appeal, the learned counsel for the appellant argued that, the learned trial Judge erred in failing to find, first, that the appellant did not breach a duly of care in respect of the respondents and secondly, that the appellant was not liable to the respondents because they moved and constructed a house in the appellant's SML area without its consent. Mr. Malongo argued further that, the learned trial Judge erred in law in misconstruing the provisions of the Mining Act, 2010 (the Act) relating to relocation, settlement and payment of compensation to occupiers and owners of land within the SML area.

According to the learned counsel, while it is not disputed that the respondents had surface right over the affected land, the appellant had

conducted valuation so that the respondents could vacate the area after having been compensated. However, the 1st respondent refused the amount offered by the appellant and instead moved into the affected land, constructed a house and stayed there. Mr. Malongo argued that, the respondents' act of moving and constructing a house without the consent of the appellant was a breach of s.96 (2) of the Act and therefore, the appellant did not owe them a duty of care. He faulted the learned trial Judge for holding that, the provisions of s.96 (2) of the Act could not operate against the respondents unless the requirements of s. 41 4) (d) of the Act were met. The learned counsel argued further that, the trial court misconstrued the provisions of the said section because it does not concern the procedure after acquisition of SML but relates to application for SML and the procedure for compensating the occupiers or owner of land within the SML area in order to make them give vacant possession of their lands. For these reasons, the learned counsel argued, the High Court erred in holding that the appellant breached the duty of care towards the respondents. He stressed that, the respondents' act of staying on the land was illegal because the 1st respondent constructed a house thereon without the consent of the appellant.

In response, the respondents opposed the contention by Mr. Malongo that the appellant did not have a duty of care on the respondents on account that, the 1st respondent constructed a house without the consent of the

appellant. They argued that, since the appellant had not compensated them, they had the right to stay on the affected land and the appellant had the duty of ensuring that they were safe from the effect of the mining operations.

The issue which arises from the submissions of the parties in the 3rd, 4th and 5th grounds of appeal is whether or not under the circumstances of this case, the appellant owed the respondents the duty of care. In answering the issue, we find it apt to state what the duty of care entails. In the law of tort, a duty of care is a legal obligation upon which an individual is required to act reasonably so as to avoid careless or negligent acts which may harm other persons who are within his proximity or who may be directly affected by his acts. In the tort of negligence, such persons are termed as neighbours, hence the establishment of a neighbour principle.

The principle was established in the case of **Donoghue v. Stevenson** [1932] AC. 562. In that case, Lord Atkin's stated as follows:

> *"You must take reasonable care to avoid acts or omissions which you can reasonably forsee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are too closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am*

directing my mind to the acts or omissions which are called in question".

The argument by the counsel for the appellant is that the appellant did not owe the respondents the duty of care because they stayed on the affected land after constructing a house without the former's consent. It is true that under s. 96 (2) of the Act, the lawful or occupier of a land in the SML area is prevented from erecting a building or structure without the consent of the SML holder. That section provides as follows:

"96-(1) ....

(2) The lawful occupier of land in a mining area shall not erect any building or structure in the area without the consent of the registered holder of the mineral right concerned but if the Minister considers that the consent is being unreasonably withheld, he may give his consent to the lawful occupier to do so".

We also agree with Mr. Malongo that s. 41 (4) (d) of the Act provides for the conditions which a person who is applying for a SML should comply with. That section provides as follows:

"41-(1) An application for a special mining license shall be in the prescribed form and shall be accompanied by the prescribed fee.

(2) ....

(3) ....

(4) Every application for a special mining license shall include or be accompanied by

(a) ....

(b) ....

(c) ....

(d) Proposed plan for relocation, resettlement and compensation of people within the Mining area in accordance with the Land Act".

The appellant had already obtained SML and therefore, that section has nothing to do as regards the conditions set out under s.96 (2) of the Act. It is therefore, a correct position that the respondent constructed a house in the affected land without the consent of the appellant or the Minister thus breaching the provisions of s. 96 (2) of the Act.

Notwithstanding that breach, we do not, with respect, agree with the appellant's counsel that the respondents were staying in the affected land illegally. It was not disputed that the affected land belonged to the 1st respondent who had not vacated it because of unsettled dispute over payment of compensation. His only mistake was construction of a house. It did not mean however, that, the appellant should not take reasonable care to avoid acts which would harm him and other respondents on account of his mistake. The appellant was as a result, expected to have adhered to the

neighbour principle. We thus find therefore that in the circumstances of this case, the appellant had a duty of care towards the respondent who were staying in their land situated between 50 and 100 metres from the appellant's mine. In the event we do not find merit in the 3rd, 4th, and 5th grounds of appeal. The same are hereby dismissed.

That said, we now revert to the 2nd ground of appeal. Submitting in support of that ground, Mr. Malongo challenged the finding of the trial court to the effect that, through the acts of the appellant, the respondents were caused to suffer health wise by contracting respiratory, ear and skin diseases. He argued that, the evidence which was adduced by the 1st and 2nd respondents as well as PW3, did not link the illnesses complained of by the respondents with the appellant's mining operations, including explosive blastings.

He argued further that, the respondents did not prove that the water which allegedly harmed the 3rd respondent's skin after using it to bath as stated by the respondents, was under the control of the appellant or that it was polluted by any harmful material from the appellant's mine. The learned counsel argued further that, the High Court misapprehended the evidence of DW2 when it stated that, the said witness had testified that, the evidence of PW3 established that the illnesses complained of by the respondents was caused by the appellant's mining activities.

In reply to the submission made by the appellant's counsel on the 2nd ground of appeal, in their written submissions, the respondent supported the finding of the High Court, that they become ill as a result of the fumes, dust and noise produced as result of the appellant's mining operations. They relied on the evidence of the medical chits, exhibit P4 (a) –(e).

We have duly considered the submissions of the learned counsel for the appellant and the respondents. We have also re-evaluated the evidence adduced by the witnesses, particularly the evidence of the Doctors, PW3 and DW2. In our considered view, the same is insufficient to link the appellant with the health problems complained of by the respondents. In his evidence, PW3 testified that, he attended the respondents who complained of respiratory, ear and skin illnesses. He prescribed a treatment for them as indicated in their medical chits- exhibit P4 (a) – (e). He did not however, adduce any further evidence linking the illnesses with the mining operations. He merely stated that, after questioning the respondents, they told him that they were staying in the mine area and his advice to them was that they should leave the area. He also stated that, he wrote to the appellant advising it to facilitate the movement of the respondents out of the Mining area. Actually, when he was cross-examined on the cause of the respondents' illnesses, he stated that:

"I suspected that their complaints came out of allergy arising from dust".

As for the evidence of PW1 and PW2 the same was on the complaint of illnesses and how they were attended by PW3.

With regard to the evidence of DW2, he merely testified on the contents of exhibits P4 (a)-(e). With due respect to the learned trial Judge, the witness did not state that the illnesses were caused by the appellant's mining operation. At page 75 of the record, the witness is recorded to have stated that:

"This (exhibit P6) shows that the people had been coming at Tarime Hospital with problems of ear and repeated cases of chest problems. He [PW3] never recorded the disease. The language used is complaining.

When he was cross-examined, he stated as follows at the same page:

"This (exhibit P6) shows that bronchitis was caused by fumes from the mine. It is not confirmed. The doctor took the history of the patient. Dust can cause the problems. These medical cards show that these people are sick, affected. It is true as per the medical chits".

[Emphasis added].

It is clear from his evidence that, DW2 only described what was in the respondent's medical chits. He did not confirm that the illnesses were directly linked with appellant's mining operation. In order to do so, it was necessary to get the expert evidence on that matter because as testified by PW3, it was suspected that the illnesses might have been caused by the mining operations. Evidence was therefore required to establish that the mining operation and not other factors, caused the illnesses complained of by the respondents.

Despite our finding above, we are of the considered view that, by conducting mining operations and particularly blasting explosives at a close distance to the respondents' house while they were in occupation of the affected land was a breach of the duty of care towards them. The fact that the 1st respondent constructed a house on the affected land without the consent of the SML holder or the Minister contrary to s. 96 (2) of the Act, did not, in our considered view, exonerate the appellant from that duty because it ought to have acted reasonably not to injure the respondents. There is no dispute that the respondent were subjected to nuisance. It is in evidence that the appellant continued with mining operations after the respondents had moved to stay on the affected land thereby blasting explosive close to the respondents' house. The mining operations also resulted into emission of dust which, given the proximity of the mine to the respondents' residence,

the dust inconvenienced them, we do not with respect, agree, with the contention that the respondents followed the nuisance. As conceded by DW1 the appellant had not acquired the affected land and therefore, the respondent had the right over it.

From the foregoing, the answer to the 2nd ground of appeal is that even though the respondents' claim that the mining activities of the appellant caused them illness was not proved, the Court finds that the activities caused nuisance to them thereby making the appellant liable to pay them general damages.

Coming to the 6th and 7th grounds of appeal, Mr. Malongo argued that, whereas the learned trial Judge ignored the admission by the parties that there was valuation report of the affected land, he erred in raising the issue of the approval by Chief Government Valuer of the valuation report, the matter which was not raised as an issue at the commencement of hearing.

The respondents replied to the two complaints by the appellant by arguing that, the question of valuation is a matter of law and the learned trial Judge was thus justified to make a decision on it. They submitted that the matter was raised by the appellant that there was a valuation report which was approved by the Chief Government Valuer and therefore, the trial court

proceeded to satisfy itself on whether or not the law relating to compensation was adhered to.

Having considered the submissions on the two grounds of appeal, we think we need not to be detained much in disposing them of. It common ground that the parties disagreed on the amount of compensation hence the respondent's act of moving to affected land and the subsequent filing of the suit. In our considered view therefore, whether there was a valuation report and whether or not such valuation report was approved by the Chief Government Valuer or not could not be of relevance to the determination of the respondent's claim of general damages. We could not find any provision in in Act which compels a lawful occupier of a land in a SML area to accept the amount of compensation once it is approved by the Chief Government Valuer.

On that observation, we do not find merit in the two grounds of appeal. They are thus hereby dismissed.

Finally on the 8th and 9th grounds of appeal in which the respondent challenged the award by the trial Court of TZS. 50,000,000.00 to each of the respondents while, according to the appellant the evidence to support their claim was lacking. As elucidated above, the award was based on the finding that the appellant breached of the duty of care and caused the respondents

to contract diseases. We have found above that the evidence acted upon to arrive at that finding was scanty. Our re-evaluation of the evidence has led us to find that, what has been proved is the breach by the appellant of the duty of care causing nuisance to the respondents. We therefore vary the decision of the High Court to that extent and set aside the award of TZS. 600,000,000.00. Following our finding, the appellant is liable to compensate the respondents for causing nuisance to them as a result of a breach of the duty of care resulting into the above stated injury

In according damages, we have considered that the respondents contributed to their injury. It is an undisputable fact that the 1st respondent constructed a house on the affected land in breach of S.96 (2) of the Act and moved to stay in that house as a result of his disagreement with the appellant. He could have resolved his disagreement with the appellant from the place where he was living with his family outside the SML area. He was aware of the closeness to the mining area. He thus acted negligently in so doing.

The principle is that, where there is contributory negligence by a party, the amount of damages awardable to the party are to be reduced depending on the degree of his negligence. Bearing in mind the nature of the injury suffered by the 1st respondent and his family, including the children who were

minors and the extent of the 1st respondent's contributory negligence, we find that a compensation of TZS. 25,000,000.00 to each of the respondents will meet the justice of the case. The appellant is thus ordered to pay a total of TZS 150,000,000.00 plus interest at the court's rate of 7% per annum from the date of the trial court's judgment to the date of full satisfaction of the decree.

In the circumstances of the case whereby contributory negligence is involved, we order that each party should bear its own costs.

DATED at **MUSOMA** this 14th day of June, 2024.

A. G. MWARIJA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 14th day of June, 2024 in the presence of Mr. Faustine Malongo and Ms. Caroline Kivuyo, learned counsel for the Appellant and the Respondent connected via teleconferencing, is hereby certified as a true copy of the original.

M. O. NDYEKOBORA
DEPUTY REGISTRAR