

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

CIVIL APPEAL NO. 31 OF 2020

JACKSON NYAMACHOA APPELLANT

VERSUS

HIGIRA ZABLON 1ST RESPONDENT

YOSIA ZABLON 2ND RESPONDENT

SARURYA ZABLON 3RD RESPONDENT

*(Arising from the ruling and order of the Resident Magistrate's Court of
Musoma at Musoma in Civil Case No. 14 of 2020)*

JUDGMENT

5th May and 4th June, 2021

KISANYA, J.:

Before the Resident Magistrate's Court of Musoma at Musoma the appellant sued the respondents claiming that the latter had breached the contract. It was the appellant's case that, on 26th May, 2019, the respondents jointly and severally being members of mining crevice known as "mduara wa wasabato" or "Mduara No. 28B" agreed the appellant to pay or invest TZS 5,000,000/= to facilitate the mining crevice activities and facilities.

The appellant averred further that; the respondents breached the agreement by denying him access to mine. He therefore claimed for damages arising from loss of business (TZS 113,000,000) and payment of TZS 300,000/= per day from the date of filing the suit until the respondents refund him the contractual investment fund or allow him to use their mining crevice as agreed.

The respondents through the service of Mr. Edson Philipo, learned advocate, lodged a written statement of defence to contest the appellant's claim. In addition, they filed a notice of preliminary objection on point of law that, the trial court had no jurisdiction to try the matter under section 102 of the Mining Act No. 14 of 2010.

At the end, the trial court sustained the preliminary objection. The learned trial magistrate was of the view that the trial court had no original jurisdiction in mining issues unless the Commissioner for Minerals (hereinafter referred to as "the Commissioner") files the matter for execution under section 103 of the Act. He therefore held that the proper domain to decide the matter prior to lodging it in the court of law was the Commissioner for minerals. Being aggrieved with the said decision, the appellant appealed to this Court with two grounds of appeal, that is to say:-

- 1. That, the Senior Resident Magistrate grossly erred in law and misdirected himself in holding that section 102 of the Mining Act, 2010 ousters the Resident Magistrate Court's original jurisdiction to entertain a breach of contract matter simply because it emanates from the mining issues.*
- 2. That, the Senior Resident Magistrate grossly erred in law and misdirected himself in holding the appellant's cause of action was mandatorily within the vicinity of the Commissioner for minerals, as such the Resident Magistrate Court lacked original jurisdiction.*

At the hearing of this appeal, the appellant was represented by Mr. Ostack Mligo, the learned advocate while the respondents enjoyed the services of Mr. Edson Philipo, the learned advocate.

Mr. Ostack Mligo argued that section 102 of the Mining Act 2010 (now section 119 of the Mining Act, R.E. 2019) could not apply because the matter before the trial court was over breach of contract and not mining operations. He argued further that the Commissioner resolves disputes related to boundaries of area subject to the mineral rights, claim by any person, assessment and other claim relating to prospecting or mining operation. In view thereof, Mr. Mligo prayed the Court to allow this appeal with costs.

Responding, Mr. Philipo submitted that the dispute between the parties was related to mining issues and hence required to be determined by Commissioner for mineral. He therefore, asked me to dismiss the appeal with costs.

In rejoinder, Mr. Mligo reiterated his submission that, the dispute was over the breach of contract.

I am of the considered view that, the only issue for determination is whether the trial court had jurisdiction to try the matter filed by the appellant.

I am mindful of the settled law that jurisdiction of the courts is a creature of the statute. It is a fundamental issue required to be determined before commencement of trial. See **Aloisi Hamsini Mchuwau and Another**

vs Ahamadi Hassani Liyamata, Criminal Appeal No. 583 of 2019, CAT at Mtwara (unreported) where the Court of Appeal cited with approval its decision in **Fanuel Mantiri Ngúnda vs Herman Mantiri Ngúnda and 20 Others**, Civil Appeal No. 8 of 1995, CAT (unreported) that;

"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature ... The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial.... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case."

Where the issue of jurisdiction is raised as preliminary objection, it must meet the principle of preliminary objection set out in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] E.A 696. The said case defines what a preliminary objection and prescribes when it can be raised. It is noteworthy that, the preliminary objection cannot be raised if any fact has to be ascertained. The relevant extract reads:-

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the

assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

As stated earlier, the preliminary objection which gave rise to this appeal was premised on the section 102 of the Mining Act No. 14 of 2010 (now section 119 of the Mining Act, R.E. 2019). Therefore, I find it appropriate to reproduce the said section. It provides: -

*"119 (1) The Commissioner may inquire into and decide all disputes **between persons engaged in prospecting or mining operations**, either among themselves or in relation to themselves and third parties other than the Government not so engaged, in connection with-*

(a) The boundaries of any subject to a mineral right;

(b) The claim by any person to be entitled to erect cut, construct, or use any pump, line of pipes, flume, race, drain, dam or reservoir for mining purposes, or to have priority of water taken, diverted, used or delivered, as against any other person claiming the same;

(c) The assessment and payment of compensation pursuant to this Act; or

(d) Any other matter which may be prescribed. [Emphasis added]

Reading from the above cited provision, I agree with the trial court that the Commissioner is vested with powers to inquire and decide disputes between persons engaged in prospecting or mining operations. However, not all dispute pertaining to prospecting or mining operations are inquired and decided by the Commissioner. His mandate is limited to disputes set out in paragraph (a), (b), (c) and (d) of section 119 (1) of the Mining Act. I am persuaded by the decision of this Court (Mongella, J) in **Suzana Pius Karani vs Godlisten Mbise**, Civil Appeal No. 14 of 2019, HC at Mbeya, when Her Ladyship had this to say on the above provision:

"...the provision is crystal clear to the effect that the kind of disputes to be entertained by the Commissioner are to be connected with matters enlisted under subsection (1) (a-d) which includes disputes on boundaries or erection, cutting, construction and use of facilities listed under subsection (1) (b) above.

In that regard, the two questions derives from section 119(1) of the Mining Act. The first question is whether any of the parties in the case at hand was engaged in prospecting or mining operations. The answer to this question is not hard to find. The appellant pleaded in paragraphs 1 and 2 of the plaint that both parties are miners at Isanilo Gold Mine. The said paragraphs were not disputed by the respondents.

The second question is whether the dispute between the parties was in connection with any of matters listed in section 119 (1) of the Mining Act. In his submission before the trial court and this Court, the learned counsel for the respondents did not address this issue. He just stated that the matter was related to mining.

It is trite law that parties are bound by their pleadings. Now, the nature of case filed before the trial court was averred in paragraph 4, 6 and 7 of the plaint as follows:

4. *That, on 26th May, 2019 the Defendant jointly and severally being members of mining crevice known as "**Mduara wa wasabato**" or "**Mduara No. 28B**" contractually agreed the plaintiff to pay or invest Tsh. 5,000,000/= to facilitate the mining crevice activities and facilities in return as soon as the defendants were allowed to mine, the Plaintiff will be allowed to use their mining crevice (mduara) to enter into mining and proceed with his mining activities.*
5. *That, the Plaintiff duly paid Tsh. 5, 000,000 in two instalments....*
6. *That, to the Plaintiff dismay the Defendants denied to honour their contractual obligation. When the Defendants were allowed to start mining and purposely denied the Plaintiff to access to mine via mining crevice No. 28B to date.*
7. *...the Defendants have neglected, refused and or ignored to pay the Plaintiff either the incurred investment plus interest or*

allow him to utilize the investment via mining crevice no. 28B.

(the underline is mine)

In the light of the above, I am of the view that the dispute between the parties is based on breach of contract. It does not fit in the disputes which the Commissioner may inquire and decide under section 119(1) (a), (b), (c) or (d) of the Mining Act. In alternative, evidence was required to prove whether the dispute at hand falls in the above cited provision. Therefore, it was premature for the trial court to uphold the preliminary objection and strike out the case.

In conclusion, I find merit in this appeal and allow it. I accordingly quash and set aside the ruling and orders made by the trial court on the preliminary objection. I order that the case file be remitted to the trial court to proceed where it ended. Costs shall follow the event.

Ordered accordingly.



DATED at MUSOMA this 4th day of June, 2021.

E.S. Kisanya
JUDGE

COURT: Judgment delivered this 4th day of June, 2021 in the presence of the appellant and in the absence of the respondents.

E. S. Kisanya
JUDGE
04/06/2021