IN THE HIGH COURT OF TANZANIA

MWANZA DISTIRCT REGISTRY

AT MWANZA

HC. CIVIL APPEAL No. 05 OF 2021

(Original from Bukombe District Court Civil Case No. 01 of 2020 delivered on 16/11/2020)

UHURU MINING'S COOPERATIVE

SOCIETY LIMITED ---------- APPELLANT

VERSUS

PAUL JOSEPH MULYA ---------- 1ST RESPONDENT

MULYA JOSEPH ---------- 2ND RESPONDENT

ANDREA OBORE ---------- 3RD RESPONDENT

JUDGMENT

15th July & 12th August, 2021

TIGANGA, J

Before the District Court of Bukombe at Bukombe, the appellant sued the Respondent for the following orders namely;-

i. That the defendants pay the plaintiff the sum of Tshs. 60,000,000/= being the specific damage suffered by the plaintiff for the loss due to the unlawful conversion and asportation of three hundred and sixty sacks as a results of the defendants trespass to goods wherein the plaintiff's member one Mohamed Dotto was conducting his mining business.

ii. Interest as assessed by this honourable court from 2016 to the date of institution of the suit.

iii. Interest as assessed by the honourable court from the date of institution of the suit to the date of Judgment delivery.

iv. Interest of 10 per centum from the date of the judgment until satisfactory payment in full.

v. Any other relief as the court deem fit and just to grant.

In the written statement of defence the defendants who are the respondents in this appeal, disputed the claim and asked the trial court to dismiss the suit in its entirety, they asked the defendant to be declared that they are the legal owner of the mining area, they be paid costs of this suit, and any other relief(s) that thus honourable court deem fit and just to grant.

After full trial the trial District Court found the plaintiff case falling short of proof and it was therefore dismissed. Dissatisfied by judgment and decree, the appellant appealed to this court filing five grounds of Appeal as follows;-

1. That the trial court erred in law by turning itself into a mining commission thereby ending up turning the tortious trespass to goods into an issue of underground right which was not pleaded.
2. That the trial court having found PW1 established the taking of 360 sacks the gold bearing rocks which was the chattel goods by the defendants on broad day light, erred in fact by not ordering the return of 360 sacks to the plaintiff.
3. That the trial court having found the mineral right PML 001847, 001848 and PML 001849 were not completely transferred to the respondents as per law erred in law to hold that eh respondents, had posed enough defence to warrant justified trespass to chattels.
4. That the trial court erred in law or fact by framing issues not reflected in the reliefs sought ending up determining *inter alia*, land right which the trail court lacks jurisdiction to try.
5. That the trial court erred in law by mis directing itself that members of the co - operative society should sue on individual bases in total disregard of the objectives of co - operative society per legislation.

He prayed the judgment of the trial court be reversed, the appeal in its entirety with costs to be borne by the respondents and any other relief

as this Court deems fit and just to grant. The respondent filed the reply to the Memorandum of Appeal in which they disputed all he grounds of appeal and asked the appeal to be dismissed with costs. The appellant was represented by Mr. Beatus Emmanuel, Advocate, while he respondent enjoyed the service of Mr. Ezekiel James, Advocate. By consent of the parties and order of this court, the appeal was argued by written submissions.

Submitting in support of the appeal, the appellant submitted that. The appellant is a cooperative society with objectives of protecting the interest of its members. In this case, it sued for and on behalf of its members and having been aggrieved by the decision of the trial court filed about five grounds of appeal, starting with the first ground of appeal.

The counsel submitted that the suit was founded on trespass to chattel in the form of sacks. He submitted that the respondent had no justification to squander the said chattels from the appellant's members. It turned out that all relief sought as per pleadings focused on specific damages resulting from chattel trespass. It was submitted that, ownership alone cannot suffice to lead the court to inquire into issues which it has no jurisdiction to wit an underground right.

He submitted further that, the chattel trespass involved only movable items thus requiring no need no right which is underground. Regarding the second issue or ground of appeal, he submitted that at page 4- 5 of the typed judgment, PW1, established trespass to goods that is 360 sacks of gold bearing rock. Having been established, the court was supposed to order the return of the said chattel.

He also submitted that, PW2 and DW1 corroborated each other that the respondent has never concluded any agreement with the appellant's members or with the appellant as a society capable to enter into agreement for and on behalf of its members. As the respondent had no underground title, they had no right in that respect, and even if they had one, then they had to mandatorily seek consent from the appellant. This legal stand according to him was held by his lordship, Hon. Juma CJ, in the case of **Hosea Katampa vs The Ministry of Energy and Minerals and 2 Others,** Civil Appeal No. 221 of 2017 CAT - at Mwanza (unreported) page 17 and 18.

He submitted that, as the respondents were trespassers, they were supposed to be ordered to return 360 sacks of gold bearing rocks chattel which they have gained. He relied on the authority in the case of **AGRO**

Industries, Limited Vs Attorney General [1994] TLR 43 in which it was held *inter alia* that

> *"in the eyes of the law a trespasser is a trespasser, be it public enter prises or private enterprise or an individual, public interest requires that legal properly right should be protected against trespasser".*

He reminded this court of the findings of the trial court at page 6 paragraph 4 in the judgment that the respondent did not comply with the law before they trespass into the chattel.

Submitting on the third ground, of appeal which raises a complaint that underground on whether incomplete transfer of underground title sufficed on the balance of probabilities to pose defence, it is clear on record that DW1 told the trial court that transfer pertaining the actual location where chattels were taken from was incomplete. He further testified that once transfer is complete he shall inform the transferees, which meant the transferees had no title of the three mining blocks/plots in which the appellant member chattels were stored.

He referred this court to the case of **Jane Kimaro vs Vick Adili (As Administratrix of the Estate of the late Adili Daniel Mande),** Civil

Appeal No. 212 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported) in which it was held that;

> "*in the eyes of the law, the owner of the property remains the one whose name appears in the Registry as no transfer of tittle had been effected.*"

He further submitted that although DW1 attempted to tender the Tanzania Mining Cadastre Portal which accessed through. **Portal Madini.go.tz/map/on 19/05/2020** to any member of the public, the court ruled that, it would access the status of the plot where the chattels were taken from. However, in the division, the trial court never referred to the portal in which the online record showed that the respondent had no title to the area where chattels were taken from by trespasser, instead the owners remained to be third parties. Therefore a defence was very weak to be taken to have proved the case on the balance of probabilities.

On the fourth ground of appeal which is whether the issue of PML arose in the pleadings, the plaint does not at aver on PML, it is from this premises, he submits that the third issue was wrongly framed as it touches the Mining law instead of the ingredient of trespass, the trial court lacked jurisdiction, to try an issue falling squarely under the mining disputes.

According to him, it has been argued by counsel for the respondents that, counsel for parties were involved in the framing of that issue, but they differ with that position in that the matter of law cannot be reversed by counsel for parties. He referred this court to the decision of his lordship Hon. Mdemu, J in the case of **Exim Bank Tanzania Limited vs Geita Upendo Dispensary**, Land Appeal No. 30 of 2017 (High Court of Tanzania - Mwanza (unreported) where it ws held inter alia that,

> *"Was the issue of default notice pleaded? I have gone through the amended application and could not see any. As it was not pleaded, the same it against fair hearing ..... and remedy on such irregularity is to remit the file for retrial"*

He submitted that, this ground be allowed and it suffices to dispose of the appeal with costs.

On the fifth ground of appeal from which an issue whether the member of the cooperative society can sue through the cooperative society was framed. He referred to section 35 of the co - operative societies Act No. 06/2013 and submitted that the law allows the society to institute and defends the suit for purpose laid down by laws. According to the counsel, one of the society's objectives is to defend the welfare of its members. The

same position was adopted by the trial court in ruling of the preliminary objection dated on 10th March 2020 and at page 7 of the impugned judgment in which it was held *inter alia* that;

> *"Owing to the nature of this case being class action with public interest ....."*

He submitted that, it was therefore very unfair to order a member to sue in his capacity and in Criminal avenue, while under section 3 (1), section 23 (a) and (b) both read together with section 27 (1) of the Co operative Societies Act (supra) the appellant is capacitated to sue for the purpose of defending welfare of its members and protect their economic interests once they are interfered with.

According to the counsel, the terms "asportation and conversion" are common in tort of trespass to goods as can be caught in chapter 8 of the **Treatise by P.S.A Pillai, Law of Tort, 9th Edition, Eastern Book Company at PP 155 to 121**. The trial magistrate erred to associate them to criminal remedies thus denying justice to the appellants.

He asked the court to find that, the appeal has merit, therefore it is bound to succeed, he asked the same to be allowed with costs.

In reply by the counsel for the respondent, it was submitted that, the appellant sued on behalf of one Mohamed Dotto and the basis of claim against the respondents according to the plaint was found on two cause of action namely, trespass to goods in which as a result Mohamed Dotto suffered specific loss to the tune of Tshs. 60,000,000/= (sixty million) and disturbance as a result the appellant has suffered general damages.

According to the counsel, although the suit was made on behalf Mohamed Dotto, but Mohamed Dotto did not appear in court to testify and it seems, he was not even aware of the said suit.

He submitted that, the evidence tendered to prove the case was very insufficient because there is neither constitution of the society which was tendered nor by law which empowers the society to sue on behalf of its members. The only document tendered was the Certificate of Registration of the appellant, which also does not show that it was registered to carry out the mining operation.

He submitted that from the pleadings, the respondent obtained a mineral right by purchasing a Primary Mineral Licence PML, and having

proved the possession of such PML, the trial court was satisfied and held in the favour of the respondents.

In respect to the five grounds of appeal, the respondent observed two important issues of law, **one;** the appellant was not in actual possession of the 360 sacks of gold bearing rocks at the time of the inference and **two,** privity to the contract. In elaboration to the first ground of reply, he submitted that there was no justification for the court to hold that, the trial court turned itself into a mining commission this fact is misleading as the Mining Commission, is not pleaded in the pleading, and there is no evidence in the pleading of judgment where the trial court so turned itself. He said the findings and decision of the trial court based on the evidence submitted by both parties, he asked the court to find the appeal to have no merits and dismiss it.

Regarding the second ground, he replied that, the evidence of the respondent was heavier than that of the appellant. He submitted that the evidence of PW1 was contradicting that of PW2 Abdallah Juma who said that he said sacks were pebbles (Kokoto) and not golden bearing rocks which were in possession of Mohamed Dotto who never testified.

He relied on the authority in the case of **Hemed said vs Mohamed Mbilu** [1984] T.L.R 113 where it was held that "a person whose evidence is heavier than that of the other is the one who must win." Basing on that view therefore, he prayed the appeal to be dismissed with costs.

Regarding to the 3rd ground he replied that, the appellant miserably failed to lead any evidence to establish the claim contained in the plaint. He submitted that through PW1 and PW2, it was not proved that the appellant was established and designed to deal with mining operations Mineral marketing, or that it had the capacity to institute or defend the suit for purposes laid down in by laws, these statement arose during the writing the written submissions. He reminded the court that, parties in civil proceedings/cases are bound by their pleadings and no party is allowed to present his case contrary to the pleading. To buttress that position he cited the case of **YARA, Tanzania Limited vs Charles Aloyce Msemwa & 2 others**, Commercial Case No. 5 of 2013 HC - Commercial Division at Dar es salaam (unreported). Regarding the fourth ground, his reply was that, issues were framed by the court while assisted by the counsel and the court resolved all issues by making specific findings an each and every issue framed in line with the authority in the case of **Sheikh Ahmed Said**

vs The Registered Trustees of Manyema Masjid (2005) TLR 65. He thus submitted that it was important for trial court to make specific findings on each issue as it did, he in that view asked the court ot find that the said ground has no merit.

Regarding the allegations in the fifth ground of appeal, it is the respondent's reply that the appellant's evidence before the trial court had nothing to do with trespass to goods. He submitted that in paragraph 8 of the plaint for example it was pleased that the respondents inserted beacons on Mohamed Dotto's Land, therefore the issue framed reflected what was pleaded in the pleading and therefore the issue reflected the actual dispute which existed between the parties. As a result the procedure observed cherished the principle of pleading that, proceedings in civil suit and decision should come from what has been pleaded and so goes the parlace "parties are bound by their own pleadings" as held in the case of **James Funke Gwagilo vs The Attorney General,** [2004] T.L.R 161.

He submitted that the members of the appellant had capacity to sue on their personal, individual right unlike the appellant who failed to establish that the said goods were in its possession or that it was holding a mining licence over the disputed area as there was no evidence lead to

prove these facts therefore, failure to prove these fact means failure to prove the claim which made the trial court to be justified to find as it found.

Regarding the damages he submitted that, the general damage must be averred, while special damage must be proved, damage must be proved for damages are awarded to repair the injuries caused to the party who has suffered damages. He referred the court to the case of **Kibwana and another vs Jumbe** [1990] - [1994] 1EA 223. He said as in this case, the appellant sued on behalf of Mohamed Dotto, it was important that Mohamed Dotto be called to testify. It was further important for the appellant to prove to have called him so that he could prove that he actually suffered specific damages to the tune of Tshs. 60,000,000/= which he did not do. There is also no evidence lead to prove general damage and 10% interest sought in the plaint.

He submitted that, it was proper for the trial court to find that the case was not proved at the required standard, therefore, the claim failed.

Reading between lines, the contents of the records, which includes the pleadings proceedings and judgment of the trial court. It is established

that the appellant sued not of itself, but on behalf of one of its members one Mohamed Dotto, who was allegedly the owner of the site and the premises from which the alleged chattel of gold bearing rocks were trespassed and taken away by the respondent. This is also reflected in the evidence by PW1 and PW2 who insisted that, the trespassed into properties are of Mohamed Dotto.

In dealing with this appeal, I will deal with one ground of appeal after the other, in the manner they are arranged in the petition of appeal. Starting with the first ground of appeal which raised the complaint that the trial court erred when it shifted from determining the tort of trespass to goods to the issue of underground right which was not pleaded. In the reply to this ground of appeal, the respondent averred that there is no trespass to goods because there is no proof of ownership of good by the appellant or that the appellant was entitled to any claim under the contract which he was not a party too.

This has really driven me to recheck the plaint to ascertain what was actually the pleaded; I mean what the appellant who was the plaintiff pleaded as the base of his claim. From the plaint, the damages which lead to the injuries allegedly sustained by the plaintiff is pleaded under

paragraphs 7, 8 and 9 of the plaint; which when read between lines the contents of the said paragraphs, it can be found that the plaint did not confine the claim to just trespass to goods as alleged by the appellant, it went as far as raising complaints of respondents encroachment to mining sites which was belonging to the members of the appellant by putting their beacons and interference to the mining area of the members of the appellants.

According to the plaint in paragraph 7, of the plaint, that access to the mining site resulted into the respondents asporting 360 sacks of gold bearing rocks materials. In paragraph 8 of the same plaint the complaint was that the respondent trespassed the appellant's mining area and activities, without negotiation and erected the beacons after surveying the area without the permission of the appellant or its members.

The other issue which was complained of, is the act of the respondents of procuring the legal mining rights on the appellant's area of operation, which resulted into the halting of the mining activities of the members of the appellants.

In paragraph 9, the complaint was on what the plaintiff (appellant) referred to as unfair practice of procurement of the mining rights over a place which legally formed cooperative society had been doing its activities for over 20 years.

From these exposition, it goes without saying that, the plaint did not plead trespass to the goods or chattel, but trespass to the mining sites, and interference to the mining right of the members of the appellant.

These right, were really in the commission's capacity to decide under section 119 of the Mining Act [Cap 12 R.E 2019]. Under that provision the commission is mandated to decide all the dispute between persons engaged in the 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 the boundaries of any area subject the mineral's right as reflected in subsection (1) (a) of section 119 of [Cap 12 R.E 2019]

Now, looking at the content of paragraph 7, 8 and 9 of the plaint, it goes without saying that the dispute was not really based on the tort of trespass to goods, but was and extended to trespass to mining cites and to the

mining right. This was supposed to be tabled not to the District Court but to the Mining Commission as established under section 21 of the Mining Act (supra) for the commission to decide the dispute and whoever dissatisfied by the decision of the Commission he was supposed to come to the High Court by way of appeal as provided under section 121 of the Mining Act (supra).

This means the District Court was in the first place not clothed with the jurisdiction to entertain the case at hand. It was supposed to rule that it had no jurisdiction to entertain it. That said it is therefore true that it assumed the role of the commission for what it held, but with respect to the appellant, that misconception started from the pleading from which the said court based in its findings.

It should be noted that, the question of jurisdiction is basic to every case; it goes to the very root of the court to decide the matter before it. That means at the filing and registration stage of any case, the registry officer must reject cases which on the face of it, the court lacks jurisdiction, if that escapes the attention of the registry officers then the adjudicator must, if so find, declare that, the court has no jurisdiction and halt the proceedings. This is because proceedings and decision based on

such kind of cases shall on appeal be declared a nullity on appeal. See **Fanuel Mantiri Ngunda vs Herman Mantiri Ngunda and 2 others** [1995] T.L.R 155 CAT.

Basing on the pleading which according to the authority in the case of **James Funka Gwagilo vs Attorney General** (supra) binds the parties, and the authority in the case of **YARA Tanzania Limited vs Charles Aloyce Msemwa and 2 other** (supra) which held that the proceedings and judgment should base and be results of pleadings, it goes without saying that, since the pleading clearly indicated that the court had no jurisdiction, for the facts pleaded clearly indicated that the matter was falling under the powers of the Mining Commission. I thus find that the trial court had no jurisdiction therefore whatever went on including decision were nullity as it based on nullity.

As this ground suffices to dispose of the appeal, I find discussing other grounds of appeal will be of no value other than academic purpose which I am not prepared to spend this court's precious time for.

In fine, the appeal allowed, the proceedings before the trial court are quashed and the judgment is set aside. The proceedings and the judgment

are declared the null and void. The appellant is advised if still so desire to file or refer the dispute to the ommission as directed by section 119 of the Mining Act [Cap 12 R.E 2019].

It is accordingly.

DATED at **MWANZA**, this 12th August 2021

J. C. TIGANGA

JUDGE

12/08/2021

COURT:

Judgment delivered in open chambers in the presence of the counsel for the parties as per coram.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA
MWANZA

J. C. TIGANGA

JUDGE

12/08/2021