IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 166 OF 2019

(Appeal from the Judgment of the District Court of Kinondoni at Kinondoni in Civil Case No. 92 of 2017 before Hon. C. Kiliwa, **RM** dated 29/08/2019)

JOSEPH CHEPA T/A NRJ COMPANY LIMITED.....APPELLANT

VERSUS

VGK COMPANY LIMITED..... RESPONDENT

JUDGMENT

30th Sept, 2021 & 22nd Oct, 2021.

E. E. KAKOLAKI J

Before this court is the appellant Joseph Chepa T/A NRJ Company Limited, who after being discontented with the judgment of the District Court of Kinondoni at Kinondoni in Civil Case No. 92 of 2017, handed down on 29/08/2019 dismissing his suit is appealing equipped with four grounds of appeal going thus:

1. That the Honourable Trial Court grossly erred in law and fact in not accord any weight the evidence of the Appellant which established conclusively that the Respondent herein breached the contract as it failed to pay the appellant the agreed sum of money for the work done.

2. That the Honourable Trial Court grossly erred in fact and law in relying on the unfounded and contradictory evidence of the respondent.
3. That the Honourable Trial Court grossly erred in fact and law for having properly found that the Appellant and the Respondent has entered into a binding contract, but failed to award the claimed compensation and/or damages to the Appellant for making follow ups of mining royalty and obtained licence.
4. That the Honourable Trial Court grossly erred in fact and law for failure to take into account the weight of documentary evidence tendered by the Appellant's side.

It was appellant/plaintiff's case during the trial through PW1 and PW2 that, sometimes 2015 he entered into agreement with the respondent to look for mining sites and process mining licences on her behalf in which he performed his part including payments of all necessary fees. The contract and nine (9) copies of Primary Mining Licences for sand mines at Mkuranga District and fees receipt worth Tsh. 5,000,000/- were tendered in court and admitted as Exh. P1 collectively. It was undisputed term of the contract that, as consideration for the work done the appellant be paid Tshs. 2,000/= per each trip mined from Konje sand mining site and Tshs. 100,000/= per each acre of mining site secured at Mwakatobe area and other farms (mining sites). The appellant claimed the respondent breached the contract when refused to pay him as per the agreed terms. Therefore he was entitled to compensation of Tshs. 10,633,000 for 106.33 acres of sand mines plots, Tshs. 2,300,000/= for 23 acres of Mwakatobe area, 2,700,000/= for 27 acres of Kufa area, Tshs. 250,000/= for 2.5 acres at

Makama Hassan area, Tshs. 10,000,000/= for 5,000 trips of sand mined at Kunje Ngombaremwiru area mining site and refund of Tshs. 5,000,000/- being mining fees as exhibited in Exh. PE 1, all totalled Tshs. 30,883,000/=. Further to that he claimed for general damages to the tune of Tshs. 15,000,000/= , interest at the rate of 25% of the decreed amount to the date of judgment and 7% interest of the same amount to the date of full payment as well as the costs of the suit. In rebuttal both in the Written Statement of Defence and during defence hearing through DW1 and DW2, the respondent apart from admitting existence of the said contract, contended that, the appellant never performed his obligation under the contract as the mining sites allegedly secured by the appellant were in fact obtained by one Jumanne Omari Mbwela (DW2), thus a submission, the appellant was not entitled to any remedy from the court. The trial court disbelieved the appellant's story as it adjudged the case in the respondent's favour by dismissing the suit. It is from that decision as stated earlier herein above this appeal has been preferred.

When the matter came for hearing parties opted to dispose it of by way of written submission and I thank them for complying with the filing schedule orders something which made possible this judgment. The appellant proceeded unrepresented while the respondent enjoyed the services of Mr. Emmanuel Mbuga, learned advocate. I had an ample time to peruse the lower court record and consider the fighting arguments from both parties. I am not intending to reproduce the whole submission and evidence adduced during the trial as I will be referring them in the course of determining issues as raised by the appellant, as this court being the first

appellate court is entitled to reappraisal of evidence or rehearing of case. See the case of **Hassan Mfaume v R** (1981) TL.R 167.

In his first ground of appeal the appellant is faulting the trial magistrate for his failure to award him compensation as claimed despite of cogent evidence from his side and in contravention of the provisions of section 73(1) of the Law of Contract Act that entitles the party to compensation for the loss or damages sustained out of breach of contract by the other party. In riposte Mr. Mbuga submitted the appellant failed to establish the three mandatory P's for proving specific damages as stated by this court in the case of **Xiubao Cai & Another Vs. Mohamed Said Kiaratu**, Civil Appeal No. 87 of 2020 (HC-unreported) as he ought to have **pleaded**, **particularised** and **proved** the said claimed compensation as per the requirement of section 110(1) and (2) of the Evidence Act. Since in his evidence the appellant failed to specify whether the tendered mining licences were connected to the alleged mining sites in which his claims are based then there is no proof that he discharged his obligation under the contract, thus he was not entitled to compensation, the court was informed. Reliance was place by Mr. Mbuga on the cases of **George Ngando Vs. Bakhita Salum Ally**, Land Appeal No. 7 of 2019 (HC-unreported and **Soulter River Auction Mart and Co. Ltd Vs. D.K.M Legal Consultants & Another**, Commercial Case No. 67 of 2016 (HC-unreported). It is trite law under section 110(1) and (2) of the Evidence Act, [Cap. 6 R.E 2019] that, whoever moves the court to enter judgment in his favour as any legal right relying on the existence of any fact which he alleges, must prove that, that fact exists. And in so proving the standard is on the balance of probabilities for the court to believe that occurrence of

the event was most likely than not. This was the stance also of the Court of Appeal in the case of **Mathias Erasto Manga Vs. M/S Simon Group (T) Limited**, Civil Appeal No. 43 of 2013 (CAT-unreported) when the Court made reference to the case of **Re Minor** (1996) AC 563 where it was held that:

> *"The balance of probability standard means a court is satisfied an event occurred if the court considers that, on the evidence the occurrence of the event was more likely than not."*

What is discerned from the record and submission by both parties, it is uncontroverted fact, appellant did entered into contract with the respondent for securing the mining sites and Primary Mining Licences as per the terms stipulated in exhibit PE1. The only dispute is whether the appellant discharged his duties under the contract or not in which case Mr. Mbuga claims he failed to do. I disagree with Mr. Mbuga's assertion as the appellant through PW1 at page 30 of the typing proceedings without objection tendered the contract and nine (9) photocopies of Primary Mining Licences and receipt proving payment of mining fees as Exhibit PE1 collectively to prove that he discharged his obligation under the contract. PW1 went on to tell the court on how the said licences were received before he was denied of his payment and I quote:

> *"I gave them all the information and Fidelis Lebabu received the licences. We agreed that the payment be done effective after submitting the licence. Unfortunately, until now there is no any money paid to me. The defendant refused to pay me."*

The appellant was never cross examined by the defendant to discredit his evidence on the fact of securing the said Primary Mining Licences and handing them to the respondent. And during defence when DW1 was cross examined as to whether he knew who prepared the said licences he is recorded at page 40 of the typed proceeding to have said he does not know. Failure to cross-examine on important matters implies admission of the facts stated by the opposite party. That proposition was confirmed in the case of **Jaspini s/o Daniel @ Sizakwe Vs. DPP, Criminal No. 519 of 2019**, (CAT-unreported) Court of Appeal held that:

> *"....it is settled law that failure to cross examine a witness on an important matter implies acceptance of the truth of the witness evidence in that respect..."*

With the above cited position of the law and fact that the respondent failed to cross examine on such important fact of securing and handing mining licences to the respondent after they were tendered in court, I remain with no scintilla of doubt that, the appellant discharged his obligation under the contract and therefore was entitled to payment as per the contractual terms. The defence raised by the respondent (DW1) during her defence at page 39 of the typed proceedings that when went for inspection of the mining sites found the sites to contain minerals which they did not want, in my considered opinion is unjustifiable for not being pleaded in her written statement of defence. It is the law, parties are bound by their pleadings. Failure of the respondent to plead in her WSD the fact(s) that the secured mines by the appellant did not contain the required standard of minerals (sand) denies her of the right to consideration of that defence by this

court. In the case of **Charles Richard Kombe t/a Building Vs. Evarani Mtungi and 2 Others**, Civil Appeal No. 38 of 2012 (CAT-unreported), the Court of Appeal expressed the law and object of requiring parties to adhere to their pleadings and had this to say:

> *"It is cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings unless an amendment is permitted by the Court. The rationale behind this proposition is to bring the parties to an issue and not to take the other party by surprise. Since no amendment of pleadings was sought and granted the defence ought not to have been accorded any weight."*

Applying the above cited principle to the fact of this case where the respondent failed to plead such important defence, I hold the trial magistrate was at err when failed to find that the respondent was in breach of contract for his failure to pay the appellant the agreed amount as per their contract exh. PE1. Save for the case of **Xiubao Cai & Another** (supra), the rest of cases relied on by the respondent I find could not save her day for being irrelevant to the facts at issue. Thus the first ground of appeal has merit and I uphold it.

Next for determination is the second ground of appeal where the appellant is complaining the trial magistrate was in error to rely on contradictory evidence of the respondent to hold the appellant supplied or handed the farm with unwanted mineral/sand without requiring the respondent to so prove by documentary evidence. In his response Mr. Mbuga contested the submission arguing that the appellant was trying to shift the burden of

proof to the respondent. I think this ground need not detain me as the same point has been addressed when determining the first ground that, the defence of securing mines with unsatisfactory mineral material is unfounded for not forming part of the pleadings of the respondent's WSD. Even if the same was pleaded still I could hold it was not proved as under section 110(1) and (2) of Evidence Act, it was for the respondent who asserted the minerals did not meet the required standard, who was to so prove in which case she failed to do. Thus the second ground of appeal also has merit and I uphold it as well.

As to the third ground it is contended by the appellant that the trial magistrate having found the contract was binding was in fault when failed to award him the claimed compensation and/or damages after performing his part in the contract as agreed. Mr. Mbuga is contesting the submission arguing that the appellant did not discharge his obligation, as there was no any proof of the respondent using such alleged acres nor was there any for securing the same for the respondent. Thus prayed the court to dismiss the ground and appeal in its entirety. I partly disagree with Mr. Mbuga's submission that there was no proof that, the appellant secured mining sites for the respondent as that fact has already been determined in the first ground of appeal to the effect that he did as there is also proof of the nine licences exhibit PE1 collectively, handed to the respondent. The only remaining issue for determination is whether the appellant proved the damages as claimed. To start with the special damages of Tshs. 30,883,000/-, it is trite law that, special damages being ***special expenses incurred or monies actually lost*** must be specifically pleaded and strictly proved. See the cases of **Zuberi Augustino Vs. Anicet Mugabe**,

(1992) TLR 137, **Peter Joseph Kilibika and Another Vs. Partic Aloyce Mlingi**, Civil Appeal No. 39 of 2009 (CAT-unreported) and **Reliance Insurance Company (T) Ltd and 2 Others Vs. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (CAT-unreported). In the case of **Peter Joseph Kilibika and Another** (supra) the Court of Appeal when deliberating on how special damages should be established and proved before it is granted by the court cited with approval the holding of Lord Macnaughten in **Bolog Vs. Hutchson** (1950) A.C 515 at page 525 on special damages, where it was stated that:

> *"... such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore,* ***they must be claimed specifically and proved strictly.***" (Emphasis supplied)

Similarly in the case of **Reliance Insurance Company (T) Ltd and 2 Others Vs. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (CAT-unreported) the Court of Appeal on proof of specific damages said:

> *"The law in specific damages is settled, the said damages must be specifically pleaded and strictly proved..."*

In this case as stated before herein above the appellant pleaded the said special damages in paragraph 3 and particularised it in paragraph 6 of the plaint. He also managed to tender the contract, nine (9) Primary Mining Licences issued in the names of the respondent and receipt for the paid fees amounting to Tshs. 5,000,000/= as exhibit PE1 collectively in his urge to prove the claimed specific damages. However, as rightly submitted by Mr. Mbuga in the said nine (9) licences it is not specifically indicated which

licences amongst nine licences were meant for the areas claimed to have been secure by the appellant for the respondent to wit: Mwakatobe, Kunje, Kufa's family and Makame Hassan's areas. Further to that it was not proved by the appellant with certainty how many acres were secured by him for the respondent so as to justify payment of Tshs. 100,000/= per each secured acre nor was there any documentary or oral proof that 5,000 trips of sands amounting to Tshs. 10,000,000- were mined from Kunje NgombaleMwiru mining site, so as to strictly prove the claimed amount. As that is not enough a glance of an eye to the receipt of fees allegedly paid by the appellant for the respondent the same does not prove that the payment was made in favour of the respondent as the payer therein is Ngalaba R.J and not the respondent (VGK Company Limited). With all those discrepancies in the appellant's evidence I can hardly hold that he strictly proved the claimed compensation. It is therefore the finding of this court that, the appellant failed to strictly prove the claimed spefic damages of Tshs. 30,883,000/- as required by the law.

Having so found I now turn to consider the general damages as claimed by the appellant. The term general damages is not defined under our statutes. Black's law dictionary (7th Edition) defines general damages thus:

> *"Damages that the law presumes follow from the type of wrong complained of.* ***General damages do not need to be specifically claimed or proved to have been sustained"*** (Emphasis supplied)

Understandably from the above definition general damages does not need proof as it is awardable at the discretion of the court after the court has determined and quantified the damages suffered by the party. Only what the claimant is required to do is just to aver or plead it in the plaint. This position of the law secures legal validity from the case of **Peter Joseph Kilibika and Another** (supra) when the Court of Appeal quoted with approval the wisdom of Lord Dunedin as stated in the case of **Admiralty Commissioners v SS Susqehanna** [1950] 1 ALL ER 392, on award of general damages, where it was stated.

> *"If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question."*

In the present matter in paragraph 8 of the plaint the appellant averred general damages where he stated and I quote:

> *"8. That, the defendant's act of failure to comply with the terms and conditions stipulated in the executed agreement is tantamount to breach of the lawful contract and thus has caused great inconveniences and/or embarrassment, economic loss and mental agony to the plaintiff, for which the plaintiff claims the defendant for payment of Tshs. 15,000,000/= as general damages thereof to be assessed by this honourable court."*

As the law does not require the appellant to prove the claimed general damages, I have taken into consideration the fact that it not in dispute the

parties had entered into agreement for the appellant to secure mining sites and Primary Mining Licences for the Respondent which according to Exhibit PE1 collectively the appellant proved to have performed his obligation in the contract. I have also considered the fact that in so performing the obligations under the contract the appellant incurred costs including spending his time in making a follow up of the mining sites, processing and payments of fees for the secured licences though he failed to specifically prove the claimed special damages. To deny him general damages suffered out of breach of contract I hold is tantamount to double punishment in which is not the intention of this court to do as he has already been denied specific damages for want of proof. In my humble view justice will smile if the appellant is awarded general damages to that effects. Justice dictates that general damages of Tshs. 10,000,000/= will mitigate the suffering the appellant has gone through out of breach of the contact by the respondent. It is from that understanding I hold the third ground of appeal is partly allowed. With that finding I fill not obliged to address the fourth ground as it will add no effect to the appellant's appeal for being partly determined in the above addressed grounds.

In the premises and for the fore reasons and explanations, this appeal is partly allowed to the extent expressed above that, the appellant is awarded Tshs. 10,000,000/= as general damages.

The appellant is also entitled to costs of this appeal.

It is so ordered.

DATED at DAR ES SALAAM this 22nd day of October, 2021.

E. E. KAKOLAKI

JUDGE

22/10/2021

The Judgment has been delivered at Dar es Salaam today on 22nd day of October, 2021 in the presence of the Appellant in person, Mr. Alfred Rweyemamu Advocate for the respondent and Ms. **Asha Livanga**, Court clerk.

Right of Appeal explained.

E. E. Kakolaki

JUDGE

22/10/2021