IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 25 OF 2021

(Appeal from the decision of the District Court of Bukombe at Bukombe in Civil Case No. 03 of 2020)

LUMALA KISIMBU----------APPELANT

VERSUS

NICHOLAUS MICHAEL MASHAMBA----------1ST RESPONDENT

EVANCE EVARIST----------2ND RESPONDENT

FRANK MSONGOLO----------3RD RESPONDENT

JUDGMENT

Last Order: 27/10/2021
Judgment Date: 29/11/2021

M. MNYUKWA, J.

The appellant appealed against the Judgment of the District Court of Bukombe at Bukombe in Civil Case No. 03 of 2020 which was decided in favor of the respondents.

The background to this appeal is briefly that, sometimes in 1995 the appellant entered into an agreement with the 1st respondent over a

shamba measured 8.3 acres for the respondents to mine gold. The agreement was to the effect that the appellant was to get 1 sack out of 10 sacks of the rock bearing gold. Before 2005, parties were indifferent on honouring the agreement, and the 1st respondent claims leds to have bought the land from the appellant. The appellant sued at the ward tribunal and the judgment was entered in favour of the appellant who applied to the DLHT for execution. The execution was duly conducted and the respondent was evicted from the appellant shamba. Claiming not to be aware of the case in the ward tribunal, the respondent filed to the DLHT a Misc. Land Application No 139 of 2016 so as the DLHT to review its Order in Misc. Land Application No 133 of 2015. The appellant herein believes that, the DLHT cannot review its Order and therefore applied to the High Court for revision in Land Revision No 01 of 2017 of which the same was struck out for noncompliance with the requirements of the law. All done, the respondent resolved to file Civil Case No. 03 of 2020 which was decided in his favour. The appellant did not see justice and therefore knocked the doors of this court and filed this instant appeal with 5 grounds of appeal as hereunder;

1. *That the learned magistrate erred in law and facts by holding that the appellant used the plant belonging to the first respondent since 2015 to 2019 whilst it is the first respondent who rented the said plot to another user.*
2. *That the learned magistrate erred in law and facts by holding that the judicial process and its decision in the ward tribunal for Bukandwe did not terminate the mining agreement between the parties*
3. *The learned magistrate having held that the appellant did not obstruct the respondent from exercising their mining rights thus committed a grossly error when he granted the plaintiff a general damage to the tune of Tsh 30,000,000/=*
4. *The trial court failed to properly evaluate and analyze the evidence adduced at the hearing thereof*
5. *That the learned magistrate applied a wrong principle in assessing general damages.*

When the matter was coming for necessary orders, the appellant added three grounds of appeal as follows: -

1. *That the trial court erred in law and in fact to determine Civil Case No. 03 of 2020 while it had no jurisdiction to determine.*
2. *That the trial court erred in law for pronouncing/ entering judgment in favour of the respondent based on the documents collectively admitted as exhibit PE2 and exhibit DEX1.*
3. *That the disposal of the suit was proceeded by final pre-trial conference without a declaration from the mediator declaring that the mediation has failed.*

Submitting on the first additional grounds, he avers that, the trial court had no jurisdiction in terms of section 167(1) of the Land Act and section 4(1) of the Land Dispute Courts Act. He went on insisting that, looking at what constitutes a cause of action and looking at para 5, 6, and 7 of the plaint, and the relief sought under item (ii) of the plaint, it shows that the prayer is related to land. He insisted that the act of the respondent to pray for eviction of the defendant in the mine and processing plant touches possessory or usufructuary right on the shamba which in nature purely a land matter.

On the second additional ground he stated that the trial court erred in deciding the matter based on the documents wrongly

admitted. He went on that exhibit PE2 and DEX1 were wrongly admitted. He went on that the exhibits could not be collectively admitted as it is against the rule of evidence and compromise justice and therefore, prays the same to be expunged from the court records. Insistingly, he cited the case of **Antony M. Masanga vs Penina (Mama Mgesi) & Lucy (Mama Anna)** Civil appeal No. 118 of 2004 CAT and prays this court to follow the principle established in the cited case and expunge the exhibits in the court records.

On the 3rd additional grounds, he avers by referring to the typed court proceedings on corum dated 27.07.2020, 06.08.2020, and 09.09.2020 where it is not indicated whether parties failed to mediate before the matter was remitted to the trial magistrate for final pre-trial settlement contrary to Order VIIIC Rule 33(b) of the Civil Procedure Code Cap 33 RE: 2019. The omission vitiates the proceedings and the judgment. He, therefore, prays to remit the file for re-trial before another magistrate.

The appellant learned counsel decided to submit on the 1st, 2nd, 3rd, 4th, and 5th grounds of appeal on the memorandum of appeal for he enlightened that the grounds are intertwined. He went on that,

the oral evidence of PW1, PW2, PW3, and PW4 in respect of the claim that there was an agreement should not be regarded, for exhibit PE2 is to be expunged from records for being wrongly admitted.

He submitted by referring to section 95(1) (e) of the Mining Act 2010 and section 64(1)(a) and (b) of the Land Act cap 113 RE. 2019 that before the holder of the mineral right exercise his right under the license, must first seek consent from the surface holder and that consent must be in writing. He went on that in absence of the written agreement, the trial magistrate erred in holding that there was an agreement between parties.

He further submitted that, the respondent does not deserve the awarded damages for it is on record that the fault was on the side of the respondent who defaulted to honour the terms of the agreement. To cement his averments, he referred to page 47 of the typed proceedings that after the breach parties were mediated and the appellant was compensated at a tune of 250,000/=for unpaid debts by the respondent. He went on that, the respondent can not benefit from his wrongful acts.

On the award by the court at a tune of 30,000,000/=, he avers that the court erred for there is no reason for the justification of the award. Insisting he avers that court ignored the evidence of DW1 and DW2 that the respondent was evicted from shamba through the court order and it was illogical for the court to award the respondent at the expense of the appellant. He further submitted that there is no evidence as to the assessment contrary to what was held on the case of **The Cooper Motors Corporation Ltd vs Arusha Occupational Health Services** (1990) TLR 96.

He, therefore, prays this appeal to be granted with costs.

Responding to the appellant's submissions, Mr. Gervas Gabriel learned counsel, opted to respond to the grounds on the petition of appeal first, and later respond to the added grounds of appeal.

On the first ground on the memorandum of appeal that the appellant used the plant that belonged to the respondent, was not among of the issues for determination at trial court therefore can not be raised at this stage for it is contrary to the principle of law. citing the case of **National Bank of Commerce limited vs Lake Oil**

Limited Commercial Appeal No. 05 of 2014 HC. Where the court held that an issue not raised on trial will not be entertained on appeal.

On the second ground, the appellant avers that the magistrate erred in holding that the decision of the ward tribunal did not terminate the mining agreement between the parties. He went on that, the same was misconceived for the land rights are not of the surface land while the mining rights are secured through the mining license. He insisted that the failure of the respondent to remit the appellant's shares was an afterthought for it was the appellant alone who was benefiting from the illegal mining. He went on that the appellant was to report the matter instead of waiting till he was sued by the respondent.

Submitting on ground three and four together, he avers that these grounds are misconceived for thought, the trial court did not hold that the appellant did obstruct the respondents from exercising their mining rights and therefore it was fair and just for the trial magistrate to award them Tshs. 30,000,000/=. He went on that general damages are the discretion of the court citing the case of **China Friendship Textile Limited vs Our Lady of Usambara Sisters** (2006) TLR 70.

Furthermore, he went on disputing the cited case of Cooper (supra) that the circumstances are different from the case at hand.

He, therefore, claims that the appellant failed to establish the extent to which the trial court failed to evaluate the evidence on record.

Reacting on the added grounds of appeal, on the first added ground of appeal he submitted that, the respondent had neither claimed ownership nor interest over the appellant's land but the mining rights conferred to them by the law. Insisting, he cited section 2 of the Land Act Cap. 113 RE 2019 that defines the term land. He went on that, the basis for the respondent's prayer of eviction is to allow the respondents to exercise their mining activities which were obstructed way back in 2005. He, therefore, avers that the trial court has jurisdiction to entertain the matter.

Submitting on the 2nd added ground of appeal that exhibits PE2 and DEX1 were wrongly admitted, the appellant failed to show how the collective admission of the exhibits denies the appellant right to be heard as observed in the cited case of **Anthony M. Masanya** (supra)

On the third added ground of appeal, he went on that during mediation the appellant was represented by Advocate Frank Samwel. He went on that the trial magistrate declared to parties that further mediation was not worth it and remit the same to the trial magistrate. He went on that the same is curable under overriding objectives citing Written Laws (Misc. Amendment) Act, No 08 of 2018. He, therefore, prays this court to dismiss the appeal with costs.

In his rejoinder, on the first additional ground of appeal, he insisted that since the dispute pertaining a claim of rights over land, it was a matter concerning land within the meaning of section 167(1) of the Land Act and section 4(1) of the Land Disputes Court Act. He insisted that the district court of Bukombe had no jurisdiction to grant such reliefs.

On the second additional ground of appeal, he insisted that the law requires that the documentary evidence should be dealt with by one another and not collectively. On the case at hand, he insisted that the same was contrary to Order XIII Rule 4(1) and (2) of the Civil procedure Code Cap. 33 RE 2019. He insisted that a fair trial can only be achieved by tendering and admitting the exhibits one after another.

On the 3rd additional ground of appeal, he insisted that as long as the records are silent that the mediation was not marked closed before the case file was remitted to the trial magistrate, then such omission has the effect of rendering the trial proceedings a complete nullity.

On the 1st, 2nd, 3rd, 4th, and 5th ground of appeal, He referrers to section 95(1) of the Mining Act 2010 that before the holder of the mineral right can exercise any right under the license must first seek consent from the surface landholder and such consent or agreement must be in writing. He went on that the respondents were not required to exercise their rights conferred to by the mining license without proper agreement with the appellant. He claims therefore that it was illegal for the court to bless the illegal acts of the respondents.

He maintains that the respondents did not qualify for the award awarded to them by the trial court and therefore prays this court to allow the appeal with costs.

After the rival submissions from both parties, I now stand a position in determination of this appeal. And, as I find it wanting, I will determine the same in the modality submitted by the appellant starting

with the added grounds of appeal and winding up with the grounds advanced on the memorandum of appeal.

To start with the first additional ground of appeal, the appellant claims the court to have determined the matter while lacking jurisdiction the claim which was objected by the respondent. I have had time to go through the pleadings to include documents annexed and exhibits tendered at a trial court. What I observed is that from the origin of this matter as a whole, there is existence of land rights and mining rights which are governed by two different pieces of legislation.

The rights over the land which is governed by the Land Act Cap. 113 RE 2019, was determined by the ward tribunal that resulted in the eviction of the respondent from the disputed shamba. What is the subject of this appeal, emanates from the respondents' claims over his mining rights which were within the jurisdiction of the trial court. it appears from the records that, the dispute which involves the land rights between parties were resolved to its finality and the decision which led to the eviction of the respondent who by then claims to possess the disputed land still binds as it was neither revised nor set aside for the same was determined ex-parte.

I am in accord with the respondents learned counsel view that the trial court had jurisdiction to try the matter as against the appellant learned counsel who disputed the same. In our case at hand the respondent invited the trial court to determine the matter after claiming that the appellant obstruct the respondent from exercising the mining rights, this clearly suggests that there was contract between the two on how the appellant shamba will be used in the mining activities and how they will divide the proceeds resulted from the mining activities.

Thus, it is clear that the appeal is not a land dispute as it is not centred as to who is the ownership of the land. When I visited the plaint specifically on paragraph 3, 5 and the prayers (reliefs) advanced by the respondent before the court, it is clear that there is no anywhere where the respondent claimed the ownership of the shamba rather than the enforceability of the agreement between the parties on mining over the appellant's shamba. In the case of **Exim Bank (T) Ltd v Agro Impex (T) and others,** Land Case No 29 of 2008 (unreported) The court observed that in looking whether the court had jurisdiction or not, two things are important to be looked upon, the pleaded facts that may constitute the cause of action and the reliefs(s) claimed and

to determine whether the court had power to grant them and whether they correlate with the cause of action. As I have earlier stated, since the reliefs sought and the cause of action resulted from the breach of agreement, the trial court had the jurisdiction to entertain the matter and therefore this ground of appeal lacks merit.

On the second additional ground of appeal, the appellant claimed the trial court erred in admitting the exhibits PE2 and DE1 which were admitted collectively. It was the appellant's claim that the court erred by admitting the exhibits collectively while it ought to admit them separately. He cited the decision of this court in **Antony M. Masanga** (supra) that doing so denied the other party inadequate opportunity to be heard in respect to the particular exhibits. This was opposed by the respondent's learned counsel who avers that the counsel for the appellant failed to show how the same denied the appellant the right of being heard.

Upon going through the trial court's proceedings, particularly at page 24, I found that the counsel for the appellant objected the admission of Exhibit PE2 collectively on the reason that the witness had not identified it correctly. The same was strongly disputed by the

respondent on the reason that the objection was not merited because the said exhibits have been in custody of the witness (appellant) and had identified to have been involved in their execution. I examined exhibit PE2 collectively which are the sale agreement of the claim right over the "shamba" owned by the appellant and the agreement to pay debt of Tsh 250,000/=. As it was rightly submitted by the respondent, the appellant did not show how his right to be heard has been denied by these two documents to be admitted collectively. Looking at the facts rising this dispute, the two documents are related as they originated in the transactions which is very familiar to the appellant and they are very much related.

Again, the appellant involved in the execution of those exhibits because it was the basis of their relationship with the respondents and the said relationship was not disputed. The same goes to DE1 which are correspondence of the court and court broker and notice, they were also related. Therefore, it is my considered view that, the appellant had never been prejudiced as he is very much aware of the existence of the said exhibits. The same is well reflected in his evidence at the trial court on how he came into contact with the respondents.

With due respect, the case of **Antony M. Masanga** (supra) cited by the appellant is distinguishable in our case at hand because in the present case only two exhibits which originated in the same transaction were tendered and in fact the appellant executed the same while in the cited case it involved four exhibits which are not related and some of them were not in possession of the other party. Thus, this ground of appeal also lacks merit.

On the third additional grounds of appeal, the appellant claims that the suit was proceeded by the final pre-trial conference without declaration from the mediator, declaring that the mediation failed. The appellant claimed that the mediator contravened the requirement of Order VIII Rule 33 (b) of the Civil Procedure Code, Cap 33 R.E 2019. Responding on this point the respondents averred that it is true the trial court's proceedings do not indicate that the mediator declared the mediation failed but the same was declared during the mediation before the case file remitted to the trial magistrate. He added that the counsel for the appellant raised this ground because he was not a party to the mediation.

I had time to go through the handwritten and the typed trial court's proceedings. As it was conceded by the counsel for the respondent, it is true that the typed trial court's proceedings do not show that the mediator declared that the mediation has failed. But when going through the handwritten proceedings, the mediator clearly stated that the mediation has failed and remit the case file to the trial magistrate for necessary order. This is reflected in the handwritten proceedings in the coram dated 6/8/2020 where the mediator wrote to the effect that;

"Court:

Mediation marked failed. The file be placed before trial magistrate for his necessary orders.

Sgd

6/8/2020

Order: M 6/8/2020

Before trial magistrate

Sgd

6/8/2020"

From the above court's records, it is clear that the mediation was marked failed as it is reflected in the hand written proceedings which

is the original sources of information in which the typed proceedings is certified from it.

Therefore, I am settled that a conflict between the hand written proceedings and the typed proceedings, the ones to be resorted first is the hand written proceedings because the original information was taken through handwritten and the omission in typed proceedings was the typing error. My decision is supported with the decision of the Court of Appeal of Tanzania in the case of **Richard Jared vs The Republic**, Criminal Appeal No 23 of 2018, CAT at Dar es Salaam (unreported), the court observed that;" omission *of that portion in the typed proceedings forming the Record of the Court was a typing error."* Therefore, this ground of appeal has no merit and therefore fails.

I am now turning back to the other grounds of appeal that had been filed by the appellant in his memorandum of appeal before filing the supplementary grounds of appeal. The appellant fronted five grounds of appeal. In determining these grounds of appeal, I will determine ground no 3 and 5 jointly and the others grounds will be determined in isolation.

On the first ground, the appellant claimed that the learned magistrate erred in law and in fact in holding that the appellant used the plant belonging to the first respondent since 2015 to 2019. In this ground the appellant did not specifically address this issue in his submission as he joined altogether the first, second, third, fourth and fifth grounds of appeal and his position is that since Exhibit PE2 were collectively admitted and if expunged from the record for being collectively admitted, the allegation by the respondent that there was breach of agreement between the parties remained unproved.

Responding to this ground the counsel for respondent submitted that this issue was not framed by the trial court and therefore was not among the issue for determination before the trial court. He added that since it was raised in the appellate stage, it is against the principles of law and it is a trite law that new facts are not allowed on appeal stage. He buttresses his position by citing the case of **National Bank of Commerce Limited** (supra).

Upon determining this issue, I compelled to visit the trial court's judgement and I managed to see three issues that has been framed

by the trial court as it is reflected at page 2 of the typed judgement. The framed issues were;

(i) *whether the plaintiff have the legal mining rights over the disputed premises/land.*

(ii) *Secondly whether the defendant has obstructed the plaintiff to exercise their mining rights.*

(iii) *Thirdly what reliefs are parties entitled to, and*

(iv) *Lastly is whether the plaintiff has suffered damages.*

The above were the issue that were framed, considered and determined by the trial court. As it was rightly submitted by the respondent that this ground may attract the new facts at this stage and the law does not allow so. If the first ground of appeal was originated from the issue that has been framed by the trial court, this court will have the power to entertain it. Since the use of the respondent's plant by the appellant was just observed in the trial court judgement as reflected at page 6 of the said judgement, I am settled that this is a new issue that cannot be entertained in the appellate stage. Thus, this ground of appeal has no merit and thereby fails.

On the second ground of appeal the appellant claimed that the learned trial magistrate erred in law and facts by holding that judicial process and its decision in the ward tribunal did not terminate the mining agreement between the parties. In his submission to this ground, the appellant to a great extent questioned the validity of the mining agreement as the requirement of the law was not followed. He specifically alleged that section 95(1) (e) of the Mining Act, 2010 that requires the written consent of the holder of the surface right for an agreement to be valid. He also disputed the modality of admitting exhibit PE2 collectively.

On the other hand, the respondent submitted that this ground is misconceived that mineral rights are secured through the mining licence and if at all there was a dispute between the two on what they have agreed, the appellant would have reported the matter to the relevant authorities.

Upon going through the trial court's typed proceedings, particularly the evidence of DW1 at page 44-46 and that of DW 2 at page 47-50, their testimony alleged that the dispute arose after the respondent had refused to remit the share as they have agreed. This compelled the

appellant to institute the case before the ward tribunal in which its decision was delivered in favour of the appellant. It is clear from the record that the execution of the ward tribunal's decision, resulted the respondent to be evicted from the suit premises and hence denied his right to mine on the disputed land.

The trial court learned magistrate held that the mining agreement between the two was not terminated as the appellant demonstrated that he had land right on the disputed land.

In that reasoning I agree with the trial court decision because it is undisputed that the appellant had the land right and he had been declared so by the ward tribunal because the ward tribunal is one among the forum that deals with determination of land dispute including the ownership of the land. Though the decision of the ward tribunal is not available in the case file, the evidence of DW2 when cross examined as it is reflected at page 50 of the typed proceedings shows that the court broker was interested to return the shamba to the appellant and not the mining activities. This suggests that since the appellant was the one who moved the ward tribunal to issue an order to evict the respondent from the mining area and much as he was

aware that there was a valid mining contract with the respondent, as he was declared as a rightful owner, he was not supposed to obstruct the respondent from mining activities. The act of the appellant to execute the order and ultimately the respondent to be evicted in the shamba amounted to a breach of the contract in which the appellant cannot deny a blame.

The appellant's claim that, the requirement of section 95(1)(e) of the Mining Act. 2010 was not complied with. I see this averment to be an afterthought because ever since the parties had entered into the agreement and executed it, the issue of consent was not raised as the parties entered into agreement on 1995 and 2005 there was no such kind of the requirement. Therefore, it is the view of this court that, since the mining agreement by the parties were not terminated by the ward tribunal's decision the act of the appellant to obstruct the respondent is a breach of contract. Thus, this ground of appeal lacks merit too.

On the third and fifth ground of appeal, the appellant stated that the respondent is not entitled to general damages of Tsh 300,000,000 and that the trial court applied a wrong principle in assessing the

general damages. The appellant submitted that the trial magistrate wrongly awarded the respondent the general damages as the appellant did not obstruct the respondent and it is the respondent who breached the contract. Responding, the respondent learned counsel submitted that general damages are purely the discretion of the court, therefore the trial magistrate was right to order payment of general damages.

Upon going through the trial court judgement particularly on page 5 and 6, the trial court denied the award of the specific damages because the same need to be specifically pleaded but awarded general damages after considering the fact that the appellant obstruct the respondent from exercising his mining rights and still the appellant benefit from the mining licence as it was clearly seen in the trial court's proceedings.

In the case of **Peter Joseph Kilibika and CRDB Bank Public Company Ltd vs Patric Aloyce Mlingi,** Civil Appeal No 37 of 2009, CAT at Tabora (unreported), the Court of Appeal of Tanzania when referring to the decision of Lord Blackburn in **Livingstone v Rawyards Coal Co** (1850) App. Case 35 at page 39 defines damages as

"Damages generally are;

The sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation."

Coming back to our present appeal, it is well established through the evidence adduced in the trial court's proceedings that the agreement between the appellant and the respondent was breached after obstructing the respondent from exercising his mineral right. The appellant obstruct the respondent from 2015 and worse enough he was using respondent's licence to benefit until he was stopped by the ministry of mineral for illegal mining.

In the case of **Antony Ngoo and Denis Antony Ngoo vs Kitinda Kimaro,** Civil Appeal No 35 of 2014, CAT at Arusha (unreported) it was stated that;

"The law is settled that general damages are awarded by the trial court after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the award of general damages."

As it was rightly held by the trial magistrate, I agree that the respondent is entitled to be paid general damages of Tsh 30,000,000/.

The trial court reasoning and justification of general damages is rightly upheld. Thus, this ground of appeal lacks merit too.

On fourth ground, the appellant stated that the trial court failed to properly evaluate and analyse the evidence adduced at the hearing. Upon going through the appellant's submission, I did not manage to see how does the trial court failed to analyse the evidence adduced during the hearing. As it was rightly submitted by the respondent's counsel that the appellant did not explain how the court failed to analyse the evidence,

This issue should not detain me much, since the appellant has miserably failed to explain how the trial court failed to evaluate and analyse the evidence adduced during the hearing. I am of the view that the evidence presented by the parties were properly evaluated and analysed. Therefore, I find this ground of appeal being misplaced and thus fails.

In the final result, I uphold the trial court's finding in the Civil Case No 03 of 2020. Consequently, I find the appeal has no merit and I hereby dismiss it.

No order as to costs. It is so ordered.

M.MNYUKWA
JUDGE
29/11/2021

Right of appeal to the parties explained.

M.MNYUKWA
JUDGE
29/11/2021

Court:

Judgment delivered on 29th November, 2021 via audio teleconference whereby all parties were remotely present.

THE HIGH COURT OF TANZANIA
MWANZA

M.MNYUKWA
JUDGE
29/11/2021