IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CIVIL CASE NO. 10 OF 2021

BETWEEN

MATIKO ENOCK ISAAC & MWITA ENOCK ISACK..... PLAINTIFF

VERSUS

NORTH MARA GOLD MINE LIMITED..... DEFENDANT

RULING

A. A. MBAGWA, J.:

This ruling is in respect of preliminary objections that were raised by defendant's counsel one Waziri Mchome. The brief factual background that gave rise of preliminary objections and eventually this ruling may be recounted as follows;

The plaintiffs Matiko Enock Isaac and Mwita Enock Isack are holders of power of attorney from one Enock Isaack Mwita hereinafter to be referred to as '*the Donor*'. The Donor was the holder and beneficial owner of the Mining Claim Title No. 41311 in respect of a parcel of land situated within Tarime District. On 3rd day of September, 1999, the Donor entered into agreement with Afrika Mashariki Gold Mines Limited, the predecessor of the defendant, North Mara Gold Mine Limited. According to the agreement

(annexure- EIM2) to the plaint, the Donor granted sole and exclusive rights to Afrika Mashariki Gold Mines Limited (AMGM) to use the land, the subject of claim in this case, or any mineral right under the Mining Act 1998 in substitution for the claim for any purpose including but not limited to purposes ancillary to the conduct of mining operations and disposing, staking or dumping of mineral or waste products and construct any facilities necessary for those purposes. It was further agreed under clause 3 of the agreement that upon commencement of the mining operations on any part of the claim, the AMGM would pay the Donor the sum of US$ 6,000 and the Donor would be entitled to a royalty equal to the value of 1% of all gold produced from any part of the area covered by the claim.

It is alleged that the defendants did not act according to the terms and conditions of the contract. At paragraph 8 of the plaint, the plaintiffs claim that the defendant did not pay the Donor they said US$6,000 nor has it been paying 1% royalties of the produced gold as required by the contract. The plaintiffs contend that the defendant commenced the mining operations in respect of the Claim Title area in 2013 but she has never furnished the Donor with any information pertaining to gold production. According to the plaint, the Donor first became alert of the Defendant's production via reports of the

Tanzania Extractive Industries Transparency Initiative (TEITI) published in November 2015 then June 2017, March 2018 and December 2019.

The plaintiffs state that, basing on the reports of the Tanzania Extractive Industries Transparency Initiative (TEITI), they are entitled to a sum of US$ 21,610,827.00 being royalties of gold produced from 2013 to 1st July, 2017. Further, they claim for payment of royalties of gold produced for the years 2017, 2018, 2019, 2020 and 2021.

Upon service of the plaint, the defendant filed a Written Statement of Defence along with a notice of preliminary objections on points of law as follows;

1. In so far, the plaintiff alleges that his claim for outstanding royalty is from 2013 to 2021, that part of the alleged claim up to 2015 is time barred under section 3 of the Law of Limitation [Cap. 89 R.E. 2019] in that, by virtue of items 7 and 12 of Part I of the Schedule to the Act, claims under contract and on account, respectively, must be made within six years from the date the cause of action arose
2. The purported Power of Attorney attached to the plaint does not authorize the filing of the present suit.

When the matter was fixed for hearing of the preliminary objections, the plaintiffs were represented by Heri Kayinga, learned advocate whereas the defendant enjoyed the services of Waziri Mchome, learned advocate.

Submitting in support of the 1st preliminary objection, Mr. Mchome said that the claims in respect of 2013 to 2015 years are time barred. The defendant's counsel contended that according to paragraph 9, the plaintiffs were aware that production started in 2013 and there was no payment of royalty yet they did not take action. He continued that paragraph 18 of the plaint does not state as to when the cause of action arose. As such, the counsel submitted that the anomaly violates Order VII Rule 1(e) of the Civil Procedure Code. He added that the whole plaint is silent as to when the plaintiffs became aware of the commencement of production.

Moreso, it was the counsel's submission that if the plaintiffs wanted the claim covering 2013 to 2015 years to be within time, they should have stated precisely as to when they became aware. In absence of such statement as to when the plaintiffs became aware, the year 2013 should be taken as time for accrual of action, the counsel submitted. He elaborated that as per the item 7 of the schedule to the Law of Limitation Act, the limitation period for claim based on contract is six years.

He concluded that since the suit was filed on 18th August, 2021, the claims for 2013 to June 2015 and June 2016 are time barred. He further expounded that according to section 3(1) of Law of Limitation Act, any claim which is time barred is liable to be dismissed.

With regard to the 2nd objection in respect of the power of attorney, Mr. Mchome's argument was that the plaint does not show under which capacity the plaintiffs MATIKO ENOCK ISAAC and MWITA ENOCK ISACK have filed this suit, rather at the end of plaint the two have signed as plaintiffs.

The defendant's counsel submitted that on the face of the plaint, it is the donees of the power of attorney who are going to enjoy the decree because the donor of the power of attorney does not feature anywhere in the pleadings. As such, the counsel candidly submitted that the purported plaintiffs have no locus standi to bring the suit in their own capacity. On this note, Mr. Mchome cited the case of **Monica Danto Mwansasu (by virtue of power of attorney from Atupakisye Kapyela Tughalaga) vs Esrael Hosea and another**, Land Division No. 2 of 2021, HC Mbeya at page 6. He clarified that according to the decision in the above cited case, the donor should have featured in the plaint. He invited the court to strike out the case with costs for being incompetent.

In reply, Mr. Kayinga, learned advocate for the plaintiffs commenced his submission by stating the total claimed amount falling under the period which is allegedly out of time. He said that the objected amount is USD 7,195,801 being 1% of royalty for June 2013 to June 2016.

Responding on time limitation, Mr. Kayinga said that it is on record that the plaintiffs were made aware of the commencement of production in 2015 through Tanzania Extractive Industries Transparency Initiatives which is a creature of the statute under the Ministry of Minerals. He said that this is found under paragraph 10 of the plaint. He thus submitted that the cause of action arose in November 2015. Further, the plaintiffs' counsel while citing the case of **Isaack & Sons Co. Ltd vs North Mara Gold Mine Ltd**, Commercial Case No. 3 of 2020, HC at Mwanza, contended that the plaint should be read as a whole with its annexures. He insisted that, upon holistic reading, it becomes abundantly clear that plaintiffs became alert in November 2015. On that basis, he prayed the court find the objection without merits and consequently dismiss it with costs.

With regard to the second preliminary objection, the counsel submitted that the objection is equally devoid of merits. He said that the capacity to sue is pleaded under paragraph 1 of the plaint. He went on that non citation of

donor of power of attorney is not fatal as it does not prejudice the defendant in anyhow. Alternatively, the plaintiffs' counsel beseeched the court, in case it finds merits in the objection, to allow the plaintiffs to amend the plaint in order to insert the name of the donor of power of attorney with the view to attain the end of justice namely, to dispose of the suit on merits.

In rejoinder, Mr. Mchome clarified that the claims which are beyond the prescribed time are found under paragraphs 10,11,12, and 13 of the plaint. He said that the total claimed amount for the period in dispute is well above USD 7,195,801.

As to when the cause of action accrued, Mr. Mchome submitted that the plaintiffs did not plead that they became aware in 2015. He said that this fact came from the bar through submission. He further stressed that facts of the case cannot be deduced from the annexures as such, he distinguished the decision in **Isaack & Sons Co. Ltd** (supra).

Regarding the power of attorney, the counsel reiterated that the power of attorney does not authorize the plaintiffs to sue in their names. He said that the defendant will be prejudiced for the decree will only reflect the donees of power of attorney, who have no contractual relation with the defendant instead of the Donor. Consequently, Mr. Mchome urged the court to strike

out the matter with costs. He further insisted that the anomaly cannot be cured through amendment even by invoking overriding objective principle.

I have had an occasion to keenly canvass the rival submissions by the learned counsel of both parties. I also dispassionately went through the pleadings along with their annexures.

To start with the issue as to when the cause of action arose, it is noteworthy to state, at the very outset, that the position is abundantly settled that to determine cause of action, the pleadings must be read as a whole that is plaint and its annexures. See the case of **Chesco R. Kihwelo vs Pyrenthrum Company of Tanzania Ltd Civil Appeal No. 11 of 2019, HC Iringa.**

By reading both the plaint and annexures, it becomes apparently clear that the plaintiffs became alert of the commencement of production in November 2015 via the Fifth and Sixth Reports of the Tanzania Extractive Industries Transparency Initiative for 2013 and 2014 years which are annexures EIM3 and EIM4 respectively.

In the circumstances, it is my considered view that the plaintiffs pleaded that the cause of action arose in November, 2015. I therefore find the first preliminary point of objection without merits and consequently dismiss it.

Coming to the second point of objection, the defendant's counsel contends that the plaintiffs have no *locus standi* to institute the suit in that the plaintiffs brought the matter as actual claimants whereas they act on behalf of the Donor of power of attorney one Enock Isack Mwita. The thrust of Mr. Mchome's argument is that the plaintiffs ought to indicate in the pleadings i.e., plaint that they are acting under power of attorney. Mr. Mchome expounded that if the matter is left to proceed as it is, it would prejudice his client for the Donor who has contractual obligation with the defendant would not feature in the decree.

In reply, Mr. Kayinga said that the capacity to sue is pleaded under paragraph 1 of the plaint. Alternatively, Mr. Kayinga urged the court to order amendment in case it finds merits in the objection.

It is common cause that where a person sues on behalf of other, the party on whose behalf the matter is instituted should appear as a party to the case in the pleadings. In this case, as rightly submitted by Mr. Mchome, the

plaintiffs presented themselves as the actual claimants whereas, in actual sense, they are acting on behalf of the Donor one Enock Isaack Mwita.

Order III rule 1 and 2 authorise agents with powers of attorney to appear on behalf of the parties. The said provisions provide;

> 1. **Any appearance, application or act in or to any court, required or authorised by law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by his recognised agent or by an advocate duly appointed to act on his behalf or, where the Attorney-General is a party, by a public officer duly authorized by him in that behalf: Provided that, any such appearance shall, if the court so directs, be made by the party in person.**
> 2. **The recognised agents of parties by whom such appearances, applications and acts may be made or done are-**
> **(a) persons holding powers-of-attorney, authorising them to make appearances or applications and to do such acts on behalf of such parties;**

Indeed, upon carefully reading the above provisions, it goes without saying that power of attorney does not make an agent a party to the case rather it authorizes him to appear on behalf of the party. This connotes, in my views, that an actual party (donor of the power of attorney) must feature in the pleadings as rightly submitted by the defendant's counsel. See also **Monica Danto Mwansasu (by virtue of power of attorney from Atupakisye Kapyela Tughalaga vs Esrael Hosea and another**, Land Division No. 2 of 2021, HC Mbeya and **Royal Salum Mohamed (by virtue of special power of attorney from Sherdel Ghulam Rend) vs Registered Trustees of Masjid Sheikh Albani**, Civil Application No. 340/18 of 2019. In fact, the plaintiffs ought to indicate on the top of the pleadings as follows;

> ***'Matiko Enock Isaac and Mwita Enock Isack (by virtue of special power of attorney from Enock Isaack Mwita versus North Mara Gold Mine LTD'.***

In view of the above, non-inclusion of the party to the case makes the suit incompetent as the agent cannot, on his own, institute the suit.

In light of the above deliberations and authorities, it necessarily follows that the plaintiffs had no ***locus standi*** hence they were incompetent to institute the suit. Since the anomaly goes to the root of the matter (competence of

suit), I do not accept the invitation by the plaintiffs' counsel to order amendment. Indeed, as correctly submitted by Mr. Waziri Mchome, the error cannot be salvaged via the overriding objective principle.

In the result, I find the suit incompetent before this court and consequently strike it out with costs.

It is so ordered.

Right of appeal is explained.

A. A. Mbagwa

JUDGE

13/10/2022

Court: Ruling has been delivered in the presence of Heri Kayinga, learned advocate for the plaintiffs through teleconference and Waziri Mchome, learned advocate for defendant this 13th day of October, 2022.

A. A. Mbagwa

JUDGE

13/10/2022