IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB - REGISTRY OF MWANZA

AT MWANZA

CIVIL CASE NO. 29 OF 2016

JOHN BARNABA MACHERA ---------- **PLAINTIFF**

VERSUS

NORTH MARA GOLDMINE LTD ---------- **DEFENDANT**

JUDGMENT

Feb. 7th & March 9th, 2023

Morris, J

The kernel of cause of action for this case is the hybrid of tortious and criminal acts. The suit involves a dispute between two neighbours. Both are owning and operating a respective goldmine site bordering one another. The plaintiff accuses the defendant of having caused his stone crusher machines; operating motors; working tools; bags of gold stones and other property to be damaged and removed by the police. Consequently, the plaintiff sues the neighbouring defendant company for various reliefs. *One*, Tshs. 6,670,000,000/- specific damages; *two*, interest at 25% commercial rate from date of cause of action to judgement; *three*, general damages; *four,* court-rate interest on decretal sum; and *five and last*, costs of the suit and discretionary reliefs by the Court.

The deciphered history of this case is that the plaintiff is a licenced businessman dealing with small scale gold mining. By 2008, he had a valid Primary Mining Licence (PML 0003455) which was converted to a Mining Licence (ML 441/2011) in September 2011. Incidentally, his mining area borders that of the defendant's mining site. Both sites are situated at Nyamongo area, Kerende village, Kemambo ward -Tarime District. Allegedly, the cause of action herein arose between April 9th – 11th, 2008. It is pleaded further by the plaintiff that, the defendant made false, unfounded, malicious and unreasonable report to the police.

The plaintiff also alleged that, acting on the foregoing report, the police; on April 11th, 2008, destroyed the plaintiff's property on his site and took away some of them. Unsurprisingly, the defendant denied all allegations and craved for dismissal of the suit with costs. Out of such rivalry/contention, eight (8) issues were framed for determination by the Court.

1. Whether the defendant made a false, unfounded, malicious and unreasonable report or complaint to the police that the plaintiff was operating stone crushing machine which was stimulant to theft of gold stones from the defendant.

2. Whether the police destroyed and damaged the plaintiff's property and mining structures, acting on malicious and unreasonable complaint or report from the defendant.
3. Whether the defendant initiated, triggered and caused to be destroyed properties of the plaintiff by malicious and unreasonable report or complaint.
4. Whether the police ordered the plaintiff to stop mining activities on his mining area.
5. Whether the plaintiff entered into an agreement of Tshs. 150,000,000/-.
6. Whether the plaintiff entered into hire contract with TIANFU Co. Limited for hiring mining equipment or crusher machine.
7. Whether the plaintiff suffered damage.
8. To what reliefs are the parties entitled to.

The plaintiff enjoyed legal representation from Dr. Chacha Murungu and Mr. Octavianus Mushukuma, learned advocates. The defendant was represented by Mr. Faustine Malongo and Ms. Carolyne Kivuyo, learned counsel. Pursuant to ***the Civil Procedure Code*** (***Amendment of First Schedule***) ***Rules***, 2021; parties filed respective witness statements. On his part, the plaintiff had six (6) statements for PW1-PW6 respectively. Also, a total of eight (8) exhibits from the

plaintiff were admitted. However, only one witness (DW1) had his statement filed in defence. Through cross examination of PW1, the defendant tendered exhibit D1.

Nevertheless, the defence successfully prayed that, contents of paragraphs 14, 15, 20, 24 and 26 of John Barnaba Machera's (PW1's) witness statement should be ignored for containing inconsistent evidence to both cause of action and framed issues. That is, the Court admitted PW1's statement subject to ignoring evidence in those paragraphs which specifically established that the defendant, his agents or employees were responsible for actual destruction of plaintiff's property. On such basis, testimonies from all witnesses will be synthesised in respect of appropriate framed issues above.

Furthermore, parties secured an opportunity to file respective written closing speeches. The Court appreciates the smooth-tongued final submissions from each party's pair of counsel. In the main, the submissions summarise strengths of party's case and highlights weaknesses in opposite side's state of affairs. I have objectively taken all submissions into consideration while resolving the framed issues.

I will now start with the **first issue**. Parties are at loggerheads with the defendant making or not making a false, unfounded malicious and unreasonable report/complaint to the police alleging that the

neighbouring plaintiff's mining activities were stimulating theft of gold stones from the defendant. To answer this issue affirmatively, I humbly think, the plaintiff was with a task of proving five (5) things. I will address them. One at a time.

One; who, from the defendant company, actually reported the alleged problem. The plaintiff's pleadings, testimonies and submissions allege that the defendant is the one who made the report. To prove the said assertion, the prosecution; I am quick to observe, is overly relying on hearsay evidence. None of the procured witnesses had a personal knowledge of the actual reporting. PW1-the plaintiff, simply pleaded and restated that it was the defendant who lodged the complaint. PW3 - the then Officer Commanding the District (OCD) for Tarime district, expressly testified that the alleged report was made to the Mara Regional Police Commander (RPC), by the name of David Ole Saibuli.

Like PW1, PW3 too, was not there when the alleged report was purportedly lodged. Precisely, under paragraph 4 of his witness statement, PW3 authoritatively deposes that the RPC **told him** over the telephone that he (RPC) had received complaint from the defendant's General and Security Managers. Names of such officers, in so far as reporting is concerned, remain anonymous. Further, the RPC was not summoned to testify on such allegations. More so, at the wake of PW3

testifying when he no longer was a spokesperson for the district or the regional police issues. Precisely, he had already retired from the force.

In addition to that, it was his barefaced testimony that, PW3 attended the alleged meeting with the foregoing defendant's officials. That attempt notwithstanding, several unusual essentials of police *modus operandi* are too obvious. Let me sieve them. A complaint was made from the complainant's office; the police arranged for the meeting for some event not formally booked in their records; senior police officer used public resources to travel from far-away places to attend the meeting in the complainant's offices; the corporate-police formal meeting had a verbal agenda; the police, once again, recorded no formal statement at the alleged meeting; the said meeting had no minutes recorded either; the police did not commence any investigations for the reported events; they too did not make any physical visit or verifications of the parties goldmine sites' boundaries; the next day they went straight to demolish the plaintiff's property; *et cetera, et cetera!*

Midst of all such inconsistencies, in my view, the plaintiff's tale would be too rib-tickling to be close to the truth. All the same, if the reporting is hearsay-based, the law is not accommodative of such alleged fact. That is, under the law, claims premised upon hearsay disserve no consideration. That is the spirit of section 62 of ***the***

Evidence Act, Cap 6, R.E. 2022. On the same footing are cases of ***Rosemary Stella Chambe Jairo v David Kitundu Jairo***, CAT Civil Application No. 517/0/2016; ***James Bernado Ntambala v Furaha Denis Pashu***, CAT Civil Application No. 178/11/216; and ***Leopold Mutembei v Principal Asst. Registrar of Titles & Another***, CAT Civil Appeal No.57/2017 (all unreported).

On the same legal foundation as presented above, the testimony of the only defence witness (DW1) is discarded in so far as it introduces matters that are not founded on his own knowledge. I am mindful of the fact that, the principle of hearsay, has been the anchor of the prosecution side in challenging the defence. However, the weaknesses in the defence case do not exonerate the plaintiff from proving his case on the standards laid down by the law. Surely, law casts a duty on a party alleging to prove his allegations fully. Sections 110 and 111 of the ***Evidence Act***, Cap 6 R.E. 2022 and cases of ***Barelia Karangirangi v Asteria Ntalwambwa***, CAT Civil Appeal No. 237/2017; ***Dominicus Zimanimoto Makukula v Dominica Dominicus Makukula & 3 Others***, CAT Civil Appeal No. 359/2020; ***Anthony M. Masanga v Penina (Mama Mgesi) & Another***, CAT Civil Appeal No. 118/2014; and ***Jasson S. Rweikiza v Novatus R. Nkwama***, CAT Civil Appeal No. 305/2020 (all unreported) are adopted accordingly.

Two; to whom, in particular, the report or complaint was made. Auxiliary to the above, the plaintiff's allegations are that the complaint was lodged with the police. Hearsay aside, it remains unclear whether the reporting was done to the purported RPC in his personal or official capacity. Both PW1 and PW3 are sincere on this point. None of them is disclosing, with certainty, at what police station or post the complaint was made. Even within the alleged meeting, it is not clear if the matter was being handled under the regional or district mandates. PW3 stated that he supervised the exercise of damaging and uprooting the plaintiff's property. He, however, did not tender the report he made to the authority regarding details of how he accomplished the assignment.

Nevertheless, exhibit D1 which was from RPC's offices, is silent as to both the alleged defendant's report and/or having received any report from someone, whomsoever. Paragraph 3 of the said letter (exhibit D1) simply confirms that, on the fateful day (11.04.2008), the police undertook a special operation (*msako maalum*). Hence, it remains a puzzle whether the police acted *suo mottu* or they were executing an order from the superior authority to the regional division or they acted on anyone's complainants. It was the plaintiff who should have put the missing jigsaw blocks in place for this incomprehension to be sorted out in his favour.

Three; the time and day when the alleged reporting was done. To answer this query, one needs to have the first two (2) interrogations above conclusively settled. As it is the finding of the court that the first enquiry is essentially hearsay, it is natural that this one too falls in the disconcerted pool of facts. In this connection, paragraphs 7 and 8 of the plaint also vaguely answer this question. Undeniably, both paragraphs state that the alleged reporting/complaint was 'on or before 11th April 2008'. To me, the recipient of the report/complaint, if there were any, would have been the fit witness to squarely drive this point home. The plaintiff's current marshalled evidential-plan is subordinate to the best evidence rule. Lest, the rules against hearsay are to be transgressed. This Court, I am confident and respectful, is not ready for such ridiculing invitation.

Four; the medium through which the reporting was done by the defendant should be proved. Once again, the relevant witness to this point is the then OCD (PW3). However, all that is gathered from his witness statement and testimony during cross and re-examinations, is that he received a telephone call from his boss who had received the alleged complaint. The latter's testimony is not before the Court to prove the medium from/by which he received the alleged complaint. It is uncertain if it was verbal (oral/telephonic), written (letter, email of

telefax) or otherwise. Unquestionably, a respective medium used by the defendant, if any, would need a different way of proof.

Five; the nature of the complaint, if any, being false, unfounded malicious and unreasonable. Having determined the other four questions above, the Court now needs to address the correctness or falsity of the complaint. In my profound view, this, too, is going to be a straightaway undertaking. If the plaintiff had proved the existence of the report, the next huddle for him would obviously be proving the falsity, unfoundedness, maliciousness and unreasonableness of the said compliant/report. This objective, he has not been able to achieve.

To begin with, his pleadings front malice on the part of the defendant in relation to the alleged report. I am aware that, under Order VI Rule 10 of ***the Civil Procedure Code***, Cap.33 R.E. 2019, the plead of malice calls for no setting out of the circumstances from which the same is to be inferred. However, to me, such relaxation of the rule does not go the extent of exonerating the plaintiff from proving malice of the defendant during the trial.

As it for the suit on malicious prosecution, the focal proof of malice, in the present suit, should target at establishing that the defendant had no probable cause or he acted maliciously. The reasoning of the courts in ***Mbowa v East Mengo Administration*** [1972] EA

353; ***Yonah Ngassa v Makoye Ngasa*** [2006] T.L.R. 123; and ***North Mara Gold Mine Ltd. v Joseph Weroma Dominic***, CA Civil Appeal No. 299 of 2020 (unreported) are accordingly adopted.

In contrast to the above proof-bar, the plaintiff is categorical that the alleged report was given to RPC on 9th April 2008 while he was not present. PW3 (ex-OCD) who did not witness the actual report being made, if it actually were made; was also sincere (during cross examination) that when a complaint is made to them, the police operate according to criminal procedural law and orders. Among other mandatory steps, according to him, would entail the report being given the Police Report Book (RB) Number followed by Investigation Report (IR) Number, where applicable. But, in this suit, none of the two were in existence. Further, as the plaintiff did not prove existence of the complaint from the defendant, as observed earlier, the obscurity on this issue is even darkened.

In another offs-target shoot, PW3 testified further that, the alleged report by the defendant was for a meeting but not for crime. To him, that was the reason for not giving the complaint/report the requisite RB/IR Numbers. Another less helpful scheme to the plaintiff, was PW3's testimony that he attended the meeting where one agenda was tabled and deliberated on. That too, in the standards set by the ex-OCD-witness, did not seem to qualify as report or complaint worth being given subject numbers. Further, he added that no written statement of the complainant from the defendant was made;

and that, if it was made, it should have been made to a person to whom the defendant reported. Still in the vicious circle of unknowable due to hearsay.

Further, if the alleged meeting and outcome therefrom were matters to go by, the agenda centred on the increase of the crime rate due to "gold stone crusher machines placed by intruders in the mining area of North Mara Gold Mine Limited" (see paragraphs 9 and 10 of the witness statement of PW3). This proven fact notwithstanding, the said witness also testified that as a good citizen, the defendant -like any other set of citizenry, is not precluded to report occurrence of crimes in the society. I am of settled mind that, the reporting turns to be malicious, if it is later investigated by the mandated authorities of the state and the opposite findings are revealed.

The Court appreciates the plaintiff counsel's argument in the final submissions that the defendant's malice is traceable from the fact that as opposed to the alleged reporting, the plaintiff had a valid licence and that he was mining in his licenced area. With respect, if the report was indeed made, it did not concern whether or not the plaintiff was involved in illegal mining or that he was mining from the area other than the one for which he was licensed. The alleged report was about the increase in crime rate. For the same argument to be faulted, one was required to prove that there were no such crimes or increment thereto. And for such conclusion to be made, evidence to establish that the police made investigations which proved

otherwise is obligatory. In this case, no such investigation or findings therefrom were made available to the Court.

In view of the reasoning and analysis above, the first issue is answered in the plaintiff's disfavour. It accordingly fails.

The **second issue** is in regard to allegations that, acting on malicious and unreasonable complaint or report from the defendant, the police destroyed and damaged the plaintiff's property. As it can be seen, this issue is partly adjunct to the first one. It aims at determining the consequential effects of the alleged defendant's malicious complaints to the police. It goes without saying, that for the second issue to be answered fully; one has to primarily establish the destruction of the property. Thereafter, he is required to demonstrate the motive for such destruction.

The plaintiff paraded evidence towards exhibiting that his mine site was invaded by the police at the instance or under assistance of the defendant; his property at the mining site was destroyed, uprooted and taken away by the police. Two important questions are pertinent here. ***The first one is***, why the defendant involved in the **police special operation** to which he was not mandated. From all the plaintiff's witnesses, none decrypted this puzzle. PW1 and PW3 were general while testifying in this connection. PW1 for instance, stated that on April 11th,

2008; his workers and him were on site only to witness the police, defendant's staff and vehicles invading his gold mine. He was not particular as to role of each.

However, in his clear asseverations, the plaintiff is being ironical by stating that it was the police, a party not in court, who actually destroyed and took away his property. Paragraphs 5, 9, 10, 11, 13, 14 and prayer (vi) of the plaint are specific on this point. On his part, PW3 also testified that he oversaw/supervised the operation. Further, exhibit D1 cements it by stating that it was the Tarime ex-OCD (PW3) who was in charge of the operation. Part of the letter states:

> "*Msako huo ulisimamiwa na Mkuu wa Polisi Wilaya ya Tarime akisaidiana na Naibu Mkuu wa Upelelezi wa Makosa ya Jinai Mkoa wa Mara ambao walikuwa na askari kadhaa waliosaidiana kuendesha msako huo".*

From the except above, there is no mention of participation of the defendant in the exercise. **The second** obvious interrogation relates to the reason for police to supervise or oversee the criminal activities of the defendant. The response to the two questions settles at the obvious conclusion. That is, it is the police who carried out the '**special operation**' culminating into damage to the plaintiff's property.

Henceforth, while it is established that the plaintiff's properties were damaged and/or alienated by the police on the stated date; in view of the findings of this Court regarding the first issue; the damage was not as a result of the police acting on malicious and unreasonable complaint or report from the defendant. The second issue, thus, does not meet the threshold of affirmation. It, too, fails.

The Court now embarks on the **third issue**. Did the defendant initiate, trigger and cause to be destroyed properties of the plaintiff by malicious and unreasonable report or complaint? Principally, this issue is an integral subsection of the first issue. The alleging party must first prove existence of the defendant's malicious or unreasonable complaint/report to the police prior to condemning him of having triggered or initiated the destruction of his property. The facet of alleged reporting by the defendant to the police has been given adequate evaluation in the first issue. As such, at this point, I find myself loath to hold otherwise.

In a form of supplement, I state further that, the police through exhibit D1 are stating evidently that the uprooting of the alleged machineries from the plaintiff's site was legitimate. Through the letter (exhibit D1), apart from not mentioning the defendant howsoever, the police are being committal that:

> "*Kwa ujumla, kazi iliyofanyika au iliyofanywa na Maafisa hao wa Polisi pamoja na askari ni halali na walikuwa wanatekeleza wajibu wao kama walivyoagizwa*".

With the understandable risk of repeating myself; I reaffirm that, the plaintiff having failed to conclusively establish how the defendant involved himself with the alleged malicious or unreasonable reporting to the police, this issue is negated. It fails accordingly.

The **fourth issue** is whether the police ordered the plaintiff to stop mining activities on his mining area. Reading through the pleadings and evidence of the plaintiff I, right from the outset; declare that, it is unclear the direction of the plaintiff in this connection. The record is inconclusive in terms of when, how, why and through which media the police ordered the plaintiff to stop his otherwise legitimate mining activities.

The foregoing incongruity notwithstanding, the plaintiff's final submissions are fronting two branches of argument for this aspect. On the one hand, the plaintiff's advocates are vehement that on April 11th, 2008 the police ordered the plaintiff to stop mining activities on his site. According to them, this was a verbal order. However, apart from the statement by PW1 (the plaintiff), his evidence regarding this order - if

any, is not corroborated by any independent witness. Throughout his testimony, PW1 was categorical that when the alleged destruction was taking place, there were other people on the site. The then OCD (PW3), too, confirmed existence of people who were working on the plaintiff's site when the police operation was ongoing. However, the plaintiff did not take any trouble to procure any of such workmen to appear and testify in Court about such verbal order.

In law, the onus of parading a very important witness, rests upon the ultimate beneficiary of such witness' testimony. Apart from such advantage, failure to summon him is not without disincentives. In law, when a party fails to summon a key witness, the court may make negative inference against the otherwise-calling party.

Further, it is uncommon for police to give verbal orders and end there; especially given the nature of this suit. Assuming the alleged defendant's complaints were in a form of a crime, the police would be expected to register the report formally and mount the necessary investigations. If at all this route was taken by the police; the plaintiff should have brought in Court, the evidence to prove existence of not only the police investigation process and progress but also the formal order from them. It has to be noted that PW3, ex-OCD did not testify, even by passing, that his office or that of Mara Region formally stopped

operations of the plaintiff's gold mine; and/or that there were any investigations done in this connection.

In addition to the above evaluation, if he was indeed ordered to stop his mining activities by the police, the plaintiff seems to had somewhat condoned such stoppage. He has proved before the Court that he did not make a follow up to collect his property irrespective of showing the police the valid mining licence. It is undisputed that the police had written to and allowing him (PW1) to collect the alienated property. Absence of his remedial or mitigative reaction against what he terms as illegitimate undertaking by both the police and the defendant, defeats his subsequent claims that he was stopped from operating his mine. More so, he did not prove the time line for the alleged stoppage order. That is, whether it was provisional/temporary or permanent injunctive order. Proof or the status of the alleged order would subsequently benefit the Court when gauging the extent of loss suffered based on respective duration of the order.

Furthermore, PW3 did not testify to the effect that he or any other police ordered the plaintiff to stop his mining operations. On the other hand, the plaintiff's final submissions are to the effect that the stoppage of mining operations should be inferred from the fact that his mining equipment were destroyed or uprooted or alienated by the police

consequent of which he was, to borrow his phrase, "rendered incapable of continuing to mine". First of all, this reasoning, to me, fits better in arguing for damages suffered by him rather than the order to stop operations. Further, as evaluated earlier, the plaintiff did not satisfactorily prove the subject order. As such, the proof cannot come from the bar.

In law, submissions from the bar are not evidence. See, for instance, ***The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman, Bunju Village Government & 11 Others***, Court of Appeal Civil Appeal No. 147 of 2006; ***Bish International B.V. & Rudolf Teurnis Van Winkelhof v Charles Yaw Sarkodie & Bish Tanzania Ltd***, Land Case No. 9 of 2006; and ***Rosemary Stella Chambejairo v David Kitundu Jairo***, Court of Appeal (Dar Es Salaam) Civ. Reference No. 6 of 2018 (all unreported).

In addition to that, contrary to such line of submissions, the plaintiff is definite that he was continuing with his mining business such that he kept renewing his PML before converting it to ML well after the alleged machinery had been destroyed/uprooted. Under paragraph 6 of the plaint he avers, in part, that:

> *"Before expiry of its validity, it (PML) was again renewed on 16 December 2010 for another five (5)*

years period up to and including 26th December 2015. However, the plaintiff later preferred conversion of the said Primary Mining Licence to a Mining Licence. The licence was converted to Mining Licence No.ML441/2011 for a period of 10 years effective from (sic) 15 September 2011 the date the said conversion was granted. The said mining licence will expire in 2021".

The foregoing quoted part of the pleadings, is defeating any subsequent argument of the plaintiff to the contrary. Law makes it a specific principle that parties are bound by own pleadings. Reference is made to ***Salim Said Mtomekela v Mohamed Abdallah Mohamed***, CAT Civil Appeal No. 149 of 2019; ***Scan Tan Tour v The Catholic Diocese of Mbulu***, CAT Civil Appeal No. 78 of 2012; ***Lawrance Surumbu Tara v The Hon. Attorney General and 2 Others***, CAT Civil Appeal No. 56 of 2012; (all Unreported); and ***James Funke Ngwagilo v Attorney General*** [2004] TLR 161.

In view of this whole evaluation, the fourth issue is demerited.

The **fifth issue** relates to the loan agreement of Tshs.150,000,000/- allegedly concluded between the plaintiff and Edward Mwita Mohere (PW5). It was pleaded by the plaintiff and testified by him (PW1) and the lender (PW5) that the plaintiff borrowed the stated amount of money exhibit P3. A close evaluation of exhibit P3,

reveals that the contract was executed on February 14th, 2006. The same has all the attributes of a valid contract under section 10 of ***the Contract Act***, Cap 345 R.E. 2019; and cases of ***Merali Hirji and Sons v General Tyre*** (E.A) Ltd [1983] TLR 175; and ***Humphrey Siliyo Pallangyo and Outdoor Expeditions Africa v Haruna Idd Mwiru***, HC Civil Appeal No. 3 of 2020 (Unreported).

It was testified further that the loan amount was to be used by the plaintiff as investment capital in the mining activities. Reading recital (B) and clause 2(c) of the said contract, it is evident that the purpose of the loan was for the development of the plaintiff's mine. The relevant clause of the contract states that:

> *"2. The lender agrees with the borrower* [for the latter]
>
> *(a) …(not relevant)*
>
> *(b) …(not relevant)*
>
> *(c) To use the said loan for the construction of the mining camp, mining operations and purchase of equipment assets and materials for the said mine."*

From the excerpt above, it is clear that the contract was executed by parties therein with the mining activities in mind. Consequently, the issue regarding the borrowing is affirmatively determined.

Another contract allegedly concluded between the plaintiff and TANFU Company Limited forms the grain of the **sixth issue.** In this

regard, it is alleged that the plaintiff hired mining equipment valued at Tshs. 660m/- from TIANFU Company Ltd. The subject equipment/machineries are contained in exhibit P8. Allegedly, the equipment are the ones that were damaged and/or uprooted by the police acting on the defendant's malicious complaint. The defendant's advocates submitted that the contract was not valid for it contained items which are not capable of being hired and that it was rather a joint venture agreement with the plaintiff giving his mining licence and the counterpart providing equipment. With necessary respect, I do not support this defence line of argument. The present issue demands the court to evaluate the given evidence and determine if the same was a hire-contract worth a name.

I have taken liberty to study the subject exhibit (P8). It is undisputed, the document is not express regarding the nature of the 'contract'. None of the terms or phrases therein suggests that the either party is a **hirer**. Instead, the title thereof suggests that various items were **received from a sponsor**. In its uppercase, the heading of the document runs as follows:

> *"Mradi wa uchimbaji wa dhahabu kwenye PML Na 0003455 mwaka 2007-2009* ***vilivyopokelewa*** *kwa* ***mfadhili toka nchini China*** *kampuni ya TIAFU*

Co. Ltd. iliyosajiliwa hapa nchini na makazi yake ni Mwanza Tanzania" (bolding for emphasis).

Moreover, item three (3) in the said document; which otherwise suggests that an excavator machine was for hire, is enlisted as part of the equipment received from the sponsor. It is, thus, unclear as to whether or not even the sponsor 'hired' it at a monthly rate of Tshs. 20million/-. However, one witness who testified as being the company's director (PW4) amplified this problem by testifying that some items were hired from another company (ARARA Building Construction). In addition, the document is full of obscurity for it does not state the consideration. That is, if really the plaintiff hired the itemised machinery and equipment, the alleged contract does not state the money which he would pay the owner thereof.

Further, If I were to assume that the said machineries/equipment were 'received' on the basis of hire-purchase; I would soon get stuck in the jungle of factual uncertainties. For instance, the payment pattern and the time within which the plaintiff would pay the purchase price are undisclosed. More so, the plaintiff would not be expected to pay the so-called 'purchase price' of the money (Tshs.40m/- and Tshs.5m/-) allegedly received by him to cater for operational costs and transportation of staff respectively. Worse still, the hire-purchase

arrangement would not work for explosives (Tshs.20m/-). Equally so, for construction of the mining camp [see item 8(v) of exhibit P8].

The Court was also taken aback by the fact that the alleged hire-contract seems to suggest that the plaintiff was converting his PML to ML so as to pave way for a three-year joint venture; with whom- it is, once again, blur. To wrap it together, the **handing-over** of the items in the subject 'hire-contract' (to justify that they were merely received not hired) was done in the following phraseology:

> *"**Makabidhiano** haya yamefanyika leo tarehe 18/12/2006 kati ya wawakilishi wa kampuni ya TIANFU CO LTD, S.L.P. 2417 Mwanza Tanzania NDG Denis Kuboja Mbuge na Kuang Xiangdong/wawakilishi wa kampuni ya TIANFU CO. LTD (na) NDG John Barnaba Machera wa S.L.P. 68 Tarime mmiliki wa eneo lenye machimbo ya dhahabu Nyamongo lenye PML Na:0003455 kwa **utaratibu wa kubadilisha** PML iliyopo Kwenda kwenye mining licence **tayari kwa JV(ubia**) wa kufanya shughuli za uchimbaji wa muda wa miaka (3)"* (with necessary emphasis).

I find that the purported document, with its current impurities, does not meet the requisite threshold of a valid contract. However, even

with the forceful promotion to a valid one; it is not qualifying to be hire-contract. Consequently, this issue is answered in disavowal.

The **last but one issue** is whether the plaintiff suffered any damage. The plaintiff's pleaded damage is in terms of special and general damage. To support his claims for specific damages, the plaintiff argued on four (4) limbs. *Firstly*; that he had borrowed and injected money in his goldmine only the mine to be vandalized in two (2) years' time. *Secondly*; that he had hired machineries for the same project which machineries were both destroyed and/or confiscated. *Thirdly*; that due to the destruction and alienation of his property, the plaintiff was made to stop production thereby subjecting him to loss of profit/income. *Fourthly*; that he would have earned interest over the duration time for which he did not produce. As for general damages, the plaintiff argued that he suffered psychological torture prolonged by inconvenience and hardship for over a decade and a half.

To prove each category of damage above, the plaintiff relied on both oral testimony and documentary evidence. However, I undertake to cite a couple of discrepancies from the said evidence which have negative effect on the plaintiff's claims. For instance, to prove the loss related to the Tshs. 150m/- loan, he produced exhibit P3. However, production of such document alone does not, in my view, prove that he

lost the loan amount in its wholistic sense. It is to be borne in mind that the alleged incident occurred two years after the loan had been taken. Full repayment deadline was less than a year away. Logically, if the loan amount had been injected in the project as planned, it must have generated income for the plaintiff.

Further, under paragraph 3 and 5 of the said loan agreement, the plaintiff was required to submit to the lender periodic financial plans, income returns and statements. However, both the borrower-plaintiff and the lender (PW5) did not testify on compliance thereof. For example, proof of the contractual "full, clear and correct statement of all sales, orders, income, transactions concerning the mine", at the end of every quarter was not done. If there was compliance, the plaintiff would have tendered such statement to prove, not only his business trajectory but also the loss suffered by him over time. Consequently, the Court was left without an authentic credentials upon which to gauge the loss of the plaintiff, if any.

Furthermore, pursuant to paragraph 2 (b) of the same exhibit, the plaintiff surrendered 50% share in the mine. Accordingly, any loss established hereof should have been apportioned in the same proportions.

Another document tendered by the plaintiff to establish his loss is the statement of expected income (exhibit P6). Nevertheless, the same is also having various anomalies. It was testified by the accountant who prepared the exhibit that he did not take into account several variables which have significant fiscal and income implications. For instance, he stated to had excluded important aspects such as tax obligations; social security contributions; depreciation of working tools over time; mine-ownership pattern; fluctuation in gold prices, etc.

Moreover, the purchaser of the plaintiff's gold was stated as being **Japhet Kija Mnada** only (see exhibit P4). But this critical witness was not summoned to reinforce the plaintiff's income status. I reiterate the importance of calling key witnesses to testify in courts. It is trite law that where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called, they would have given evidence contrary to the party's interests. This position was augmented in ***Hemedi Saidi v Mohamedi Mbilu*** [1984] TLR 113; *and* ***Simon Kamoga v SHANTA Mining Co. Limited***, High Court Labour Revision No. 08 of 2020 (unreported).

The foregoing analysis leaves the plaintiff's claim with critical uncertainties in terms of the actual amount of loss suffered. Law requires that special damages must not only be pleaded but also proved.

See, for example, ***Bamprass Star Service Station Ltd v Mrs Fatuma Mwale*** [2002] TLR 390; ***Zuberi Augustino v Anicet Mugabe*** [1992] T.L.R 137; ***Stanbic Bank Tanzania Ltd v Abercrombie & Kent (T) Ltd***, CAT Civil Appeal No. 21 of 2001 (unreported) that special damages require strict proof.

As I wind this issue up, I am inclined to find that, undisputedly, the police confirmed to had carried out their special operation over the plaintiff's mine site. Through exhibit D1 and PW3, it is evident that the police confirmed to destroy and take some of the plaintiff's property with them. The plaintiff's failure or neglect to make necessary follow up for recovery of his property (as advised in Exhibit D1, in order to mitigate the loss) notwithstanding; it is undisputed that the damaged or alienated property caused loss to the plaintiff. However, as it has been conclusively settled in the previous issues, any liability which would be established hereof does not fall on the defendant.

Finally, the Court is left with the **eighth issue**, namely, the reliefs parties are entitled to. Surely, this one is highly dependent on the findings of the preceding issues above. As it can be seen, the relevant issues towards establishing rights and liabilities of parties (especially issues 1, 2, 3 and 7) have been determined in negation against the plaintiff.

In the upshot, this case is accordingly dismissed. Considering the circumstances surrounding this matter, I make no order as to costs.

Dr. C.K.K. Morris

Judge

March 9th, 2023

Judgement delivered on-line this 9th day of March 2023 in the presence of Dr. Chacha Murungu, advocate for the plaintiff (who is also present) and Advocate Castory Peja for the defendant.

Dr. C.K.K. Morris

Judge

March 9th, 2023