

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

CIVIL CASE NO. 5 OF 2022

(Originating from High Court of Tanzania (Original Jurisdiction))

**ALLY AMAR HAMDUN PLAINTIFF
VERSUS**

MWAZEZEMA MINERALS LIMITEDDEFENDANT

EXPARTE - JUDGEMENT

Date of Last Order: 02/11/2023

Date of Judgement: 10/11/2023

B.E.K. Mganga, J.

It is said that, Ally Amar Hamdun, the herein plaintiff, owns Primary Mining Licence No. 815 and 816. It is further said that, in 2016 plaintiff entered a contract with Mwazezema Minerals Limited, the herein defendant, so that the later can conduct exploration and mining gold at Kajima area within Igunga district in Tabora region for six years commencing from 06th June 2015 to 06th June 2021. It is alleged by the plaintiff that, defendant failed to honour the terms of their contract because the later did not conduct exploration and or mine minerals at Kajima area within Igunga district. It is further alleged by the plaintiff that, apart from failure to conduct exploration and or mining minerals at

the aforementioned area, defendant failed to Pay USD 20,000 yearly they agreed in their contract.

Based on those allegations, on 4th July 2022, plaintiff filed this suit against the defendant alleging that the latter breached the contract. In the plaint, plaintiff is claiming (i) to be paid One Hundred Twenty Thousand United States Dollars (USD 120,000) which is equivalent to Two Hundred Seventy Nine Million Seven Hundred Eighty Thousand Tanzanian Shillings (TZS 279,780,000/=), (ii) to be paid damages, (iii) interest at Court rate from the date of filing the suit to the date of judgment, (iv) interest at commercial rate from the date of judgment until payment in full, (v) costs of this suit, (vi) any other relief(s) as the court may deem just and fit to grant.

Plaintiff served the defendant with the plaint, but the latter filed her written statement of defence out of the 21 days provided for under Rule 1(1) of Order VIII of the Civil Procedure Code [Cap. 33 R.E. 2019]. Since written statement of defence was filed out of time, plaintiff raised a preliminary objection. The preliminary objection was sustained as a result, the case to proceed ex-parte. It is with that background; plaintiff was heard ex-parte hence this ex-parte judgment.

When the case was called on for hearing, two issues were drafted namely, (i) whether, defendant breached the contract and (ii) whether, plaintiff is entitled to be paid the case out claimed.

In proving his case, plaintiff (PW1) testified that, on 30th November 2016, he entered a contract (exhibit P1) with the defendant for exploration and mining of minerals at Kajima area within Igunga District in Tabora region. He stated further that, he was the holder of Primary Mining Licence (PML) No. 815 and 816 that was expiring in 2021 but renewable. He further testified that, in the said contract, defendant had a duty of exploration and mining minerals. He added that, they agreed that defendant will receive 82% of production and that, he will get 18% of total production. He went on that, defendant was supposed to commence production soon after signing of the contract on 30th November 2016 and that the contract was expired on 1st June 2021.

It was further evidence of PW1 that, defendant only sent an excavator machine with Registration No. T. 660 DDT to the site at Kajima, Igunga but did not do exploration or mine gold and thereafter took the said excavator to unknown place. PW1 stated further that, they agreed under clause 9 of exhibit P1 that, defendant will be paying USD 20,000 yearly. He added that, for the period of six years, defendant did not pay the said amount, which is why, he is claiming to be paid USD

120,000. PW1 also testified that he did not enter another contract with any other person for exploration and mining at the said sites because, he had already entered a contract with the defendant. He added that, entering another contract with other persons would have amounted to breach of contract on his side. He concluded his evidence praying the court to enter judgment and decree in his favor so that he can be paid USD 120,000/= by the defendant and that, the defendant be ordered to pay interest at court rates from 4th July 2022 to the date of judgment and interest at commercial rate from the date of judgment to the date of payment and costs for this suit.

Majid Omary Salimin(PW2) testifying in favour of the plaintiff stated that, he is the manager of businesses owned by PW1 and that, he has been the manger for 13 years now. PW2 also stated that, on 30th November 2016 Plaintiff and the defendant signed contract relating to exploration and mining of gold at Kajima area within Igunga District in Tabora Region. Like PW1, PW2 stated that, defendant had a duty of mining gold but sent at site only an excavator with registration number T. 660 DDT that stayed there for a long period and thereafter took it to unknown area. He concluded that defendant did not perform what was agreed in the contract with PW1.

That is the only evidence that was adduced on behalf of the plaintiff in this case. After closure of plaintiff's case, Mr. Phares Malengo, advocate for the plaintiff, informed the court that he does not intend to file final submissions. For that reason, there will be no reference to final submissions in this judgment.

I have considered evidence adduced by both PW 1 and PW2 in support of the claim by the plaintiff against the defendant that the later breached the contract (exhibit P1) the two entered in 2016. I should point out from the start that, the duty to prove that defendant breached the contract is on the plaintiff as per section 110(1) and (2) and section 111 of the Evidence Act [Cap. 6 R.E. 2022]. Again, this being a civil case, plaintiff is required to prove his case at the balance of probabilities. See the of *Oliva James Sadatally vs Stanbic Bank Tanzania Limited* (Civil Appeal 84 of 2019) [2022] TZCA 388, *Registered Trustees of the Evangelical Lutheran Church in Tanzania, Eastern & Coastal Diocese vs Grace William & Others* (Civil Appeal No.366 of 2020) [2023] TZCA 17469 and *Paulina Samson Ndawavya vs Theresia Thomasi Madaha* (Civil Appeal 45 of 2017) [2019] TZCA 453, all unreported, to mention just a few.

Plaintiff's claim is that, defendant breached the contract they entered. It was, therefore, the duty of the plaintiff to prove that, (i) there was a valid contract between himself and the defendant, (ii) that he fulfilled his obligation under the said contract and (iii) that defendant breached the said contract. See the case of [Paulina Samson Ndawavya vs Theresia Thomasi Madaha](#) (Civil Appeal 45 of 2017) [2019] TZCA 453(unreported).

I have considered evidence adduced by both PW1 and PW2 and the contract (exhibit P1) that was signed by the plaintiff and the defendant. It is clear that, Clause 7 of the said contract (exhibit P1) placed a duty to the plaintiff to provide any local support concerning government clearance. Further to that, the said clause placed a duty to the plaintiff to clear any issue concerning local community. The said clause 7 of exhibit P1 reads: -

"7. LOCAL SUPPORT

*ALLY AMAR HAMDUN is to **provide any local support concerning government clearance** and **to clear any issue concerning local community.**"* (Emphasis is mine).

In his evidence, PW1 only testified that he had Primary Licence (PML) No. 815 and 816. Both PW1 and PW2 did not testify that they supported the defendant to clear all issues with the government in compliance with clause 7 of exhibit P1 quoted above. Not only that but

also, neither PW1 nor PW2 testified that plaintiff cleared all issues with the local community or that there were no issues to be cleared by the plaintiff with the local community. In short, there is no evidence proving that plaintiff discharged his duty under clause 7 of the contract he alleged that was breached by the defendant.

In addition to the foregoing, neither PW1 nor PW2 testified that there was no force majeure that could have made defendant not to be liable for failure to fulfill her obligations under exhibit P1. It was duty of the plaintiff to adduce evidence negating presence of force majeure to prove his case against the defendant. I am of that considered view because, Clause 11 of exhibit P1 is clear that, presence of force majeure was a factor for a party not to be liable. The said clause 11 of exhibit P1 provides: -

"11. FORCE MAJEURE

A party shall not be liable for a failure to fulfil an obligation under this Agreement, if and to the extent to which fulfillment has been delayed, interfered with, curtailed or prevented by Force Majeure. In this paragraph, "Force Majeure" means any circumstance whatsoever that is beyond the reasonable control of the party affected. The party that declares a Force Majeure condition shall immediately initiate and diligently pursue corrective actions to cure the Force Majeure condition."(Emphasis is mine)

As pointed hereinabove, in my view, it was not sufficient for the plaintiff to prove that there was a contract between himself and the

defendant and that the later breached the contract without showing how he discharged his duty on the said contract. In my view, plaintiff was supposed to adduce evidence to show that breach by the defendant was intentional and that there was no Force Majeure in compliance with the provisions of clause 11 quoted hereinabove. Plaintiff took it for granted that since the case was heard ex-parte, this court will swallow wholesome his evidence without digesting it. That assumption was wrong. The court must, before issuing an order in favour of the plaintiff in a case that was heard ex-parte, satisfy itself that plaintiff proved his or her case.

Further to the foregoing, payment of USD 20,000 yearly provided under clause 9 of exhibit P1 was subject to the project being profitable, which, of course, is not the case in this matter. Both PW1 and PW2 testified that defendant sent an excavator with registration No. T. 660 DDT to site at Kajima area and thereafter removed it after the said excavator has stayed there for a long period without conducting exploration or mining gold. I have read clause 9 of exhibit P1 and find that payment of USD 20,000 yearly was subject to (i) delay by the defendant only and (ii) profitability of production. The said Clause 9 of exhibit P1 provides: -

"9 PRODUCTION

*MWAZEZEMA MINERALS LIMITED is committed to pay AMAR HAMDUN USD 20,000 for every year there is a delay caused by MWAZEZEMA MINERALS LIMITED **only**.*

*MWAZEZEMA MINERALS LIMITED is committed to the development of the "PROPERTY" as long as the PRODUCTION is **profitable**."*
(Emphasis is mine).

It is my view that, the word "only" in the first sentence of clause 9 was drafted with a purpose namely, that for the defendant to be liable to pay the said amount, plaintiff must have not contributed to that delay. Evidence of the plaintiff to that effect is wanting. Again, the second condition created in the second sentence of clause 9 of exhibit P1 is that, defendant was committed to develop the property as long as it profitable. In my view, for the plaintiff to succeed in this suit, he was supposed to prove that exploration and or mining of gold at Kajima area by the defendant was profitable and that, it is only the defendant who delayed to pay him USD 20,000 yearly. Going by evidence of both PW1 and PW2, it is clear that defendant did not do exploration or mining of gold at Kajima area within Igunga in Tabora. Evidence of both PW1 and PW2 is that, defendant only sent an excavator to the said site and thereafter took it to unknown area. In short, defendant did not do exploration or mine gold at Kajima area hence evidence did not show that the later got profit. In other words, no evidence was adduced to

shows that conditions in clause 9 of exhibit P1 were met for payment
this court to decide this case in favour of the plaintiff.

For all what I have pointed hereinabove, I hold that plaintiff did not
prove his case at balance of probabilities. I therefore dismiss this case
for want of merit.

Dated at Shinyanga on this 10th November, 2023.



B. E. K. Mganga
JUDGE

Judgment delivered on this 10th November 2023 in chambers in
the presence of Mr. Pharles Malengo, Advocate for the Plaintiff and
Gloria Ikanda, Advocate for the Defendant.



B. E. K. Mganga
JUDGE

