

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT MWANZA
COMMERCIAL CASE NO. 09 OF 2019

JOSEPH MUNIKO MWITA

(suing under the constituted special power

of attorney conferred to him by Mr. Mwita Makidya

and Mrs. Mwita Anthony Wambura).....PLAINTIFF

Versus

NORTH MARA GOLD MINE LIMITED.....DEFENDANT

Last Order: 04th Aug, 2020

Date of Ruling: 13th Aug, 2020

REASONS FOR THE DECISION

FIKIRINI, J.

After closing the plaintiff's case on 04th August, 2020, Mr. Kayinga counsel for the plaintiff moved this Court by way of an oral application, predicating his application under section 95 of the Civil Procedure Code Act, Cap. 33 R.E. 2002 (the CPC) requesting for the Court using its inherent powers to visit the *locus in quo*, so that it could assess the mining situation by itself at the site (Claim Title No. 41493) hereinafter referred as "the Claim Title", as there was no any other way this dispute could be resolved without visiting the *locus in quo*.

Mr. Malongo counsel for the defendant objected to the prayer contending that there were no credible or exceptional reasons compelling this Court to visit the *locus in quo*, as the case can be proved by calling of witnesses who can be cross-examined and the evidence gathered could help the to Court arrive at a decision.

Further to his submission in objecting to the prayer, he argued that citation of section 95 of the CPC, was irrelevant as that was not the Tanzania Evidence Act, Cap. 6 R.E. 2002, and as well cannot be used to change how evidence should be collected.

He continued by saying that after all even if the Court decided to visit the site yet it will not find the gold extracted from 2011 to 2017, so the matter will not be resolved in that way. Illustrating on a legal position in relation to visiting the *locus in quo*, Mr. Malongo referred this Court to the case of **Nizar Ladak v Gulamali Fazal Janmohamed [1980] 29**, when the Court stressed that it was only in exceptional circumstances that the Court should inspect a *locus in quo*, or else the Court unconsciously will take role of the witness than adjudicator. No exceptional circumstances have been portrayed by the plaintiff's counsel, submitted Mr. Malongo and pressed upon the Court that it should therefore not occur during rejoinder. The plaintiff's counsel was bound to state those exceptional

circumstances in his earlier submission and urged the Court to decline the application.

Briefly rejoining the reply submission, Mr. Kayinga, disputed Mr. Malongo's submission as not a reality to what was on the ground, and that the reality of what was on ground necessitated the visit of *locus in quo*. He thus invited this Court being an overseer of justice to examine exhibit P₂, which was the source of this case and that pursuant to section 95 of the CPC this Court was not stopped from acting in dispensing justice.

The phrase Inherent power is defined in Black's Law Dictionary, 6th Ed Centennial Edition (1891-1991) as:

"Powers over and beyond those explicitly granted in the Constitution or reasonably to be granted..."

And indeed that by virtue of the CPC, through section 95 of the CPC, Courts have been vested with such inherent power. The section reads as follows:

"Nothing in this Code shall be deemed to limit or otherwise affect the Inherent power of the Court to make such Orders as may be necessary for the ends of Justice, or to prevent abuse of the process of the Court."

In other words, Courts by virtue of section 95 of CPC can adjudicate on certain matters, even with or without express provision of the Law. This includes also in exceptional circumstances Courts, either on their own calling or on application by a party, visit the *locus in quo*, as stated in **Nizar** case (supra).

So as a rule the citing of section 95 of the CPC by the Plaintiff's Counsel for the purpose of moving this Court requesting it to visit the *locus in quo* was thus correct, as there is no specific provision in place to cater for such request. However, there are number of factors to be considered before the Court opts to visit *a locus in quo*. The main purpose is to clear the doubts coming from differing evidence of the witnesses on the subject matter. See: **Othiniel Sheke v Victor Plankshak [2008] NSCQR Vol. 35, p. 56**. Another reason which can be considered in visiting the *locus in quo*, is to clear any doubts or discrepancies in relation to the physical condition of the land in dispute. However, that does not mean it gives a party an opportunity to make a different case from the one a party has led in support of the claim before the Court.

I, declined to grant the application and the prayer by Mr. Kayinga counsel for the plaintiff, promising the reasons for my decision to follow, the exercise I am now doing: **one**, from paragraph 5 of the plaint which for ease of reference, is reproduced below, it states as follows:

“That, it was an express term of the said contract that the defendant shall have sole and exclusive right to carry out mining operations over Claim Title area and other purposes ancillary to the conduct of mining operations such as disposing, stacking or dumping of mineral waste products and construct any necessary facilities for mining activities. Futhermore, it was the express term of the contract that the defendant will not conduct any surface mining of the former claim area, and if the defendant commences mining operations on any part of the former Claim area the donors will be entitled to revenue royalties calculated at 1% (“One percent”) of all gold produced from the said former mineral Claim.....”{Emphasis mine]

The genesis of this case going by the paragraph 5 of the plaint is based on the assumption that the defendant has already commenced surface mining operations. So far no evidence has been led in that regard, to warrant this Court to consider visit to the *locus in quo* and verify what has been pleaded and testified on. As stated in the case of **Ladak** (supra) cited by Mr. Malongo counsel for the

defendant, that there has to be peculiar or exceptional circumstances compelling the Court to do so lest it find itself a witness to the case rather than adjudicator.

In the case of *Akosile v Adeye* [2011] 17 NWLR (Pt. 1276) p. 263, the Court had this to say in illustrating on the visit of *locus in quo*, when it stated:

“The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land. The purpose is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence if any about physical objects on the land boundaries.”

Two, the issues framed were basically on determining the claimed royalties of 1% from 2011. Issues are usually framed based on the pleadings which are the plaint, written statement of defence and reply to the written statement of defence. Likewise, in this case, issues were framed relying on pleadings and the emphasis was on paragraphs 9 and 10 of the plaint. There was no evidence *per se* on physical features on the land which would have compelled the Court perhaps to find it pertinent to visit the *locus in quo*. Going by the evidence, the plaintiff initially insinuated that the defendant had been doing underground mining extracting gold

since 2011 and hence deserving 1% royalty as agreed in exhibit P₂, the contract entered between parties. Later and especially during the defence case the line of cross-examination was that there was surface mining taking place which makes the plaintiff deserving 1% royalties. Underground and surface mining are two different aspects and since both were alleged by the plaintiff, it would be absurd to say there was conflicting evidence requiring resolve, since both versions came from the same party. Had the two versions been one by the plaintiff and the other by the defendant, certainly this Court would have been obliged to visit the *locus on quo* so as to determine whether what was going on was underground or surface mining, which is unfortunately not the case.

For the above stated reasons, this Court declined the request by the plaintiff's counsel that visit of *locus in quo* be made.



A handwritten signature in black ink, appearing to read "P. S. FIKIRINI".

P. S. FIKIRINI

JUDGE

13th AUGUST, 2020